EMPLOYMENT TRIBUNALS

Claimant: Mr David Caplen

Respondent: Ryan-Jayberg Ltd

Heard at: London South Croydon in public, hybrid hearing

On: 1-4 December 2025, in the afternoon of 4 December and on 5 December in chambers

Before: Employment Judge Tsamados (by CVP)
Sitting with Non-Legal Members:
Ms E Whitlam (in person)
Mr R Singh (by CVP)

Representation

Claimant: Mr J Caplen, the Claimant's son (by CVP)
Respondent: Mr B Frew, Counsel (by CVP)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

The complaints of disability discrimination, age discrimination and unfair dismissal are not well founded. The claim is dismissed.

REASONS

Background

1. The Claimant presented a claim form to the Employment Tribunal on 24 April 2024 following a period of ACAS Early Conciliation between 11 March and 16 April 2024. His claim raises complaints of unfair dismissal, age and disability discrimination against the Respondent, his ex-employer. In a response

received by the Tribunal on 23 May 2024, the Respondent denied the claim in its entirety.

2. On 29 July 2024, notice of a Preliminary Hearing for Case Management, to take place on 28 April 2024, was sent to the parties. Under separate cover, the parties were also sent notice of this final hearing listed for 5 days and Suggested Case Management Orders.

3. The Preliminary Hearing was conducted by Employment Judge ("EJ") Andrews at which the Suggested Case Management Orders were confirmed with slight variations. In addition, the Claimant was ordered to provide further particulars of his disability and supporting medical evidence, and the Respondent to write to the Claimant confirming whether or not it accepted that the Claimant had a disability. The EJ set out the various types of discrimination complaints that potentially arose from the Claimant's claim and he was ordered to provide particulars relied upon in support of each.

4. On 26 May 2025, the Claimant provided further information as to his disability.

5. On 13 June 2025, the Claimant provided further particulars of his discrimination complaints.

6. Also on 13 June 2025, the Respondent sent the Claimant a draft list of issues to which he responded in an undated document.

List of issues

7. I indicated that we would be determining those matters set out in the Respondent's draft list of issues and in the Claimant's response. Mr J Caplen assured me that he was not seeking to add any amendment to the complaints or issues but purely countering the Respondent's position as to whether the claim was presented in time or not. I made it clear that we would not depart from the list of issues unless there were exceptional circumstances that made it appropriate to do so.

Documents and evidence

8. We were provided with the following electronic documents (Ms Whitlam had paper copies).

    a. From the Respondent: a hearing bundle of 758 pages, which we will refer to as "B" followed by the relevant page number where necessary; a witness statement bundle containing both parties' witness statements and consisting of 97 pages; a draft list of issues; a cast list; and a chronology and suggested reading list.

    b. From the Claimant: loose leaf paper pages added to the Respondent's bundle; a chronology and suggested reading list; and a revised schedule of loss. There were 6 loose leaf pages: an email from Mr Wood to the Claimant cc the Tribunal consisting of one page and an attached schedule of loss dated 8 June 2025 consisting of 5 pages.

9. I made it clear to the parties that we would only read the documents that they referred to in their witness statements and others drawn to our attention.

10. We heard evidence by way of written statements and in oral testimony from the Claimant, his wife, Lyn Caplen and on behalf of the Respondent from Raskesh Patel, Chris Thompson, Stephen Childs, Angeliki Tsifodimou and Maryanne Wilson. All of the witnesses also attended by Cloud Video Platform ("CVP").

11. At the end of the evidence we received written closing submissions from both parties to which they spoke orally.

Preliminary issues

12. Mr J Caplen told us that they had only received the bundle the Friday before the hearing. This contained pages 714-758 which they had not had the chance to read or address in their witness statements. He asked for those pages to be excluded or no weight attached to them.

13. Mr Frew submitted that the document was relevant because it related to the position regarding the Covid-19 pandemic measures in force at the relevant times and that the Claimant could read it during our reading adjournment. He indicated, in response to my question, that the document could be dealt with in submissions but might possibly arise in evidence.

14. I suggested that the Claimant could read those pages during our adjournment and we would come back to the question of admissibility after we had read them. Ultimately, we came back to the document on the second day of the hearing and I indicated that having read them, the Tribunal could see that the pages consist of a government document containing guidance on the Covid-19 pandemic and are a matter of public record. The document is clearly relevant to the issues we have to determine.

Conduct of the hearing

15. The hearing took place over 5 days by CVP with Ms Whitlam attending in person in the Employment Tribunal in Croydon.

16. The Claimant was represented by his son, who explained that his father was 77 and had difficulty with his eyesight and using technology. He would need time to locate documents and have a family member assisting him, possibly his wife or another family member. I indicated that as long as the family member was on screen as well and not prompting the Claimant's evidence that would be fine. Mr Frew, for the Respondent, was content to proceed on this basis.

17. The Tribunal decided to deal with liability only and were guided by the suggested timetable set out in the record of the Preliminary Hearing. Whilst this also recorded that the final hearing as being before a Judge sitting alone, we were convened as a full panel.

18. On the morning of the first day we dealt with preliminary issues and then adjourned to read the witness statements and referenced documents. We

then heard evidence from the Respondent's witnesses in the afternoon and this continued on the second day. On the third day we heard evidence from the Claimant and Mrs Caplin (there were no questions put to her but we accepted her witness statement into evidence). On the morning of the fourth day, the parties provided written submissions which they spoke to. We spent the afternoon deliberating and also on the following day. We indicated to the parties that we would let them know on the last day if we would be able to give oral Judgment. However, in the end this was not possible, we continued deliberating and we told the partis that we would be giving Reserved Judgment and Reasons.

19. I must apologise sincerely to the parties for the length of time that it has taken to produce this perfected Reserved Judgment and Reasons. Unfortunately, this is due to my part-time working pattern and pressure of work.

Findings of fact

20. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.

21. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

22. By way of a preface, we would state that the Claimant struggled in his oral evidence to recall dates, specific events, what had been discussed at meetings or receiving documents and letters or indeed sending letters. He also struggled to put his case when asked or even acknowledge his case as set out in his witness statement and pleadings. Mr J Caplen acknowledged in his later written submissions that the Claimant found cross-examination difficult and pointed to his age and expressed his gratitude to the Tribunal for the patient shown to him. He also stated that the Claimant's witness statement was prepared over a period of five months, because of his age and the amount of documentation, he worked through the material gradually with support from his family, who had helped him navigate the documents and reconstruct a chronology of events stretching back to 2021. He also stressed that every assertion in the Claimant's witness statement was linked to a specific document in the bundle. He emphasised that the Claimant's central position has never changed: he wanted to return to work and simply needed the Respondent to acknowledge that he had not acted wrongly in September 2021 (by refusing to work at NHS sites).

23. We have also acknowledged that the Claimant's age and the effluxion of time (given that most of the events were from 2020 onwards), had much to do with this and indeed also affected the Respondent's witnesses, some of whom has since left the Respondent's employment, albeit to a much lesser extent, in recalling what happened. It was of concern that the Claimant did not know his case given that this impeded our understanding of what he was claiming. However, what was very helpful was that the events under scrutiny were well

evidenced in contemporaneous documents. This is in many respects to be preferred to having to rely on memory or witness statements.

24. We also took into account that the Claimant made a number of concessions in evidence when under questioning. However, these came across to us as honest responses when he simply did not know what had happened at key events or what certain documents meant and it struck us that he gave candid answers. In particular, he accepted that his position at the time of the events in question was either not maintainable or was unreasonable. This indeed was the central tenet of Mr J Caplen's submissions, that the Claimant wanted to return to work but wanted the Respondent to acknowledge its wrongdoing. Although, as we will see, it goes further than this because the Claimant's alternative position was a financial settlement. However, all in all, the Claimant came across as a witness doing the best he could and even taking a pragmatic approach in his answers to questions and as to events albeit with the benefit of hindsight.

25. Moving onto our findings of fact from the evidence.

26. The Claimant commenced employment with the Respondent in April 1987 and was employed by them until his dismissal on 14 December 2023. At that time, he was employed as a Refrigeration Maintenance Engineer, carrying out plant preventative maintenance ("PPM").

27. The Respondent is a refrigeration installation, maintenance and servicing specialist, based in Southwest Greater London and operating across the UK. At the time of the events in question, the Respondent employed approximately 90 staff of which there were approximately 30 engineers, 2 regional managers, a PPM Manager and a Supervisor. PPM is separate to the main department of engineers and at the material time was limited to 2 people, including the Claimant and his, then, Line Manager, Clive Cushing. The Respondent has internal HR function although they also relied on an adviser from an external HR consultancy company.

28. For the purposes of his disability discrimination complaints, the Claimant relies upon the impairment of Chronic Obstructive Pulmonary Disease ("COPD"). He provided a disability impact statement which is at B47-49 which sets out the effect of COPD on his day to day activities, the extent of his disability, medical treatment and medication, and supporting information. This also deals with his work-related stress and anxiety, although this is not the impairment pleaded or identified within the list of issues. His general position is that the Respondent knew of his COPD throughout his employment or they ought to have known that it amounted to a disability in law. The Respondent accepts that the Claimant was disabled for the purposes of his discrimination complaints by way of COPD, although knowledge at the material times is in dispute.

29. We note that in an email dated 24 March 2020 (at B104), the Claimant advised Mr Cushing that following government guidelines he was starting 14 days of self-isolation and that his wife is in the high risk category and is already self-isolating. We also refer to an NHS isolation note advising of the Claimant's period of self-isolation between 24 March and 6 April 2020 on the

basis that he lived with someone who has symptoms of Coronavirus (at B106).

30. We were referred to the Respondent's health screening questionnaires which had been completed in respect of the Claimant.

31. The first of these is dated March 2020 and is at B211-213. This document indicates that the Claimant disclosed that he was suffering from mild Emphysema for which he was receiving no treatment and no inhalers. This is noted in the Employer's Comments on B213 and that no reasonable adjustments are required.

32. The second of these is dated May 2021 and is at B208-210. This also indicates that the Claimant discloses mild Emphysema and no inhalers are needed.

33. The majority of the events in question took place during the Covid-19 pandemic from February/March 2020 onwards, the first UK lockdown commencing on 20 March 2020.

34. We have to acknowledge that this was a period of initial confusion, then uncertainty and fear for many and that the position changed almost on a day-to-day basis, not least in terms of guidance being provided by the UK government.

35. From 20 April 2020, the Claimant along with other members of the Respondent's staff was placed on furlough (we refer to the email dated 7 April 2020 at B111). The Claimant returned to work from 1 July 2020 onwards (we refer to the email dated 25 June 2020 at B114). He continued working predominantly in Waitrose supermarkets carrying out PPM services.

36. In December 2020, the Respondent won a contract to maintain cooling and refrigeration equipment at NHS sites. The equipment was within the canteens, and when being maintained, the sites were vacated, washed with antibacterial spray, significant PPE was required to be worn, and before any engineer entered the site, including the Claimant.

37. The Claimant is based in Southampton, where he lives, and his geographical area was the south and south coast of the UK. It was not challenged that within the Claimant's area, the NHS sites amounted to 28%, with 32 Waitrose supermarket stores.

38. The Respondent updated all staff generally as to work matters and this included the award of the NHS contract. We were referred to an email dated 7 December 2020, which was a Christmas/New Year update sent to all colleagues (at B120).

39. In January 2021, a number of the non-PPM engineering staff raised concerns about working at the NHS sites. The Respondent addressed these concerns in an email at B122. As we understand it, the same level of precautions carried out for PPM engineers did not apply to non-PPM engineers, although we were not told what precautions were applied to them. The Claimant was not included in this correspondence because he was not part of that group.

40. The Claimant later raised a concern that he had not been invited to the meeting held on 4 January 2021 (as referred to in the email) and was not privy to the reassurances that were given about working at NHS sites. It was accepted in his later grievance that, with the benefit of hindsight, he should have been included. In any event, the Claimant never worked at an NHS site.

41. The Claimant was concerned about attending NHS sites and raised this with Mr Cushing who agreed that he need not attend those sites. The Respondent only became aware of this arrangement in September 2021 because Mr Cushing was covering those sites himself and, as a result, was not fulfilling his own role.

42. On 10 September 2021, the Claimant attended the Respondent's office because he was having issues using his work phone. He saw Chris Thompson, the, then, Service Department Manager. Mr Thompson took the opportunity to speak to the Claimant about the NHS contract work and advised him that this was about to commence. The Claimant in response refused to work on NHS sites stating that he was unable to do so due to Covid-19 and that his wife was vulnerable (this was confirmed in an email from Mr Thompson to Alexandra Solomenco, the Corporate/Fleet/HR Administration Assistant, dated 16 November 2021 at B168). In addition, Stephen Childs, who was then employed by the Respondent as the Planned Maintenance and Administration Manager, who was aware that the Claimant was not attending NHS sites, told him that he needed to start attending.

43. The position was then set out in writing to the Claimant in an email from Mr Childs dated 16 September 2021 (at B153). This instructs the Claimant to attend Fleet Hospital (one of the NHS sites) on 17 September and gave details of the work required. The email also set out the following:

> *"Now I also refer to your concerns re not attending those NHS sites, in as much as you said that you would not attend them as your wife was vulnerable. The world is returning to some normality and most of us, and I include in that yourself and your wife have been double vaccinated and so therefore, the risks are somewhat lesser than they were last year when the business supported you by not giving those sites to you due to the vaccination programme not being rolled out in its entirety.*
>
> *Dave, we can't have a situation where we are asking people to travel large distances to do small contracts, and all these sites are within your area. Therefore, we need you to engage with the NHS, leaving Clive to do his work as a supervisor. There are times coming up where we have no one else to do them due to commitments within the business."*

44. We note that the first quoted paragraph reflects the government guidance dated September 2021(at paragraph 40, at B684) although Mr Childs said in evidence that he took this from media reports at the time. However, the Respondent's own risk assessment had not been updated to reflect the latest government guidance (at B627, specifically B635).

45. The Claimant's brief response was that he would not be attending NHS sites, in his email sent later that day (at B151-152).

46. On 16 September 2021, the Respondent wrote to the Claimant requiring him to attend an investigation meeting on 17 September (at B157). This was for refusal to carry out reasonable duties or instructions, ie not attending the NHS

Fleet site. The letter stated that this did not constitute disciplinary proceedings but may lead to formal disciplinary action.

47. In our view, this letter was certainly a precursor to formal disciplinary action. Whilst the Claimant had an arrangement with Mr Cushing not to attend NHS sites, the managers above him were unaware of this until it became apparent that Mr Cushing was not carrying out his own duties because he was attending those sites in place of the Claimant. Mr Childs became aware of the arrangement but instructed the Claimant to attend the NHS sites, explaining the rationale for this. However, the Claimant flatly refused to do so without giving any further explanation.

48. Clearly, the Respondent was reasonably entitled to investigate the position further. We can well understand why the Claimant saw this letter as the instigation of disciplinary proceedings given the language used in the letter. However, it was not, and, as we will see, no disciplinary proceedings were ever taken against the Claimant. Although we do note at one stage the Claimant was offered the right of accompaniment, which by statute only applies to disciplinary and grievance meetings. But this may have existed under the Respondent's own policy, which we were not provided with.

49. We were referred to the minutes of the meeting at B158-160. The meeting was conducted via Microsoft Teams and was between Mr Childs and the Claimant, with a note taker present. At the meeting, the Claimant provided further details of his concerns about attending NHS sites:

> *"I am responsible for my own health and safety. I am 73 years old. I am classed as vulnerable. I also have mild Emphysema which increases the risk of Covid making me very seriously ill, making me vulnerable, despite two vaccinations. These are the government guidelines. Look at the latest figures. My going to the hospital would make me anxious, uncomfortable, highly stressed. Ryan-Jayberg have a duty of care to me. My wife is categorised by the Government as Clinically Extremely Vulnerable, and I have a duty of care to her. Boris Johnson has said that Covid has not gone away. There will be higher figures in the winter."*

50. The meeting ended with Mr Childs indicating that there may be a subsequent meeting and the Claimant would be notified of any further action in due course.

51. Thereafter the Claimant continued to attend work at non-NHS sites and in particular continued to attend Waitrose stores.

52. On 8 November 2021, Maryanne Wilson, the Respondent's Finance Director, wrote to the Claimant by email advising him that he was required to attend a welfare meeting on 11 November (at B180).

53. On 9 November 2021, the Claimant sent an email to Miss Wilson raising various concerns (at B177). By email dated 10 November 2021, Miss Wilson responded to those concerns (at B176).

54. The welfare meeting took place on 11 November 2021 and was conducted by Mr Childs. The Claimant attended via Microsoft Teams from within a Waitrose store (where presumably he was working that day). The notes of the meeting are at B181-182.

55. The meeting was very brief and it would appear that it did not proceed because the Claimant had sent an email late in the evening of the day before and this had not yet been replied to by the Respondent. However, the Claimant did raise his concern that every meeting was causing him more stress and anxiety.

56. On 25 November 2021, the Claimant was sent an email on behalf of Miss Wilson (at B184-185). This was in response to an email from the Claimant which we do not appear to have in the bundle (we were certainly not referred to it) and also appears to address the issues raised in the email identified at the meeting on 11 November. The email goes on to arrange a further welfare meeting set for 30 November 2021 and sets out the following agenda:

"• the Risk Assessment
• Safety measures taken
• Attendance under contract to required sites
• Continue (sic) refusal which is a breach of contract and possible result (sic) in formal action
• Possible occupational health assessment"

57. The email further states that attendance is compulsory and failure to attend would be a breach of a reasonable instruction.

58. The Claimant became too unwell to attend work as a result of work-related stress from 26 November 2021 and did not return to work again thereafter.

59. By email dated 29 November 2021 (at B187), the Claimant indicated that whilst he was off work on doctor's orders for stress, he was very keen to resolve the situation as soon as possible and was willing to attend the meeting but only to hear what the Respondent's latest position is and the suggested way ahead and he would then consider this with his legal adviser.

60. On 3 December 2021, the Respondents received a letter from the Claimant's GP dated 29 November 2021 (at B217). This included the following:

"He is currently suffering from stress and anxiety, significantly impacting his mental health because of the threat to him of (as I understand it) possibly being told to work in a hospital setting where he believes he will be at greater risk from getting COVID. For him, the consequences of getting COVID could be life-threatening, being an older male with pre-existent lung disease."

61. A risk assessment peculiar to the Claimant was provided by the Respondent and dated 8 December 2021 (at B216).

62. By correspondence dated 13 December 2021, the Claimant was informed of receipt of the GP letter, the additional individual risk assessment and a suggestion was made for him to attend an Occupational Health ("OH") appointment. The letter asked the Claimant to contact the sender by 15 December 2021 to confirm whether he would agree to such an assessment. The Claimant did not respond save to raise a grievance (at B227-229).

63. The Claimant attended the welfare meeting (erroneously headed an "investigation meeting" in the notes of that meeting) on 30 November 2021. This was conducted by Microsoft Teams. We were referred to the notes of that meeting which are at B197-198.

64. On 10 January 2022, the Claimant submitted a grievance to Mr Rakesh Patel, the Respondent's Chairman and one of its Directors. This is at B227-229. This raised his concerns about the way he had been treated at work and his specific concerns that the Respondent had failed to fully appreciate his underlying health conditions and age and was attempting to discipline him or force him out of the company because of this.

65. The Claimant attended a grievance meeting on 26 January 2022 conducted by Microsoft Teams, the notes of which are at B239-255. The grievance officer was Mr Childs and the Claimant was accompanied by his wife.

66. The outcome of the grievance was provided to the Claimant on 15 March 2022 (at B267-278). This letter sets out the Claimant's concerns in numbered paragraphs 1 to 11 and then sets out the action taken by Mr Childs and his findings. Mr Childs found that points 1 and 6 of the grievance were substantiated, points 8 and 11 were partially substantiated and points 2-5, 7, 9 and 10 were unsubstantiated. The letter offered the Claimant the right of appeal.

67. By letter dated 29 March 2022, the Claimant appealed the grievance outcome (at B282- 287).

68. By letter dated 29 April 2022, Miss Wilson wrote to the Claimant's GP requesting a medical report (at B306-308). The letter stated that the Claimant had been absent from work since the 26 November 2021 and that the Respondent was concerned as to when he would be able to return to his normal duties. The letter set out the Claimant's job title, hours of work, that he worked at various locations, and his duties. The letter then asked a series of specific questions regarding the Claimant's ill-health, the treatment received, the prognosis and as to any reasonable adjustments. The letter also asked a series of questions seeking to establish whether Claimant was a disabled person under the Equality Act 2010.

69. On 3 May 2022, the Claimant attended a grievance appeal meeting by Microsoft Teams. This was chaired by Mr Patel and the Claimant attended with his wife. The notes of this meeting are at B311-317. The outcome of the appeal was sent to the Claimant by letter dated 31 May 2022 (at B323-332).

70. In summary, Mr Patel upheld the original numbered paragraphs 1, 2, 3, 4, 7 and 8 of the Claimant's grievance (as set out in the grievance outcome letter referred to above). However, Mr Patel overturned point 5, which he found partially substantiated as opposed to unsubstantiated, point 6, which he found substantiated as opposed to partially substantiated, and point 9, which he found to be substantiated as opposed to partially substantiated.

71. On 19 May 2022, the Respondent was sent and OH report from AXA Health (at B318--321). This followed a telephone assessment conducted with the Claimant by an OH Advisor on 11 May. In summary, the report set out the Claimant's self-reported medical history, his concerns that there had been a breakdown in communication between himself and the Respondent from January 2021 onwards, stated that the advisor did not believe that the Claimant was covered by the provisions of the Equality Act at that time, that he would be medically fit to return to work once the issues causing his

perceived work-related stress had been resolved, and suggested a meeting take place to discuss what can and cannot be accommodated by the business in relation to his work-related issues. The report then set out some guidance as to any grievance or investigation process undertaken.

72. By letter dated 21 July 2022, the Claimant's GP wrote to the Respondent in response to Miss Wilson's request for a medical report (at B339). This letter set out the following:

> *"Mr Caplen has a history of chronic obstructive pulmonary disease, IBS and emphysema. I am aware that Mr Caplen has been experiencing heightened stress, which is seemingly work related. This has resulted in the patient suffering with anxiety, sleep deprivation and associated symptoms relating to his irritable bowel syndrome condition.*
>
> *Mr Caplens's (sic) anxiety had somewhat increased in February this year and so following a discussion, it was agreed that he would commence an antidepressant to try and reduce some of his symptoms. Mr Caplen had also been suffering with a cough and some shortness of breath, which was thought to be viral in nature.*
>
> *When I last reviewed Mr Caplen on the 20th July, he was still stressed with work related issues and 1 therefore I (sic) issued a Med 3 to cover the period from the 20th July to the 26th September 2022. The patient continues to be prescribed medication and will reviewed accordingly."*

73. On 8 September 2022, AXA Health sent a further OH report to the Respondent (at B341-344). This followed a telephone assessment with the Claimant on 6 September 2022. This set out a medical update as reported by the Claimant, gave a somewhat equivocal opinion as to whether he was now covered by the Equality Act, stated that the Claimant should be considered temporarily unfit for work at the present time with no exact timeframe for his return to work, suggested he may benefit from counselling support and/or an increase in his medication which the adviser advised him to take up with his GP, suggested the Respondent take a flexible approach to the Claimant working in a hospital, given his underlying health conditions, his associated anxiety and GP advice. Finally, the report stated that the Claimant would like a further discussion in relation to his grievance and resolution of this may also help facilitate a return to work.

74. By letter dated 26 September 2022, Miss Wilson wrote to the Claimant (at B345). The letter stated that she had received the second OH report and would like to discuss this with him as well as his current state of health and whether there was anything that the company can do to facilitate his return to work. The letter proposed a meeting to take place on 30 September 2022.

75. On 30 September 2022, the welfare meeting was held by Microsoft Teams between Mr Childs, the Claimant and Ms Solomenco. The notes of the meeting are at B346-352.

76. A further welfare meeting was arranged and took place on 17 January 2023. This was again held by Microsoft Teams and was conducted by Jason Leamon, the Regional Manager, South and West, the Claimant's then line manager, and with Ms Solomenco in attendance. The note of the meeting are at B360-365. The meeting discussed possible reasonable adjustments so as to accommodate the Claimant's return to work (as to not having to work at NHS sites).

77. A copy of the notes were sent to the Claimant on 1 February and he was asked for his response to the changes discussed and how he felt about the proposed return to work (at B367 & 369).

78. By email dated 13 February 2023, the Claimant responded to what was discussed at the meeting (at B369). In essence, he stated that he was still processing what he called "the unexpected revelation" during the meeting that he would not have to work at NHS sites on returning to work and he queried why this decision was not made in January 2021 which would have avoided him finding himself in "this continuing, debilitating situation".

79. On 23 March 2023, the Claimant completed a Health Screening Questionnaire for the Respondent (at B201–203). This sets out his various medical conditions, including COPD and work-related stress.

80. On 25 April 2023 a further meeting took place by MicroSoft Teams. The Claimant attended with his wife, the meeting was chaired by Ms Tsifodimou, the HR & Fleet Manager, with Mr Leamon also attending. The notes of the meeting are at B372–381.

81. On 8 June 2023, AXA Health provided a further OH Report in respect of the Claimant. This is at B392–397. The report sets out the background medical conditions and stated that from the Claimant's perspective his workplace concerns were not being satisfactorily addressed or resolved. The report recommended that both parties should engage in a constructive dialogue. A number of reasonable adjustments were suggested with a view to staging a meeting and in addition suggested a pattern of phased return to work, duties and breaks.

82. A further welfare meeting was held on 6 July 2023 with the same parties present as at the meeting on 25 April. The notes of the meeting are at B400–407.

83. On 3 August 2023, Miss Wilson sent an email to the Claimant asking if he could confirm whether he accepted the proposed adjustments and return to his duties as discussed at the meeting on 6 July. Miss Wilson specifically asked the Claimant to note that the Respondent had agreed to all of the adjustments contained within the OH report dated 8 June. This email is at B410.

84. On 10 August 2023, Ms Tsifodimou sent an email to the Claimant again asking him if he accepted the adjustments proposed at the welfare meeting and also asked him to provide a timeframe for his return to work. This email is at B412.

85. On 11 August 2023, the Claimant sent an email in reply addressed to Miss Wilson cc Ms Tsifodimou (at B413), as follows:

"I share your keen desire to bring this matter to a satisfactory conclusion. My healthcare providers have advised that I need 'final closure' on the events which led to this situation; without this, my mental health struggles, stress and anxiety related to my job will most likely continue.

I would therefore appreciate it if Ryan Jayberg could confirm unequivocally that requiring me to carry out my duties in a hospital environment was in contravention of the company's own Health and Safety policies in place at the time, and my refusal to do so was therefore entirely appropriate.

Once this specific and crucial point, which caused this whole situation, has been finally been acknowledged by Ryan Jayberg I am confident I would be able to consider a return to work hopefully free of the stress and anxiety that has affected me for the last two years."

86. By email dated 16 August 2023, Miss Wilson responded as follows (at B416):

"Thank you so much for your response.

Ryan-Jayberg limited recognises that making all appropriate provisions for the Health & Safety of its employees and others, is an integral part of our business strategy. Our Health & Safety policy and practices are reviewed regularly to reflect all applicable new hazards, equipment, technology, or improved methods of control, as well as changes in our organisational structure and more specifically changes in legislation (Health and Safety Handbook/ Company's website).

On 3rd December 2021, was the first time we officially received full clarification from your GP of your health concerns which had instigated your identified worries undertaking your duties on a particular site / client contract.

Based on this information, advice received from the Government and during the ever- changing circumstances of Covid, we complied with every regulation along with the government's advice at the time which was imposed by law and did everything possible to protect and support you as a valuable employee and protect company's operations. The protection of our staff was and is a high priority for us as a company.

RJB complied with every regulation and along with the government advice at a time, which was imposed by law. In the last 2 years, four welfare meetings have been conducted and three occupational health assessments. We have agreed to all the adjustments suggested by the Occupational Health assessments, and we proposed additional reasonable adjustments to ensure you feel supported upon your return to work. It is good practice to conduct regular meetings for absences over one month to ensure both colleague and company are kept up to date and there are clear lines of communication.

This whole process was delayed initially due to AXA actioning the health assessment however when it was provided, we discussed the requirements detailed in the assessments.

By taking into consideration all the above, we do not admit and acknowledge any contravention of the company' s own Health and Safety policies and we followed the relevant government guidelines during the COVID pandemic to ensure all employees were safe and supported.

As it has been communicated already in previous correspondence, no decision has been taken yet in regards to your employment however your absence has been ongoing for a long period of time and the company need to ensure how we move forward. We would request you consider the adjustments proposed and advise your thoughts for your return to work discussed on 6th July. If you do not accept the adjustments proposed on the Welfare meeting held on 6ln July 2023, we will have no choice but to assess the viability of any future employment.

We look forward to hearing back from you."

87. By email dated 25 August 2023, the Claimant wrote to Miss Wilson cc Ms Tsifodimou, accepting the adjustments but subject to satisfactory answers being provided to points made in his email of 11 August and further points raised in this email (at B416).

88. By email dated 31 August 2023, Miss Wilson replied to the Claimant's email (at B422) as follows:

"Thank you for your email on Friday 25th August 2023 and all the relevant clarifications provided.

We are glad to hear that you are accepting the proposed adjustments from the meeting held on 6th July 2023, and we would like to kindly ask you to suggest a date you consider returning to your duties as we need to ensure that everything is in place to accommodate your return.

On Friday 3rd December 2021, a medical letter from your GP has been provided confirming previous and current health conditions. The stated date has also been recorded to the grievance outcome back in 2022.

On the 9th of December 2021 , an individual Health assessment had been carried out and the NHS sites have been removed from your work schedule.

Back on 16th September 2021 you had refused to attend the referred sites by writing on an email title 'NHS I will not be attending'. As our main and foremost commitment is to treat our employees equally, we followed a fair procedure and invited you to an investigation meeting to discuss this refusal.

By the time Ryan-Jayberg requested you to attend these sites, you and your wife were double vaccinated and according to the Government's findings (https://www.aov.uk/aovemment/news/covid-19-vaccines-further-evidence-of-success). there is medical evidence of the effectiveness of the vaccination program.

Furthermore, all your objections related to your age and health have been investigated and addressed on the grievance outcome on 15th March 2022.

Ryan-Jayberg has done everything imposed by law to support your health and wellbeing. In turn, we proposed reasonable adjustments (Welfare meeting held on 17thJanuary 2023) and we accepted all the proposed adjustments from an independent health provider (Welfare meeting held on 6th July 2023). All the adjustments are in line with the Equality Act 2010.

As it has been stated in the email correspondence on the 16th of August 2023, the company complied with every regulation and along with the government advice at a time and we do not acknowledge any contravention of the company's own Health and Safety policies.

By considering all the above, could you please confirm your intention to accept the adjustments and return to work without anticipating any sort of acknowledgement.

We look forward for your response."

89. By email dated 8 September 2023, the Claimant replied to the various points raised by the Respondent in its email but indicated that he accepted the adjustments (at B423–424).

90. Further correspondence took place with regard to ascertaining the Claimant's return to work date from the Respondent's side and a response to the points raised in the email of 8 September from the Claimant's side (B425-426).

91. By email dated 6 October 2023, Miss Wilson wrote to the Claimant acknowledging that the Claimant would not be fit to return to work until 27 December 2023, when his current medical certificate expired. The email went on to emphasise that the Respondent would not be acknowledging any contravention of its own health and safety policies and that it had followed the relevant government guidelines during the Covid-19 pandemic. The email concluded that the Respondent's only intention was to bring the Claimant back to work. This email is at B427.

92. By email dated 12 October 2023, the Claimant was invited to attend a meeting on 17 October to discuss his continuous absence (at B428-429). The accompanying letter set out the background medical information and was essentially the point of disagreement: for the Claimant, that the Respondent confirms unequivocally that requiring him to carry out his duties in a hospital environment was in contravention of the companies own health and safety policies in place that time and that his refusal to do so is entirely appropriate; for the Respondent, that it was not prepared to acknowledge either now or in the future any contravention of its policies and that it had followed relevant government guidelines during the Covid-19 pandemic. The accompanying letter indicated that the meeting was to discuss the Claimant's current state

of health and that the Respondent's primary concern was to facilitate his return to work and other options available including any additional reasonable adjustments could be considered. The letter ended stating that a decision would have to be made on the Claimant's future employment and one possible outcome was that employment may be terminated. The letter also offered the Claimant the right of accompaniment.

93. The meeting ultimately took place on 19 October 2023. The Claimant was accompanied by his son, Jaymie. The Respondent was represented by Miss Wilson and Ms Tsifodimou. The notes of the meeting are at B442–450. The meeting went over the various background events and each party restated their positions. The key point that came out of the meeting was that the Respondent are no longer held the NHS sites contract (having lost it approximately ten days before) and so there was no possibility that the Claimant would need to work at those sites.

94. We were referred internal correspondence between Miss Wilson and Ms Tsifodimou with regard to financial calculations in respect of the Claimant's pay, annual leave and benefits in kind (at B434). Whilst the Claimant believed this to be suspicious we found nothing untoward in it.

95. By email dated 3 November 2023, Miss Wilson wrote to the Claimant following confirmation of the accuracy of the notes of the meeting held 19 October (at B454). The email continued as follows:

"I considered the primary point discussed during the meeting which related to you requiring acknowledgement of the breach of the Company's Health and Safety Policy/Risk Assessment and I would like to inform you that the RJB's stance remained unchanged.

As a Company, we feel that we acted in line with the legislation and our internal policies.

For this reason, Citation, our HR outsourced partner, will conduct a meeting with you on the 15th of November 2023 at 11am on Microsoft Teams. Details of the meeting could be found in the attached invitation letter."

96. The attached invitation letter, set out the parameters of the meeting.

97. On 10 November 2023, the Claimant sent an email in response (at B457-459). This letter was in effect a letter before action seeking a financial settlement so as to avoid legal proceedings.

98. On 17 November 2023, Miss Wilson responded (at B461–462). The letter acknowledged the Claimant's position in seeking a resolution to his long-term sickness absence and his believed financial losses sustained. The letter set out the previously proposed meeting and offered to reschedule this and provide the Claimant with a final opportunity to attend to discuss attempts to seek his return to work or alternatively to send a representative. The letter indicated that if he did not attend then the meeting would go ahead in his absence.

99. By email dated 24 November 2023, the Claimant responded as follows (at B464):

"I am writing in response to your letter dated 17 November.

I note with considerable disappointment that Ryan Jayberg has chosen not to respond substantively to any of the points I made in my letter of 10 November, instead offering to reschedule an 'ill health review meeting'. I would ask that you read my letter again; it clearly sets out my position regarding returning to work, which has not changed. As such, I will not
be attending any further meetings. My position regarding a return to work (and reasons for it) has been set out clearly and remains contemporaneous.

Please consider my letter of 10 November my full and final statement on this matter until such time that Ryan Jayberg responds productively to my request for a settlement offer or concedes my refusal to attend NHS sites in September and October of 2021 was consistent with the Health and Safety Management System in place for such jobs at the time.

I would also ask that you give diligent consideration to the legal breaches I have been advised Ryan Jayberg has committed - or will commit should my employment be terminated on the grounds of ill health - that I set out in my letter of 10 November. This will ensure any appropriate litigation can proceed without delay."

100. By email of 1 December 2023, Miss Wilson wrote to the Claimant acknowledging his intention not to attend any more meetings, but in order to move the matter forward it was proposed to reschedule the meeting for 11 December. The email further acknowledged that whilst it was the Claimant's choice not to attend, a decision may be made in his absence and one possible outcome could be that his employment may be terminated and so it was in his best interest to attend. This email is at B465.

101. By email dated 7 December 2023, the Claimant replied restating his position and indicated that the likely outcome of this matter would be legal action and urged the company to proceed in such a way that this could be avoided. This email is at B467.

102. On 11 December 2023, the Respondent conducted the review meeting in the Claimant's absence. The meeting was attended by Miss Wilson and Ms Tsifodimou. The notes of the meeting are at B470-472. The meeting ended with Miss Wilson stating that having considered the situation at length, she could only sadly conclude that the Respondent no choice but to dismiss the Claimant due to his health.

103. By email dated 14 December 2023, Miss Wilson wrote to the Claimant advising him that his employment was terminated with effect that day with a payment of 12 weeks salary in lieu of notice plus any accrued holiday not taken (at B473-475). The accompanying letter set out the reasons for the Claimant's dismissal and concluded that given the Claimant's absence from work since November 2021 and no information from either the Claimant or doctors indicating when he would be likely to return to work in the foreseeable future or until the company knowledges that his refusal to attend NHS sites in October and November 2021 was consistent with the Health and Safety Management place time, it was not possible to continue with his employment. As the letter succinctly recorded (at B475):

"Due to the length of your absence from your duties, the lack of an end date and our position remaining unchangeable regarding our actions with this in mind, regrettably we have no alternative but to terminate your employment with us."

104. The letter offered the Claimant the right of appeal to Mr Patel within five working days from the date of its receipt.

105. By email dated 3 January 2024 (at B478), the Claimant responded with practical arrangements to return his tools, workwear, ID and electronic equipment, and querying his entitlement to accrued leave. The penultimate paragraph states as follows:

> *"I note that you have failed to give proper consideration to my request for a settlement figure to compensate me for loss of earnings and various other impacts resulting from Ryan Jayberg's actions in contravention of the company's own agreed Health and Safety protocols. Please confirm if this Ryan Jayberg's final position; if so, I will be commencing legal action against the company with immediate effect. I would also be grateful if you could advise me of who formal notification of legal proceedings should be addressed to."*

106. The Claimant did not appeal against his dismissal.

Closing submissions

107. We receive written submissions from both parties to which the representatives spoke to orally. We do not intend to set these submissions out within these reasons, unless absolutely necessary but would assure the parties that we have taken them fully into account.

Essential law

108. Section 98 Employment Rights Act 1996:

> *"'(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,*
> *(b) relates to the conduct of the employee,*
> *(c) is that the employee was redundant, or*
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
>
> *(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, and*
> *(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*
>
> *(4) [In any other case 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."*

109. Section 13 Equality Act 2010:

> *"(1) 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.*
>
> *(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."*

110. Section 15 Equality Act 2010:

"1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

111. Section 19 Equality Act 2010

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

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

112. Section 20 Equality Act 2010:

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid."

113. Section 21 Equality Act 2010:

‘

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

Conclusions

<u>Discrimination burden of proof</u>

114. Under section 136 of the Equality Act 2010:

'…(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….'

115. This wording whilst slightly different from that used in the previous legislation (section 54A of the Race Relations Act 1976 and section 63A of the Sex Discrimination Act 1975) is identical in terms of its meaning.

116. What it boils down to is the following: where the Claimant proves facts from which the Employment Tribunal could conclude in the absence of an adequate explanation that the Respondent committed an unlawful act of discrimination, the Tribunal must uphold the complaint unless the Respondent proves s/he did not commit that act.

117. With regard to the previous legislation, the Court of Appeal in Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster [2005] IRLR 258 set out guidance on the stages which an Employment Tribunal should follow. Although these guidelines were expressed in terms of a sex discrimination case, the same would apply to the other types of discrimination.

118. The Court of Appeal said the Tribunal must go through a two-stage process. At stage 1, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent had discriminated against the Claimant. In deciding whether the Claimant has proved these facts, the Employment Tribunal can take account of the Respondent's evidence. At stage 2, the Respondent must prove s/he did not commit that discrimination. Although there are two stages, Employment Tribunals generally hear all the evidence in one go, including the Respondent's explanation, before deciding whether the requirements of each stage are satisfied.

119. The full guidelines (as adapted for the Equality Act 2010) are as follows:

    a. It is for the Claimant to prove, on the balance of probabilities, 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 Claimant which is unlawful under the 2010. These are referred to below as 'such facts';

    b. If the Claimant does not prove such facts s/he will fail;

    c. It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few Respondents would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "s/he would not have fitted in";

    d. In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal;

e. It is important to note the word 'could' in section 136(1). 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;

f. 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;

g. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw from an evasive or equivocal reply to a questionnaire or any other questions that fall within the Equality Act 2010;

h. Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice;

i. Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on grounds of a protected characteristic or act, then the burden of proof moves to the Respondent;

j. It is then for the Respondent to prove that s/he did not commit, or as the case may be, is not to be treated as having committed, that act;

k. 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 a protected characteristic or act, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive 97/80/EC;

l. 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 the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question;

m. 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 explanations for failure to deal with the questionnaire procedure and/or code of practice;

120. We have also taken into account Madarassy v Nomura International plc [2007] IRLR 246, in which the Court of Appeal found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be *"something more"*. There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

121. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

122. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

The Claimant's evidence and credibility

123. Mr Frew submitted that the Claimant's credibility was in issue given his performance in cross examination. He said that it was clear that the Claimant's memory had faded to the extent that he could not remember important events, the receipt of documents or their contents and was not able to articulate his case. In addition, he asserted that the Respondent was caused forensic prejudice given that the Claimant's case sought to rely on events which took place between September and December 2021, notwithstanding his attempts to suggest that what happened thereafter up until April 2024 formed a continuing state of affairs.

124. We find that the Claimant was credible in as far as what he could recall and as to his concessions in evidence, especially that it was wholly unreasonable of him to insist as a precondition of returning to work that the Respondent accept that he was right and they were wrong. By this time he was not being asked to go to NHS sites and then the NHS contract was subsequently lost and all that was under discussion was his precondition and a possible financial settlement.

125. We find that there is no issue arising from faded memories as a result of effusion of time for either party, given that this is a well documented case.

The Claimant's case

126. We also need to address Mr J Caplen's written submissions which, perhaps unwittingly, attempt to rewrite the case being put forward by the Claimant. This is a theme that is raised on a number of occasions within his written submissions. In essence, what he asserts is that the Claimant had COPD, this made him clinically vulnerable, that vulnerability led to his refusal to attend NHS sites following the earlier risk assessment undertaken by the Respondent, that the Respondent's reaction to that refusal caused work-related stress and that the Claimant developed anxiety and this led to his long-term absence through to his dismissal. This is in part what appears to be an attempt to run a personal injury complaint which to an extent might have a bearing on elements of the discrimination complaint or more appropriately to an award for injury to feelings/injury to health assuming that the complaint is successful.

127. However, this characterisation actually rewrites the reality of the situation which we set out below.

128. The Claimant in his letter of 10 November 2023, at B457, whilst this is not the first request (the first being 11 August 2023, at B413) states that attending NHS sites would put him and his wife at risk of serious illness or death and breached the risk assessment and Health and Safety management system agreed with the NHS (at B635) and that notwithstanding his protestations and attempts to operate in line with the risk assessment, he was put under considerable pressure to work at those sites and made subject to disciplinary proceedings. Over the page, the Claimant then sets out a crystallisation of what he requested:

"It is my position that the company's actions contravene the Health and Safety at Work Act 1974, which underpins the employer's duty to ensure, as far as is reasonably practicable, the health, safety, and welfare of all its employees. Furthermore, I assert that the company's actions constitute a breach of the duty of care owed to me, potentially giving rise to a claim for personal injury due to the psychological impact, under the framework established by the Health and Safety Executive and associated case law…

I therefore seek a resolution which not only addresses the potential termination of my employment but also compensates for the financial losses sustained due to the aforementioned breaches. This tape form of a settlement agreement providing for compensation that reflects the full extent of lost earnings and acknowledges the distress suffered."

129. By way of response in its letter of 17 November 2023, the Respondent replies as follows:

"I would like to express that the company did follow our health and safety risk assessment at the time in question. You have previously confirmed that the reasonable adjustments put in place by the occupation (sic0 health report dated 8 June 2023 would be able to support a return to work however stressor as you say is mainly regarding non-acknowledgement to breaching our policy which is impacting your stress and anxiety as it has been communicated on (sic) our last meeting held on 19 October 2023."

130. And again at B464 in his letter to the Respondent dated 24 November 2023. And again this was signed off by him but he was unable to give any evidence on it :

"I would also ask that you give diligent consideration to the legal breaches I have been advised Ryan Jayberg has committed - or will commit should my employment be terminated on the grounds of ill-health - that I set out in my letter of 10 November. This will ensure any appropriate litigation can proceed without delay."

131. In his further of 7 December 2023, at B467, although largely a repetition:

"As per my last two letters, 10 and 24 November, I will not be attending any meetings with Ryan Jayberg until a settlement is presented for my consideration or there is an acceptance by the company that my refusal to attend NHS sites in October and November 2021 was consistent with the Health and Safety Management System in place for such jobs at the time."

132. And then turning to the minutes of the final meeting held in the Claimant's absence on 11 December 2023, at B470:

"We do not agree that any H&S was breached. We had a full RAMS in place for all client sites and agreed after the grievance meeting on 26/01/22 that the NHS RAMS was out of date because guidelines were constantly changing but was covered by the previous advise to always check and follow government guidelines. This part of the grievance was partly substantiated. It was recommended that those responsible for Risk assessments reconsider the review period for them especially in relation to circumstances such as Covid. However, the ever changing circumstances, interpreting ever changing advice at the time and updating all documentations and internal policies was a daily

challenge. It was noted there appears to be no delay in ensuring adequate safety was in place. The NHS site was fully covered by procedures to reduce risk. Dave did continue to attend Waitrose supermarkets where the public was possibly closer and to quote him in a welfare meeting in September 2022 he was "behind the counter with the women that worked there", "if there were too many people I just move away, I can move around"

133. What this comes down to is an ultimatum or a stand-off, if you like, between the Claimant's requirement that the Respondent admit wrongdoing with the underlying threat of litigation or in seeking a substantial financial settlement. The Respondent in return does not accept that it has done anything wrong and is attempting to move the matter forward in terms of discussing the Claimant's return to work which ultimately is without the precondition of working at NHS sites and finally there being no NHS contract in any event.

The issues

134. The issues for us to determine are set out at B62-67.

Disability

135. The issues are recorded at paragraph 3 of the list of issues.

136. However , it was accepted by the Respondent that the Claimant was disabled by reason of COPD).

137. It did appear to us that perhaps the operative impairment was actually stress and anxiety. However, that is not what has been pleaded or identified in the list of issues.

138. We would add that in cross-examination the Claimant was unable to say whether his COPD was the reason for the discrimination or whether it was stress and anxiety, beyond stating that they were linked. When it was put to him that his wife had said in her written evidence that he was physically fit at the time of the events in question, he then stated it was the stress that he was being put under to go to NHS sites. His wife's evidence was that the Claimant was not off work for a physical reason but because of stress and anxiety. However, the Claimant in evidence did not accept that this was a mental impairment.

139. We find that the Claimant suffered from COPD and this was a disability as defined within section 6 of the Equality Act 2010.

Discriminaiton - time limits

140. This is set out at paragraph 1 of the list of issues and relates only to the discrimination complaints.

141. Given the dates that the claim form was presented and the dates of early conciliation, this means that anything that happened before 12 December 2023 is on the face of it out of time, subject of course to whether there is continuing state of affairs to at least that date or we determine it just and equitable to extend the time limits.

142. The list of issues at paragraph 1.2 sets out the requirements under section123 of the Equality Act 2010.

143. Section 123 governs time limits under The Equality Act 2010. It states as follows:

> *"(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."*

144. An act of discrimination which "extends over a period" shall be treated as done at the end of that period under section 123(3) Equality Act 2010. In some situations, discrimination continues over a period of time, sometimes up to the date of leaving employment. If so the time limit in which to present a Claim Form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is 'continuing discrimination'.

145. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a sequence of individual incidents were evidence of a "continuing discriminatory state of affairs".

146. A Tribunal may also allow a claim outside the time limit if it is just and equitable to do so. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. This is a process of weighing up the reasons for and against extending time and setting out the rationale. Case law has suggested that a Tribunal ought to consider the checklist under section 33 of The Limitation Act 1980, suitably modified for tribunal cases.

147. The factors to take into account (as modified) are these:

    a. the length of, and reasons for, the worker's delay;
    b. the extent to which the strength of the evidence of either party might be affected by the delay;
    c. the employer's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;
    d. the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case; the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.

148. The Tribunal should consider whether the employer is prejudiced by the lateness, ie whether the employer was already aware of the allegation and

so not caught by surprise, and whether any harm is done to the employer or to the chances of a fair hearing by the element of lateness.

149. Where the delay is because the worker first tried to resolve the matter through use of an internal grievance procedure, this is just one factor for the Tribunal to take into account (Apelogun-Gabriels v Lambeth LBC and another [2002] IRLR 116, CA).

150. If the delay was because the worker tried to pursue the matter in correspondence before rushing to Tribunal, this should also be considered (Osaje v Camden LBC UKEAT/317/96.)

151. However, in order to determine whether the discrimination complaints have been brought in time we need to first identify the dates of the alleged acts and/or omissions relied upon.

152. Going through the discrimination complaints one by one.

Direct discrimination

153. This complaint is set out at paragraph 4 of the list of issues and the act relied upon is subjecting the Claimant to disciplinary proceedings for refusing to work on assignments at NHS hospitals.

154. This appears to have been from 16 September 2021 (relying on the Respondent's letter to him at B157 as referred to in our findings and, of course, if we accept the Claimant's characterisation of the process followed) until his dismissal on 14 December 2023.

155. The Claimant was asked in cross-examination if he was put through disciplinary proceedings and he said he did not know and that it all merged into one.

156. However, whether or not this was a continuing state of affairs or we find it just and equitable to extend time, we have found that it was not the case that the Claimant was subjected to disciplinary proceedings and so this complaint is not well founded and is dismissed.

Discrimination arising from disability

157. This complaint is set out at paragraph 4 of the list of issues and the Claimant relies on the same act as in his complaint of direct discrimination.

158. Thus for the same reasons as set out above, this complaint is not well founded and is dismissed.

Failure to make reasonable adjustments

159. This complaint is set out at paragraph 5 of the list of issues.

160. It is important for us to bear in mind section 123(4) of the Equality Act 2010 as referred to above. In essence, that unless there is evidence to the contrary, a failure to do something occurs when the Respondent does

something inconsistent with doing it or, in the absence of that, after a period of time in which the Respondent might reasonably have been expected to do it.

161. Turning to the suggested steps that the Claimant suggests that the Respondent could have taken to avoid the alleged substantial disadvantage, which are set out at paragraph 5.5 of the list of issues:

162. Paragraph 5.5.1., assigning him to non-hospital refrigeration work. The Claimant was given non-hospital work from the start of the NHS contract and then he went off sick. So, erring on the generous side, this produces a date range from 16 September 2021 onwards until the Respondent told the Claimant that he does not have to attend NHS sites – which is taken from the Risk Assessments at B216, dated 8 December 2021, in the second row which states that the Claimant is currently not attending NHS sites. However, in reality the Claimant attended any NHS sites and ultimately the Respondent lost the contract. The Claimant was informed of this at the welfare meeting held on 19 October 2023 (in which Miss Wilson stated that the Respondent did not have the NHS contract any more from approximately 10 days before (at B442).

163. Paragraph 5.5.2., enhanced PPE for vulnerable individuals.

164. Paragraph 5.5.3., temporary redeployment. This was offered to the Claimant belatedly in the final meeting, which of course he did not attend.

165. Paragraph 5.5.4., conduct risk assessment. The Respondent produced a risk assessment dated 8 December 2021. But they did not do any further assessments or suggest undertaking one if the Claimant returned to work.

166. However, looking at these suggestions as a whole, it was very difficult to determine dates because the Claimant's evidence was essentially that he did not understand the suggested adjustments.

167. In cross-examination, the Claimant was taken through each of the suggested adjustments in turn to which he said repeatedly that he did not understand what they meant. In particular, with regard to the suggested adjustments at paragraph 5.5.4 he accepted that his unwillingness/inability to attend NHS sites was not to do with his COPD but it was his fear of going into hospitals to which he added, and his fear of getting Covid-19.

168. From the evidence provided to us, and as far as we were able to ascertain dates, it was simply not possible to come to the conclusion that these matters formed a continuing state of affairs and most likely they were simply one-off acts/failures to act. However, the loss of the NHS contracts clearly sets the end date in respect of these suggested adjustments or indeed any other adjustments related to the pleaded PCP (at paragraph 5.2). This would clearly put this complaint out of time given that this was at some point in early October 2023.

169. Turning then to our just and equitable discretion. We did not hear much evidence on this and so we do not have a great deal to go on in order to determine whether to exercise our discretion in the Claimant's favour. We

know that the Claimant was not well at the time with work-related stress but we heard no evidence of how this affected his ability to bring a claim earlier. At some point, the Claimant refers in correspondence to legal advisers (in his letter of 29 November 2021 at B187 and in later correspondence which sets out legal claims and threatens legal action, as in his letter of 10 November 2023 at B457-459 and 24 November 2023 at B464) but in oral evidence he could not remember when he first took legal advice. We also know that at the time his wife and son were assisting him either by attending meetings and drafting correspondence.

170. It is a positive factor that he was trying to resolve the matter internally but this was taken to the point where what he was actually seeking was not a realistic outcome in terms of what the Respondent was prepared to do.

171. On the negative side is the period of delay and the impact on both sides' memories, as well some of the protagonists leaving the Respondent's employment, although there is voluminous contemporaneous documentation.

172. But in conclusion was simply not in position to exercise our discretion to allow these complaints in time.

Indirect age discrimination

173. This complaint is set out at paragraph 7 of the list of issues. The PCP relied upon is for all employees to attend site after removing protections previously afforded to older employees based on age-related vulnerability in the revision of Covid-19 risk assessment on 23 November 2021.

174. We considered when the Respondent applied the PCP to the Claimant, assuming that it did? We concluded that this must have been 23 November 2021 when the Covid-19 risk assessment was revised. This would place the complaint out of time.

175. We then looked at whether it formed a continuing course of conduct so as to place it in time. We concluded that it could not possibly be applied, if it continues at all, after the Respondent lost the NHS contract, which actually predated the date of the revised risk assessment. But in any event still places the complaint out of time.

176. We then turned to consider whether it was just and equitable to extend the time limit and for the same reasons as set out above we simply had insufficient evidence on which to exercise our discretion.

The substantive claims

177. Turning to then to the substantial claims.

Discrimination

Direct discrimination

178. Under section 13 of the Equality Act 2010, it is unlawful to treat a worker less favourably because of a protected characteristic, in this case disability, by reference to an actual or hypothetical comparator in the same or similar circumstances.

179. As we have stated above in the context of time limits, the Claimant was not subjected to disciplinary proceedings, which is the act of less favourable treatment relied upon. The Respondent was undertaking an investigation as to the Claimant's refusal to attend NHS sites and then held a series of welfare meetings.

180. Given that this complaint is clearly not well-founded we decided there was no merit in going through any of the further matters set out in the list of issues.

Discrimination arising from disability

181. Under section 15 of the Equality Act 2010, a complaint of discrimination arising from a disability is essentially where a claimant is alleging that he has been treated unfavourably as a result of something arising from his disability. It is a defence to such a complaint if the employer can prove the unfavourable treatment was a proportionate means of achieving a legitimate aim.

182. For entirely the same reasons as above we conclude that this complaint is not well-founded and there is no merit in going through any of the further matters set out in the list of issues, although we would make the observation that notwithstanding the submissions from the Respondent the something arising was clearly something from the Claimant's disability of COPD.

Failure to make reasonable adjustments

183. Under sections 20 and 21 of the Equality Act 2010, there is a duty upon employers to make reasonable adjustments. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage.

184. The adjustment has to be reasonable. In considering whether an employer has met the duty to make reasonable adjustments, the Tribunal must apply an objective test. Although we should look closely at the employer's explanation, we must reach our own decision on what steps were reasonable and what was objectively justified. Relevant factors can include the extent to which the adjustment would prevent the disadvantage, the practicality of the employer making the adjustment, the employer's financial and other resources, and the cost and disruption entailed.

185. There is no duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the worker has a disability and does not know or cannot reasonably be expected to know that the worker is likely to be placed at a substantial disadvantage as a result.

186. We have already indicated our difficulties in ascertaining the dates on which the Respondent failed to make the suggested adjustments in the context of time limits.

187. Moving on from that, looking at paragraph 5.1 of the list of issues, did the Respondent know or could it reasonably have been expect to know of the disability and from what date? It was clear from the evidence that the Respondent knew from March 2020 (at B211-213) that the Claimant suffered from mild emphysema. However, it was also clear that the Respondent was not aware that the Claimant had COPD until it received the letter from his GP on 3 December 2021.

188. Turning then to the PCP which is set out at paragraph 5.2 of the list of issues, that there was a blanket requirement that all refrigeration engineers attend NHS hospital sites during Covid-19. From the evidence we heard we cannot find that there was a blanket requirement that all refrigeration engineers had to attend NHS sites. Indeed, we have to remember that the Claimant never attended any NHS sites but nevertheless continued to attend supermarket sites.

189. Given the above finding as to the lack of PCP we concluded that there was no merit in continuing to go through the remaining issues.

190. We therefore conclude that this complaint is not well-founded and is dismissed.

Indirect age discrimination

191. Indirect discrimination is defined in section 19 of the Equality Act 2010. In essence indirect discrimination occurs where there is apparently equal treatment of all workers, but the effect of certain requirements and practices imposed by the employer puts workers with a certain protected characteristic at a particular disadvantage. If the Claimant is able to show that indirect discrimination has occurred, then a defence is available. If the employer can prove that requirements and practices imposed are justifiable then the treatment complained of will not be unlawful.

192. This complaint is set out at paragraph 7 of the list of issues. The PCP relied upon is at paragraph 7.1, for all employees to attend site after removing protections previously afforded to older employees based on age-related vulnerability in the revision of Covid-19 risk assessment on 23 November 2021.

193. We note that the PCP refers to sites and not NHS sites and that the protections referred to appear to be those set out in the NHS Health & Safety management system document in paragraph 1 at B635. This was something that the Claimant relied upon repeatedly in his pleaded case and states as follows:

"1) Any operative meets one of the following criteria should not come to site:
- *Has a high temperature or a new persistent cough.*
- *Has a loss of, or change in, your normal sense of taste or smell (anosmia).*
- *A vulnerable person (virtue of their age, underlying health condition, clinical condition or are pregnant).*

- *Living with someone itself isolation or a vulnerable person."*

194. Paragraph 7.2 of the list of issues then asks us to determine did the Respondent apply the PCP to the Claimant? Our answer to this is yes in respect of NHS sites but of course the Respondent can only have done so from 23 November 2021 onwards and the Claimant was off sick from work from 26 November 2021 onwards, was not required to attend NHS sites from 8 December and then the contract was lost 10 days before the welfare meeting on 19 October 2023.

195. Paragraph 7.3 of the list of issues asks us to determine whether the Respondent applied the PCP to all older employees who are vulnerable because of their age, or would have done so? Our answer to this is we simply do not know. We heard no evidence on it.

196. Paragraph 7.4 of the list of issues then asks us to determine whether the PCP put older persons of the particular disadvantage when compared with younger persons who did not have an age vulnerability in a certain number of respects, dealt with below.

197. At paragraph 7.4.1, in that, government guidance identified older individuals as higher Covid-19 risk. Our conclusion on this is that the answer is no, because in September 2021, the government guidance had changed as of 19 July 2021. We were referred to the HM government guidance Covid-19 Response: Autumn and Winter Plan, which begins at B670, at B683-684, in paragraphs 39 and 40 which state:

*"**Clinically Extremely Vulnerable guidance and shielding advice***

39. At the start of the pandemic, on the advice of clinicians, the Government made the difficult decision to advise millions of people, who were then identified as Clinically Extremely Vulnerable (CEV), to shield in order to protect themselves from the virus.

40. Since then, the understanding of the risks to this group has changed as more has been learnt about the virus, and as the most vulnerable have been prioritised for vaccination. Due to falling prevalence of COVID-19, shielding advice was paused on 1 April 2021 and, since 19 July 2021, people who were previously identified as CEV have been advised to follow the same guidance and behaviours as the rest of the adult population. The proven effectiveness of the vaccine rollout across the entire population has reduced the risk of serious illness from COVID-19. This also applies to CEV individuals, the majority of whom will be well-protected by the vaccine. Third doses have been offered to those with severely weakened immune systems and to maintain protection, the former CEV group will be prioritised for a booster (see Vaccines section above for more information). The effectiveness of the vaccine, the availability of evidence-based effective treatments and increased knowledge and understanding of the virus and the clinical risks it poses means that clinical advice has been updated to say that the shielding programme can now end."

198. At paragraph 7.4.2, in that, the original risk assessment recognised age as a vulnerability factor. We had to say that doing the best we can this could only presumably have been based on the earlier government guidance.

199. At paragraph 7.4.3, in that, removing age-based protections disproportionately affected older workers. We were not provided with any evidence of this.

200. At paragraph 7.4.4, in that, the Claimant lost protection previously enjoyed and was required to work in environments the original assessment deemed

inappropriate for his age group. Again, doing the best we can, presumably this only came about as a result of the government guidance changing.

201. At paragraph 7.5 of the list of issues, we are asked to determine whether the PCP put the Claimant at that disadvantage? We conclude yes it did but only as a result of the government guidance changing.

202. At paragraph 7.6, we are asked to decide whether the PCP was a proportionate means of achieving a legitimate aim. The Respondent relies upon the legitimate aim as being to ensure that all sites were covered at the time and to follow government guidance which stated that vaccinated persons who are vulnerable should be treated as any other person after they had been vaccinated. We took into account the guidance provided to us at paragraph 7.7 of the list of issues.

203. We concluded that the PCP was a proportionate means of achieving a legitimate aim. But in any event, the Claimant was not at work and was not attending any sites, he was told from 8 December 2022 that he need not attend NHS sites and ultimately the NHS contract was lost in early October 2023.

204. We took into account Mr J Caplen's submissions in respect of this complaint, but in reality he was making submissions in effect running a different claim which was more akin to direct discrimination.

205. We therefore conclude that this complaint is not well-founded and it is dismissed.

Unfair dismissal

206. Section 98 of the Employment Rights Act 1996 sets out how an Employment Tribunal should decide whether a dismissal is unfair.

207. There are two basic stages. Firstly, the employer must show what was the reason, or if more than one, the principal reason, for the dismissal. The reason must be one of the four potentially fair reasons set out in section 98(2) or some other substantial reason of a kind such as to justify dismissal. Secondly, the Employment Tribunal must then decide in accordance with section 98(4) whether it was fair to dismiss the employee for that reason.

208. We first have to determine whether the Respondent had a potentially fair reason to dismiss the Claimant. The Respondent alleges that this was by reason of capability and/or for some other substantial reason. In effect, for long-term ill-health and/for because his refusal to return to work unless the Respondent agreed to his precondition.

209. Capability is defined within section 98 of the Employment Rights Act 1996. It is clear that incapability can stem from sickness, what is necessary is that the sickness or ill-health impacts upon the claimant's capability to do his job which can arise from resultant lack of attendance at work or inability to return to work.

210. Some other substantial reason is in effect a catch-all reason not falling within the other potentially fair reasons. A substantial reason is one which is not trivial or unworthy but one which would justify the dismissal.

211. The matters that we have to determine are set out within paragraph 2 of the list of issues.

212. Paragraph 2.1 asks us to determine whether the Claimant was dismissed. There is clearly no dispute that he was actually dismissed by the Respondent.

213. Paragraph 2.2, asks us to determine what was the reason or the principal reason if more than one for dismissal. As we have said, the Respondent asserts that the reason was capability and/or some other substantial reason.

214. The letter inviting the Claimant to the final meeting, albeit reissued as further dates were set, is at B467. The letter of dismissal at B475 clearly sets out a dismissal on grounds of capability. This is supported by the minutes of the meeting which are at B470. The reality of the situation was that the Claimant was unable to return to work because of stress and anxiety, there was no end date in sight other than an indication that if the matter was resolved he could return but he refused to return in any event unless his demands were met and which the Respondent would not agree to.

215. We conclude that whilst this is a combination of capability and some other substantial reason of a kind justifying the dismissal, the principal reason is capability. Some other substantial reason is a part of it given the Claimant's perceived unreasonable demand as a precondition of his returning or indeed the offer of financial settlement.

216. There is no suggestion here that this was anything other than a case where the Respondent had a genuinely held belief that resulted in the Claimant's dismissal, even if the Claimant believed (at the time at least) that his precondition was reasonable and that the Respondent should agree to it. There is suggested underlying agenda or inadmissible reason for the Claimant's dismissal.

217. Mr J Caplen submitted that whilst the Claimant's absence from work was the operative reason for his dismissal, it was nevertheless unfair because his absence was caused by the Respondent's own conduct in September 2021 and its failure to follow the OH assessments in made an September 2022 and June 2023 and the resultant stress caused to the Claimant. In addition, he submitted that the Respondent had not obtained up-to-date medical opinion prior to the final dismissal meeting and could have waited longer for the Claimant to return to work.

218. This was not a submission that we were able to support. Unfortunately, Mr J Caplen was in effect attempting to run some sort of personal injury argument whereas the approach to be taken in an unfair dismissal case is somewhat more clinical and is simply down to what was the reason, was it a potentially fair reason, and if so does it satisfy the test of reasonableness both in terms of how the dismissal took place and why. This is all within the spectrum of reasonableness, so as to preclude the Tribunal reaching our own view of what we might believe the Respondent should have done. In particular, we formed

the view that the Respondent acted reasonably in proceeding on the basis of the medical opinion that it had and in terms of whether it could wait any longer for the Claimant to return it given his ongoing ill-health and the demands that he was making is a precondition of returning.

219. Once a potentially fair reason has been shown, the Tribunal then has to go on to consider the test of reasonableness.

220. The basic question in determining whether the test of reasonableness has been met in a case of a capability dismissal arising from a single period of prolonged absence is whether in all the circumstances the employer could be expected to wait any longer and, if so, how much longer? Each case must be considered on its own facts and an employer cannot hold rigidly to a predetermined period of sickness after which any employee may be dismissed.

221. We would expect the employer to have found out the true medical position and to have consulted with the employee before making a decision. A medical report on the implications and likely length of illness should generally be obtained from the employee's GP or an OH adviser or company doctor or independent consultant. Where the employer obtains a report from an OH adviser or a company doctor, the employer should also be willing to consider a report from the employee's own GP or specialist. Whereas the former may be more familiar with working conditions, the latter may be better placed to judge the employee's health.

222. Having apprised itself of the medical position, the employer's decision to dismissal ought to be based on the following factors:

    a. the nature and likely duration of the illness;

    b. the need for the employee to do the job for which he was employed and the difficulty of covering his absence. The more skilful and specialist the employee, the more vulnerable he is to being fairly dismissed after a relatively short absence;

    c. the possibility of varying the employee's contractual duties. An employer will not be expected to create an alternative position that does not already exist nor to go to great lengths to accommodate the employee. However, a large employer may be expected to offer any available vacancy which would suit the employee. What is reasonable very much depends on the facts;

    d. whether or not contractual sick pay has run out is just one factor either way;

    e. the nature and length of the employee's service may suggest the employee is the type of person who is likely to return to work as soon as he can, but length of service would not necessarily be relevant in any other way.

223. It is important for the employer to have discussions with the employee and for the employee to know when his/her job might be at risk.

224. We also had regard to the test contained within BHS v Burchell (1979) IRLR 379, EAT, which whilst relating to conduct dismissals is applicable to other potentially fair reasons. This requires us to consider the following:

    a. Whether the employer believed that the employee was guilty of misconduct;

    b. Whether the employer had in mind reasonable grounds upon which to sustain that belief; and

    c. At the stage at which the employer formed that belief on those grounds, whether s/he had carried out as much investigation into the matter as was reasonable in the circumstances.

225. When assessing whether the Burchell test has been met, the Tribunal must ask itself whether what occurred fell within the 'band of reasonable responses' of a reasonable employer. This has been held to apply in a conduct case to both the decision to dismiss and to the procedure by which the decision was reached. (Sainsbury's Supermarkets v Hitt [2003] IRLR 23, CA).

226. In addition, we remind ourselves that we must be careful not to substitute our own decision for that of the employer when applying the test of reasonableness.

227. Turning then to the Burchell test which encompasses the test of reasonableness. We came to the conclusion that the Respondent undertook a reasonable investigation, it held numerous welfare meetings with the Claimant, it commissioned three OH assessments and received three occupational health reports, it had an initial letter from the Claimant's GP followed up by a subsequent report from the GP. The matter was also explored in correspondence, in which the Claimant certainly made his position very clear. The Claimant was invited to attend a final meeting to determine the way forward and was told of his right of accompaniment, that he could bring a representative to speak on his behalf and that one possible outcome was dismissal. It was stressed that it was important for him to attend but he declined pressing agreement to his precondition of an admission of wrong doing, the spectre of legal action, or a financial settlement. He was told clearly in writing why he was dismissed and offered the right of appeal. He did not appeal.

228. We conclude that the Respondent reached the reasonable belief the conclusions reached from its investigation; that there was no physical impairment preventing the Claimant's return to work, they knew from the Claimant that his position was that he was suffering from stress and anxiety, would not return to work until his GP certified him fit to do so and he would not return in any event unless his demands were met. The Respondent formed reasonable view that with no reasonable end in sight by which the Claimant would return to work it could not wait any longer and so determined that the Claimant was no longer capable of performing his duties. As the letter of dismissal states at B474, regrettably covering the Claimant's duties either with temporary staff or through overtime was never feasible in the long term but unavoidable due to the shortage of engineers in the industry/

229. We then considered whether dismissal was within the range of reasonable responses open to a reasonable employer in the circumstances. Whilst perhaps some employers may have waited longer we cannot say that no reasonable employer would not have dismissed in these circumstances.

230. We considered the position regarding the belated offer of alternative employment. This was only raised in the Claimant's absence at the final meeting and the Claimant only became aware of it in the dismissal letter at B474. The letter did state that this would be in the Claimant's disposition to consider it or not.

231. We did wonder how an offer of employment as a desk technician based in New Malden could possibly be suitable when the Claimant lives in Southampton. Further, being told in the dismissal letter did not actually give him any opportunity to consider it even if it were something he wanted to do was suitable.

232. However, the Claimant had the opportunity to appeal but did not do so. This would have given him the opportunity, if he was interested in this offer of employment, to explore it further and either accept or reject it. The reasons he gives for not appealing are set out at paragraph 244 of his witness statement for this hearing:

"244. I did not appeal. Given the history of the grievance, the "show willing" internal email, the refusal to follow OH advice, and four explicit refusals of acknowledgment, any appeal would have been futile and harmful to my health. My GP advised me not to engage further."

233. In addition, in his contemporaneous email to Miss Wilson dated 3 January 2024, after receiving the letter of dismissal, the Claimant does not address the issue of alternative employment. This would again been an opportunity to explore, accept or reject it. The email is at B478.

234. We considered whether this matter at some length as to whether in itself it rendered the dismissal unfair? We also took into account that if it did, then there were possible considerations relating to contributory fault and/or a Polkey reduction arising from the failure to appeal.

235. Under section 123(6) of the Employment Rights Act 1996, if the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the Claimant, it can reduce the compensatory award proportionally as it thinks fit.

236. In Polkey v A E Dayton Services Ltd [1987] IRLR 503, the House of Lords (as the Supreme Court was then known) held that a dismissal may be unfair purely because the employer failed to follow fair procedures in carrying out the dismissal and in such circumstances the compensatory award may be reduced by a percentage to reflect the likelihood that the employee would still have been dismissed, even if fair procedures had been followed.

237. Ultimately we concluded that whilst the offer of alternative employment was only raised at the final meeting, the Respondent acted reasonably given that the Claimant had been invited to the meeting several times, had declined,

was offered the opportunity to consider it in the dismissal letter and did not respond either in his subsequent correspondence or by way of appeal.

238. In reality, on balance of probability it was very unlikely that the Claimant would have accepted the offer given that it was to work so far away from him home but moreover given his ongoing position that the Respondent had to agreed to his demands.

239. We therefore find that the complaint is not well-founded and is dismissed.

Employment Judge Tsamados
2nd April 2026

Judgment sent to parties on:
23rd April 2026

For the Tribunal Office

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