EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8002139/2024
Hearing Held at Edinburgh on 27, 28, 29 and 30 October 2025, and Members' Meeting on 19 December 2025

Employment Judge: M A Macleod
Tribunal Member: L Grime
Tribunal Member: T Lithgow

Mr B Szutor	**Claimant** **In Person**
Skylark Lasers Limited	**Respondent** **Represented by** **Mr G Williams** **Litigation Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims all fail, and are dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 15 December 2024 in which he complained that he had been unfairly dismissed, and discriminated against on the grounds of age and disability.

2. The respondent resisted the claimant's claims in full.

3. Following several Preliminary Hearings, a Final Hearing was listed to take place by hybrid means at the Employment Tribunal, Edinburgh, on 27 to 31 October 2025. The Hearing concluded on 30 October 2025, and a

Members' Meeting took place on 19 December 2025 to carry out our deliberations in the case.

4. The claimant appeared on his own behalf, and Mr Williams, Litigation Consultant, appeared for the respondent.

5. The parties presented a Joint Bundle of Documents to which reference was made during the Hearing.

6. The claimant gave evidence on his own account.

7. The respondent called as witnesses:

    - Paul Atkinson, Partner, Par Equity ;
    - Mark Iain Hanson, Non-Executive Director ;
    - Ewan Lindsey McLellan, Chair and Investor Director;
    - Alastair Granger Boughey-Moore, Investment Director, Par Equity; and
    - David Ewan Morton, Non-Executive Director.

8. Evidence in chief of each of the witnesses was taken by witness statement, which in each case was taken as read.

9. At the outset of the Hearing, it became apparent that one of the Tribunal Members allocated to the case, Steve Cardownie, had a conflict of interest, and accordingly recused himself from the case. Tom Lithgow was able to attend and sit as lay member in the case.

The List of Issues

10. The List of Issues, agreed by the parties, is as follows:

Time Limits

1. **Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 9 August 2024 may not have been brought in time.**

2. **Were any discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010 (EqA)? The Tribunal will decide:**

a. **Was the claim made to the Tribunal within three months (as extended by early conciliation) of the act to which the complaint relates?**

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

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

d. **If not, were the claims made within such further period as the Tribunal considers to be just and equitable? The Tribunal will decide:**

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

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

Unfair Dismissal

3. **Was the claimant dismissed?**

4. **Did the respondent do the following things:**

    a. **Allege that the claimant had resigned in May 2024;**

    b. **Allege that the claimant had issued an ultimatum that if Par Equity did not replace the Chair, Ewan McLellan, he would resign;**

    c. **Subject the claimant to an unwarranted capability procedure;**

    d. **Conduct the capability procedure unfairly;**

    e. **Issue the claimant with a written warning for capability on 12 August 2024;**

    f. **Require the claimant to work with a leadership coach, as a condition of the formal warning;**

    g. **Fail to uphold the claimant's appeal against his capability warning on 24 October 2024;**

    h. **Initiate the capability process without the proper authority of the Board;**

i. **Vary the claimant's terms of employment by imposing mandatory coaching, and if so, did this require investor consent? If it did, was investor consent obtained;**

j. **Did that breach the implied term of trust and confidence? There are a number of points that the Tribunal will require to decide:**

i. **Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;**

ii. **Whether it had reasonable and proper cause for doing so;**

iii. **Whether that breached any other term of the contract;**

iv. **Whether the breach was a fundamental one, and if so, whether it was so serious that the claimant was entitled to treat the contract as being at an end;**

v. **Whether the claimant resigned in response to the breach;**

vi. **Whether the claimant affirmed the breach or the contract before resigning;**

vii. **If the claimant was constructively dismissed, what was the breach of contract;**

viii. **Was it a potentially fair reason;**

ix. **Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?**

Disability

5. **Was the claimant a disabled person within the meaning of section 6 of EqA at the material time? The Tribunal will decide:**

a. **Whether he had a physical or mental impairment;**

b. **Whether it had a substantial adverse effect on his ability to carry out normal day-to-day activities;**

c. **If not, whether the claimant had medical treatment, including medication, or take other measures to treat or correct the impairment;**

d. Whether the impairment would have had a substantial adverse effect on his ability to carry out normal day-to-day activities without the treatment or other measures;

e. Whether the effects of the impairment were long term. The Tribunal will decided:

i. Whether they lasted at least 12 months, or were likely to last at least 12 months;

ii. If not, whether they were likely to recur?

Direct Discrimination: Age, Disability

6. At the material time, the claimant's age was 29, and he compared himself with his predecessors who were, he says, "considerably older" than himself.

7. Did the respondent do the following acts:

a. Subject the claimant to a capability process;

b. Decide that he should receive mandatory leadership coaching as part of the outcome of the capability process;

c. Was that less favourable treatment than his comparators received from the respondent;

d. The claimant's comparators are:

i. Alan Faichney (aged 65 when employed as CEO);

ii. Fedor Karpushko (aged 66 when employed as CEO); and

iii. Tom Walls (aged 61 when employed as CEO).

e. If it was less favourable treatment, was it because of his age or disability;

f. Did the respondent's treatment of the claimant amount to a detriment;

Age Only

g. Was the treatment a proportionate means of achieving a legitimate aim? The respondent argues that the legitimate aim was to ensure that the Chief Executive Officer of the respondent

had suitable communication skills when dealing with customers, staff and investors;

h. The Tribunal will decide:

i. Was the treatment an appropriate and reasonably necessary way to achieve those aims;

ii. Could something less discriminatory have been done instead;

iii. How should the needs of the claimant and the respondent be balanced?

Indirect Discrimination

8. A "PCP" is a provision, criterion or practice. Did the respondent apply the following PCP: to require all employees, including the claimant, to travel economy class on long-haul flights;

9. Did the respondent apply the PCP to the claimant;

10. Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic of age, or would it have done so;

11. Did the PCP put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, in that he is more likely to suffer the symptoms associated with migraines, which made him unwell and impaired his ability to perform his work duties effectively following the flight;

12. Did the PCP put the claimant at a disadvantage;

13. Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were: ensuring that travel costs in a small, loss-making business were kept to a reasonable level and that they would not attract investor criticism for excessive expenditure;

14. The Tribunal will decide in particular:

a. Whether the PCP was an appropriate and reasonably necessary way to achieve those aims;

b. Whether something less discriminatory could have been done instead;

c. **How the needs of the claimant and the respondent should be balanced?**

Reasonable Adjustments

15. **Did the respondent know, or could they reasonably have been expected to know, that the claimant suffered from a disability? If so, from what date;**

16. **Did the respondent apply the following PCP:**

    a. **Requiring the claimant to travel economy class by aeroplane and standard class by rail?**

17. **Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?**

18. **What was that substantial disadvantage?**

19. **Did the respondent know, or could they reasonably have been expected to know, that the claimant was likely to be placed at that disadvantage?**

20. **What steps could have been taken to avoid that disadvantage? The claimant suggests: Permitting the claimant to travel in a premium cabin (business or first class) on long-haul flights;**

21. **Was it reasonable for the respondent to have taken those steps, and if so, when?**

22. **Did the respondent fail to take those steps, in particular relating to the claimant's trip to the United States of America in October 2024?**

Harassment: Age, Disability

23. **Did the respondent do the following:**

    a. **On 12 August 2024, did Ewan McLellan and Mark Hanson state: 'You've never been a CEO before or done a commercial role before'?**

    b. **On 24 October 2024, in the formal appeal outcome letter, did David Morton state that the claimant's alleged behaviour could be 'put down to inexperience' as a basis for upholding the capability warning?**

    c. **Fail to provide the claimant with evidence in support of their concerns;**

d. On 15 August 2024, the act of imposing mandatory leadership coaching as part of a formal capability warning in contrast to the treatment of older, poorer performing predecessors;

e. If so, was that unwanted conduct?

f. Did that unwanted conduct relate to age, or to disability?

g. Did the conduct have the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

h. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

Victimisation

24. Did the claimant do a protected act, namely: making a complaint about his medical needs being ignored on 31 July 2024?

25. Did the respondent:

a. Subject the claimant to a capability procedure 7 days afterwards?

b. In doing so, did the respondent subject the claimant to a detriment?

c. If so, was it because the claimant did a protected act?

d. Was it because the respondent believed that the claimant had done, or might do, a protected act?

Remedy for Unfair Dismissal

26. Does the claimant wish to be reinstated to their previous employment?

27. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

28. Should the Tribunal order reinstatement?

29. Should the Tribunal order re-engagement?

30. What should the terms of the re-engagement order be?

31. If there is a compensatory award, what should it be? The Tribunal will decide:

a. What financial losses has the dismissal caused the claimant?

b. Has the claimant taken reasonable steps to replace their lost earnings, by mitigating his losses, for example by seeking alternative employment?

c. If not, for what period of loss should the claimant be compensated?

d. Does the Tribunal conclude that the claimant might have been fairly dismissed in any event, had a fair procedure been followed, or for some other reason?

e. If so, should the claimant's compensation be reduced, and by how much?

f. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

g. Did the respondent or the claimant unreasonably fail to comply with the ACAS Code of Practice?

h. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

i. If the claimant was unfairly dismissed, did he cause or contribute to that dismissal by blameworthy conduct?

j. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

k. Does the statutory cap of 52 weeks' pay or £86,444 apply?

l. What basic award is payable to the claimant, if any?

m. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Remedy for Discrimination

32. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What recommendation should it make?

33. **What financial losses has the discrimination caused the claimant?**

34. **Has the claimant taken reasonable steps to replace lost earnings, by mitigating his losses, for example by looking for alternative employment?**

35. **If not, for what period of loss should the claimant be compensated?**

36. **What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?**

37. **Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?**

38. **Is there a chance that the claimant's employment would have ended in any event? Should his compensation be reduced as a result?**

Findings in Fact

11. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

12. In carrying out this exercise, we make clear that we have not found it necessary to set out every piece of evidence which was given at the Hearing, but to confine ourselves to those findings which were available to us through the evidence, based on our conclusions about that evidence, relevant to the List of Issues which we were required to determine.

13. The claimant, whose date of birth is 8 December 1994, commenced employment with the respondent on 1 February 2020 as a Laser Engineer, having completed his PhD studies at Heriot-Watt University. From January 2023, the claimant held the position as Chief Technical Officer, and on 1 June 2023, he was appointed as Chief Executive Officer (CEO) by the respondent.

14. The respondent is a limited company which specialises in the development of laser technology, and in the manufacture and sale of lasers. Par Equity, an investment business, took an equity stake in the respondent's business prior to the claimant's appointment to the company. For the period of the claimant's employment, the business was loss-making and thus required the ongoing support of its investors. Accordingly, the Board of the respondent had an investor director to represent shareholder interests, and to ensure that the Board, including the CEO, were accountable for the delivery of the business plan. Ewan McLellan was nominated by Par Equity as their investor director, and during the early part of the claimant's

employment, when he was a Laser Engineer, he was appointed as Chair of the Board of Directors.

15. When the claimant was appointed as CEO, it was known that he was a highly motivated and skilled engineer, but that he had had no prior experience of being a CEO. The respondent provided coaching for him in order to assist his development in the role.

16. In January 2024, the respondent wrote to the claimant (468) to propose the following incentive package for him for 2024:

    - *"Increase in base salary to £110,000*
    - *£30k bonus is paid on hitting budget:*
        - *£15k for achieving budgeted commercial revenue (shipped and invoiced)(£1.35M)*
        - *£15k for achieving budgeted EBITDA (-£140,589). Any changes to the budget that affect EBITDA, that are signed off by the Board, will be taken into account when assessing bonus payment."*

17. The claimant responded the following day (468) to confirm that this was agreed.

18. On 26 February 2024, the respondent's Remuneration Committee met to discuss the budget for the forthcoming year, and included within it a proposal for a number of new hires, including a Chief Product Officer (CPO), at a salary of £75,000, to be advertised internally and externally (277). This was a position for which the claimant had been pressing, in order to make progress in meeting the commercial targets set by the Board. The claimant accepted in cross-examination before us that that report did not confirm that a CPO would be appointed, as Board approval would be required for this.

19. On 18 March 2024, Alastair Moore wrote to the claimant, copied to Mr McLellan and Paul Atkinson (1194), following an update provided to the investment committee. In the email he stressed the need for the company to meet its budget and to secure more funding in order to achieve its targets. At this stage, the business remained loss-making. The claimant replied on the following day (1193) to express his own views about the needs of the business. He took the view that the "overly cautious one step ahead approach of doing business" was "absolutely inadequate".

20. On 1 April 2024, the claimant emailed Mr McLellan and the Board with board packs, and confirming that a record high sales volume had been achieved that quarter (543).

21. He went on: *"Attached please find DH's CV, who has been offered the CPO role…"*. DH was the claimant's preferred candidate, and his name is anonymised by the Tribunal on the basis that he is not directly involved in these proceedings and there is no reason not to protect his identity.

22. At the meeting of the Board on 4 April 2024, it was minuted (571), under "Actions from the Board Meeting"; *"Board to review CPO candidate proposal"*, an action given to Mr McLellan as Board Chair.

23. It was also noted:

    "AM [Alastair Moore] raised issue of adding a member of staff to the executive team (CPO) without Director approval.

    EM [Ewan McLellan] agreed that the Directors should meet with the candidate before hiring and noted that the role isn't in the budget.

    DM [David Morton] added that he understood that BS needed support, but needs Investor approval."

24. Following the Board meeting, at 12.19pm on 4 April 2024, the claimant emailed the CPO job description and DH's CV (545) to Mr Morton, Mr Hanson and Mr McLellan, as well as Mr Moore, and advised that the package *"that we offered"* was £72,000, with a £13,000 option pool, a 10/15% bonus based on objectives met in the first 12 months and 35 days' holiday.

25. Mr Hanson and Mr McLellan met with the claimant's preferred candidate DH but felt that the candidate was not what the business needed or could afford given the lack of progress made by the business in terms of sales. On 18 April 2024, Mr McLellan emailed the claimant (with copies to Mr Hanson, Mr Morton and Mr Moore) (578) under the subject heading "COO/CPO":

    "Hi Ben,

    We had a discussion yesterday on this hire, which as you know is outside of the current agreed budget. There a (sic) few areas of concern that we would like to sit down and discuss with you when you return from Japan, before making a decision. I suggest that we aim to do that immediately after the Board Meeting on 1st May. Points to discuss:

    - *When the budget was finalised it was agreed that additional expenditure would be considered based on confidence in tracking to*

budget. Confidence in sales pipeline and activity – hopefully this can be covered off, post Japan, in the Board Update

- *COO vs CPO – the previous discussion on this was that the need was for a COO in order to free you up from some of the day to day running of the business to in order to focus on commercialisation. The CPO title was a work around to manage internal politics to do with Scot's role, but we seem to have ended up with very much a CPO candidate, with little or no wider business management experience. If, in your view, the need has changed to a greater product focus, then we would need to understand how this will free you up for a more commercial focus versus alternative solutions.*

- *DH – if we are to take him on with the intention of him picking up the COO role how is this going to be positioned with the team, how are we going to support him to do so given his experience to date. It also wasn't clear from our discussion with DH that this was where his interests lay.*

Feel free to give me a call to talk through any of the above points, before you leave, otherwise please can you be ready to discuss the above on the 1st, so that we can all reach a decision.

Cheers,

Ewan"

26. The claimant did not reply directly to this email. However, he contacted Paul Atkinson by telephone. Mr Atkinson's evidence was that he said "words to the effect that if we couldn't find a way of resolving it, he would have to find something else to do" (Atkinson witness statement paragraph 17). Under cross-examination by the claimant, he said it was "More that it was you or the chair." He went on to say that he remembered putting it to the claimant that it was "him or the chair", to which the claimant replied "yes". The claimant's evidence was that he denied ever issuing an ultimatum or saying to anyone that it was, in effect, Mr McLellan or him. Mr Atkinson was clear that the respondent was willing to change the Chair, but that this would take time in order to identify a suitable replacement.

27. Mr Atkinson contacted Mr McLellan thereafter to tell him that he had had a call from the claimant issuing an ultimatum either to get rid of him as chair or he would be leaving.

28. Mr Moore also gave evidence that he had had a call from the claimant in spring 2024, when he was driving (Moore witness statement paragraph 10). His evidence was "We talked about the breakdown in the relationship between him and Ewan McLellan, and that if there was not a change to the Chair position he said he would not be able to continue for much longer."

29. Mr Moore had a follow-up conversation with the claimant when he explained to the claimant that they could not make a change immediately, that the business was not performing well and that to remove the Chair would cause instability at such a time. He told him that he heard what he said and that the respondent was willing to change the Chair, but that it would not be happening in the short term. Mr Moore's evidence (paragraph 14) was; "That was the first time that the Claimant effectively said that if we did not do anything we were going to have to find a new CEO because he couldn't take the situation the way that it was."

30. On 30 April 2024, the claimant met with Mr Moore and Mr Atkinson at Par Equity, at the claimant's request. He expressed frustration, and stated that unless there was a change to the Chair, they, as investors, would have to find a new CEO for the business. When Mr Moore advised that they were willing to make a change, but that it would take time, the claimant restated his position that unless there was a change he would leave, and the business would have to find a new CEO.

31. Mr Moore made notes of that meeting (969). He noted that there had been a previous conversation between the claimant and Mr Atkinson *"where Ben Szutor delivered a message to Paul along the lines of 'you have to change the Chair of Skylark or I'm quitting'. I didn't hear this directly but I have no reason to doubt Paul's version of events."* The note continued: *"Ben at the meeting on this date reiterated that the current situation with him as CEO and Ewan as Chair could not continue and that if we as majority investor in Skylark did not change the Chair, then Ben could not continue as CEO. Paul said we have to weigh up whether we find a new Chair, which won't be done overnight, Ben finished off the sentence by saying 'or whether you need to find a new CEO'. Which Paul confirmed to him that he had been very clear that this was his ultimatum hence we were not going to do something immediately as either action would introduce a lot of risk and instability to the business. Ben nodded to confirm the mutual understanding."*

32. On the same day, the claimant emailed Mr Atkinson (597) to thank him for his time. He continued:

    "I considered your points with regards to my flight tickets and questions around retention rates. As I said, I have a fear of flying and I get very ill on long-haul flights. I still flew out to San Francisco 3 times for business and never even considered upgrading myself as the business could not afford it. I was also not short on time, so I could afford to just feel nauseous for a day or two when flying. This year I've flown on 3 long-haul flights within 3 months over weekends with an extreme amount of work on my shoulders. I decided to fly with more space and seating that reclines. I filled out 12 appraisal documents, submitted a grant proposal and prepared a board

pack among many other things on these flights, which I couldn't have done any other way. On my flight to China upgrading from business to first class made the flight cheaper and on the flight to Tokyo the pricing was similar if not lower. I understand your points, and given my situation with the board I should have at least notified you or Alastair of my decision. Regarding your comments of my colleagues not coming with me, this was considered pre-flight, but I should have given it more thought.

Regarding your questions about the 2 leavers, I hope I gave you sufficient reasons as to why these two employees left. I still want to highlight the fact that we grew our full-time team from 12 people to 27 within less than 12 months, and both the core team and new hires are still with us, I think happy and respected within their roles.

While I understand why the above points required some discussion, I do not think any of these topics are the most critical problems the business is currently facing. I do not think after the progress we achieved, I or any of the team deserves to be interrogated or assumed guilty of their actions. I accept that things can improve and as long as I am with the business I will focus on improving my work and others'. I do not want to be part of a culture, investment group, company which can only focus on negatives and can only question failures or mistakes, and which is unable to celebrate success. I am doing my best to provide support and guidance to this team, and I expect to feel the same way working with the board and stakeholders.

I am looking forward to receive your feedback on Par's decision and I am very happy to answer any other questions that you may have.

Best regards,

Ben"

33. On 13 May 2024, a Teams meeting took place between Mr Atkinson, Mr Moore and the claimant. Mr Moore's notes of that meeting include the following (969):

- *"Meeting organised for Ben Szutor's return to work following annual leave.*
- *Purpose was to see if there had been any change of views following several Directors of Skylark and Advisors to the business giving feedback to Ben before holiday on his style as CEO and how to lead the business going forward and also being pushed to sanction a hire, DH, for a Chief Product Officer role who Par had not met, which Paul and Alastair agreed to meet but communicated that Ben and the business needed a Chief Operating Officer instead.*
- *Ben quickly said that nothing had changed and that his stance was as it was before and that the ultimatum from 30th April still stood.*

- *Paul said 'so we've got the decision to make between getting a new Chairman or getting a new CEO' to which Ben said 'yes' and nodded."*

34. Shortly thereafter, on the same day, Mr Moore spoke to the claimant by telephone (notes 969/70). He advised the claimant that Par Equity had made the decision not to change the Chair of the business knowing full well the consequences of this and that it would result in losing the CEO of the business off the back of the 30 April and 13 May meetings. He instructed the claimant to meet with Mr McLellan to commence the transition process.

35. The claimant then emailed Mr McLellan, Mr Moore and Mr Atkinson on 14 May 2024 (616):

"Dear All,

Given recent developments, unfortunately, there seems to be some miscommunication, and I would like to clarify that at this moment of time, I am not resigning. I still deeply care about the success of our team.

I understand that recently there has been signs of inexperience on my part, and appreciate all the feedback from you. Furthermore, as I communicated this individually to all of you, the relationship between the Chairman and CEO has worsened. As per our scheduled discussion for Thursday, I am looking forward to hearing your views and opinion on Skylark going forward.

Best regards,

Ben"

36. Mr Moore responded to the claimant on 15 May 2024 (615):

"Dear Ben,

There has been no miscommunication. Over the course of 3 calls and meetings you presented us with the same ultimatum. After duly considering the facts we decided not to accede to your demands and instead accepted your offered resignation. This was communicated to you on Monday evening.

As Majority Investors in Skylark Lasers, we have instructed the Board, led by Ewan McLellan, to formalise your resignation and terms of departure. Ewan has requested that this be delayed pending your conversation on Thursday morning, however this does not change the fact that your resignation has already been accepted.

I sincerely hope that you will work with the company to ensure a smooth process, which I'm sure you agree is in the best interest of all parties.

Regards,

Alastair Moore"

37. The claimant emailed that afternoon (615): *"Appreciate I have voiced my concerns about the misalignment of the Chairman and CEO to you, but I did not resign in any form."*

38. On 16 May 2024, Mr Hanson met with the claimant to discuss the departure of an employee, Lauren. He noted that he had challenged the claimant about why he cared about taking the time to convince him that he was right, if he was leaving. Mr Hanson noted (609): *"At this point Ben said I haven't resigned. I said that you've provided an ultimatum and made it clear to the investors that if you didn't get your way you'd leave. This is not way to be treating your investor. Ben said that he will resign, but do it in his time and that be discussing this at the meeting with Ewan on Wednesday 22nd."*

39. A meeting took place on 16 May 2024 between the claimant and Mr McLellan, following which Mr McLellan wrote to the claimant to summarise (618/9):

    "As far as the Investor Majority and the Board are concerned you put your resignation to the Majority Investor, Par Equity as part of an Either/Or demand. It was communicated to you that your resignation was accepted on a call in the evening of Monday 13th May. Since then you and I have had two conversations and this morning you told me that you were disputing that your resignation had been tendered. That is noted and I communicated to you the company will now seek legal guidance, before responding.

    Until that legal opinion has been obtained and discussed with you, we will not be communicating your resignation beyond those individuals that are required to be in the loop. From the company's perspective, until established otherwise, your notice period started from Monday evening. As discussed with you, until further notice it is agreed that you will remain in role, but that all commercial matters should be discussed and cleared in advance with Mark Hanson and all other business matters with myself.

    It is in the interest of all parties to get agreement on the way forwards as quickly as possible and we will work with you to ensure that happens."

40. The claimant responded that afternoon (618) to thank him for summarising, and to say that while he understood that there were some outstanding disputes, he had found the discussion very positive and revealing.

41. Having taken legal advice, Mr McLellan advised the claimant that they understood that a resignation would require to be in writing (referring to the claimant's terms and conditions (180)), and accordingly they were no longer proceeding on the basis that he had resigned. The claimant was upset that Mr McLellan, while acknowledging this, did not apologise for having incorrectly alleged that he had resigned.

42. Mr McLellan also raised a concern with the claimant about his having travelled on business trips to China and Japan using first and business class tickets. He was anxious about the impression which this would give to investors. The claimant said that this was because of a medical issue, of which he did not provide details. Mr McLellan was aware that the claimant had flown by economy class to San Francisco in January 2024 without raising any issue. Mr McLellan maintained that the company's policy was that staff should travel by economy class unless for medical reasons. The company had not, at this stage, articulated this policy in writing.

43. On 31 May 2024, Mr McLellan wrote to Jen Suttie of PeopleStance Consultancy Ltd (1189/90):

"Ben at Skylark is proving just as challenging on the coaching front as I expected in stepping up to the CEO role. I had set him up previously with an experienced senior business leader, but that has not been getting to the root of the issues. It is definitely time that I need a professional involved! He definitely needs pure leadership coaching – is that something you can deliver or is there anyone you have worked with that you would recommend (having come across Ben at least in your interviews)?"

44. Ms Suttie responded to say that she would be in a position to assist.

45. On 8 July 2024, the claimant emailed DH (686) to advise that as he knew, the appointment was subject to Board approval, but that the Board had decided not to support the appointment.

46. On 13 July 2024, DH wrote to Mr McLellan and Mark Hanson (739):

"Hi,

I'm writing to follow upon on my appointment as Chief Product Officer at Skylark Lasers.

Following up on previous arrangements, I wrote an email to Ben last Saturday about additional information for me starting on 01/08 as I was going on holiday.

On Monday I received an email to say that the board had not approved my appointment. This came as a huge shock as I had been told that this was a formality and I had not received any communication on this for over 2 months. As a result I am now unemployed.

I have attempted to contact Ben for more details but have not received any response. I am reaching out to you in the hope of receiving some clarification."

47. Mr McLellan forwarded this email to the claimant on 15 July 2024 (738) and said:

"Hi Ben

I am happy to have a chat with DH next week when I am back on the rationale for the Board decision. What I can't explain to him is why he was not kept informed that the Board had not approved his appointment, leading to him clearly resigning from his current job – you need to do that, so please don't ignore him.

Cheers

Ewan"

48. On 17 July 2024, Mr McLellan emailed the claimant again to ask him to confirm that he had spoken to DH.

49. The claimant's reply, on that date, stated that:

"Yes, it was communicated to DH that unfortunately the company is unable to make an offer to him at this time. It was also communicated to DH that his appointment was conditional on Board/Investor approval. Looking back at these discussions there were two separate Teams invites sent to DH by Par Equity, both of which he turned down, and this was the last communication we received from him until last week. The decision was communicated as per our standard procedure."

50. On 17 July 2024, the claimant sent another email, this time to Paul Atkinson, in response to the "significant turmoil" within the Board of Directors, to express his serious concerns regarding the company's current direction (734).

51. In the course of that email, the claimant stated:

"Accusations were made for misuse of funds, flying on higher class to business meetings. The extra cost of these were £5,800, yet these travels secured the company over £180,000 of sales. As I said to you, I decided to fly on higher class for medical reasons, which I will be able to prove in due course…"

52. He also maintained that *"The recent characterisation of my actions as an ultimatum is a misrepresentation that has evolved into an unwarranted question of trust and confidence…"* The remainder of this paragraph was redacted, as was the next paragraph.

53. On 29 July 2024, the claimant notified the Board of his travel plans for a trip to China (755), explaining that he and one other person would be travelling in September to Taiwan and Hong Kong, with an overall cost of around £6,500.

54. Mr McLellan replied that day to the claimant to say (754) that he agreed that it was important that the claimant travel to these meetings, though he wished a timetable of the customers or potential customers he intended to meet. He continued: *"As previously discussed though, the company policy is economy class travel and this policy will not be changing while we are relying on investor funds to support the business. Please confirm that you understand this."*

55. The claimant's response, the following day (754), was that he was happy to discuss the customers he intended to see. However, with regard to the travel issue, he said: *"As discussed previously, due to an existing medical condition, I am unable to fly long-haul without meeting certain requirements… Please let me know if you, and the board is unable to support my medical needs to attend these meetings."* The claimant then asked for a copy of the travel policy to which Mr McLellan was referring.

56. Mr McLellan repeated that the company policy was for economy class travel and that he should follow up with Human Resources if he wished to argue that he required first or business class travel due to medical reasons.

57. In his response (768/7) on 31 July 2024, the claimant referred to factual inaccuracies, misrepresentation of the duties of the Board and the CEO and complete disregard of his medical needs in the previous two emails sent by Mr McLellan, which he believed were not sent in good faith.

58. On 5 August 2024, Mr McLellan met with the claimant, following which there was an exchange of emails (765/6) between them, and a Directors' meeting was arranged for 12 August 2024.

59. On 7 August 2024, Mr McLellan emailed the claimant (771):

    "As you are aware, the Board have previously discussed a number of concerns in relation to your performance in the role of CEO on an informal basis. We would now like to invite you to attend a formal meeting in terms of the Company's Capability Procedure to discuss the following issues:

    - *Your decision to issue the Investors with an ultimatum in April/May on the basis that they dismiss the Chair or you would resign;*
    - *Board and Investor concerns about your leadership and judgement."*

60. He was invited to attend a meeting on 12 August 2024.

61. The meeting took place on 12 August 2024. There were two parts: firstly, a discussion relating to the claimant's travel plans to China; and secondly, a capability meeting. Minutes of the first part of the meeting (775ff) note that

the only item on the agenda was travel to China by the claimant. He made a presentation of the trips to Taiwan and Hong Kong he had planned.

62. Mr McLellan confirmed that the trip was essential, and said: *"We're happy for you travel business class, but will you present medical details to CPG [Carly Pluckrose-Gates, HR]?"* The claimant disputed that there was a travel policy in place. Mr McLellan referred to a document, prepared by Anastasia Bombrys (1191/2), headed: "2017-2018 Travel and accommodation arrangements guidelines". The guidelines indicated that they should be adhered to whenever possible, and all variations should be agreed with the line manager in advance.

63. With regard to air travel, the document stated: *"If the airplane is the best way of travel, the economy class tickets should be booked as far in advance as possible in order to secure a good price offer."*

64. The respondent's Company Handbook provided (328) that the respondent would reimburse employees for "any reasonable expenses" incurred while travelling on their business, but required employees to inform HR of any planned national and international trips in advance.

65. The claimant expressed some scepticism about the guidelines, on the basis that they could have been edited (777).

66. Mr Hanson went on to point out: *"Whether it is written down, three Directors here are saying travel economy. If staff can't for medical reasons, there needs to be an assessment. Doesn't matter if there's no policy, as a board we are saying this is the policy."* He continued: *"So no travel booked until assessment is complete. However, due to the date, we have made the decision to allow you to book the flights today, but there should be no delay in following independent medical advice. You were told in April you should be travelling economy. You should have updated the policy, as CEO."*

67. The claimant insisted that he wanted agreement that there was no policy.

68. Following the meeting, it was noted as an action that the claimant was to provide medical evidence relating to his medical need to fly business class, and if necessary, complete a medical assessment.

69. The formal capability meeting then commenced at 11.15am. the claimant was in attendance with a witness Scott Early, and Ms Pluckrose-Gates took minutes (789ff).

70. The allegation that the claimant had presented the respondent with an ultimatum was put to him, but he denied that he had done so or that there

was any evidence of it. It was stressed to the claimant that this was a capability hearing, rather than a disciplinary hearing.

71. The conclusion of the meeting was that the respondent issued the claimant with a capability warning, and placed him on a leadership coaching programme. The claimant advised that he was happy to work with a leadership coach, but would not accept any kind of warning.

72. On 23 August 2024, Mr McLellan wrote to the claimant, responding to his email complaining that he had not received a written warning, and questioning the authority upon which the decision was made. Mr McLellan said (813) that he had followed the meeting up with a written capability warning on 15 August 2024. No such written warning was produced to the Tribunal in these proceedings. The claimant was also notified of his right to appeal against the issuing of the warning, and that if he did not engage with the leadership coach, that may result in disciplinary action.

73. On 28 August 2024, Mr McLellan and Mr Atkinson met with the claimant to establish if the matter could be resolved. Mr McLellan took minutes of the meeting (834ff).

74. It was noted that the following exchange took place (835):

"PA:

- *I represent PAR, who are the shareholders, not the Board*
- *The CEO reports to the Board, led by the Chairman, who represents the interests of the Investors*
- *My feedback on your stakeholder management is that it has been awful and you need to change*
- *You did deliver an ultimatum repeatedly to me, either EM needed to be removed or you as CEO would resign. Do you accept that you delivered that ultimatum, as I don't appreciated being called a liar?*

BS:

- *I didn't say EM, I said change the Chair*

PA:

- *EM is the Chair, so it is the same thing. Do you accept that?*

BS:

- *Yes"*

75. The claimant accepted that his stakeholder management could improve, and would be happy to work with a leadership coach, but reiterated that he would not accept the capability warning.

76. On 29 August 2024, the claimant submitted an appeal against the capability warning to David Morton (846). He maintained that there was no indication as to why the warning had been issued, and that he could only guess based on previous conversations. He continued to argue that there was no authority for the decision, and complained that he was unaware of the impact of the warning upon his future employment. He argued that he was more than qualified for the position of CEO, and that within the Board he was possessed of the highest level of subject matter and business management qualifications.

77. In a further email dated 17 September 2024 to Mr Atkinson and Mr McLellan, the claimant returned to the subject of the ultimatum (849): *"I never offered an ultimatum, never said I would resign either in writing, verbally or indicated it in any form. I appreciate the message could have been misinterpreted. So please accept my judgement on this, and I will respect your opinion too."*

78. The appeal hearing took place on 7 October 2024, chaired by David Morton. Ms Pluckrose-Gates attended and took minutes (871ff). the claimant attended unaccompanied.

79. Mr Morton considered what the claimant had said to him in the prolonged hearing, and issued his outcome letter on 24 October 2024 (912). He stated:

"It appeared to me that there was a significant degree of deflection by you, attributing 'blame' to others - it was the Chair creating mistrust; it was Par who misunderstood your intentions; there was no 'evidence' for you having delivered an ultimatum. However you have to be accountable for your actions and there is a genuine concern that similar incidents could create real issues for the business going forward and this needs to be recognised in order to restore your credibility as CEO with Par.

Having said that it remains the feeling that this behaviour can be put down to inexperience and mitigated by the pressure associated with trying to overcome the obstacles holding back the success of the business.

It was with that in mind that the engagement of a Leadership Coach was considered the best way forward to assist your development, while acknowledging that there are weaknesses which require to be addressed.

This represents a genuine desire by the board and the company to draw a line under these issues and to move forward in a positive and fruitful manner.

For the reasons stated above the appeal is not upheld and the original written warning remains, but, as previously stated, only for a period of 6 months, assuming positive engagement with the Leadership Coach."

80. On 16 October 2024, the claimant had a telephone assessment carried out by Dr J S Barhey, Occupational Health Physician, whose report was produced on 18 October 2024 (899). Dr Barhey concluded by answering the question "Is the employee fit for normal hours and duties required by his/her post?" as follows:

"Yes, with support and adjustments.

In my opinion, the reasoning that he has given in terms of preventing migraines, preventing panic attacks on an air flight, improved performance in meetings when overseas and the relatively low cost of travelling business/first class compared to performing in meetings and completing lucrative business deals, mean that the premium flight travel may be deemed a reasonable adjustment in this case, in my opinion."

81. There was no evidence available to the Tribunal that Mr Morton saw this report prior to issuing his decision on the appeal.

82. On 1 November 2024, the claimant emailed Mr Atkinson (917/8) to say that he would like to provide an update on the progress made, given "recent developments and the work completed during my recent travels". He advised that he was pleased to see that the members of the board had strengthened their relationships and were now aligned on several critical matters. He requested a one-to-one meeting in the following week. The respondent offered a meeting on 12 November 2024 (919).

83. However, on 6 November 2024, the claimant sent an email to the respondent (937) attaching his letter of resignation (938ff).

84. In the copy of the letter of resignation which was produced to this Tribunal, there were a number of redactions, which were not explained to us.

85. In the letter, the claimant wrote:

"it is with regret that I submit my resignation with immediate effect from my position as Chief Executive Officer of Skylark Lasers, as well as my resignation as a company director of Skylark Lasers. After over six years of service, beginning as a research engineer, advancing to Head of Department in 2022, then CTO, and subsequently CEO in 2023, by tenure has been both challenging and, at times, rewarding. However, as our discussions over the past six months have revealed, the current board has repeatedly failed to act in the company's best interest, thereby compromising its long-term success.

My last day with the company is the 6th of November 2024. As specified in previous conversations and outlined in my minuted conversation with David Morton, non-executive director on the 7th of October 2024, given the lack of transparency and adherence to company procedures, I will be notifying ACAS of my intention of submitting claims on multiple counts, including bullying, discrimination, and constructive dismissal. I will initiate early conciliation shortly, of which the company will receive notice.

Throughout my tenure as CEO, I have consistently prioritised the company's best interest. Over the past six months, however, a series of incidents have resulted in a complete breakdown of trust:

> *On the 15th of May, Par Equity investment manager Alastair Moore purported to accept my resignation and alleged I had issued an ultimatum to Par Equity. This claim was factually incorrect, unsupported by evidence, and outside Alastair Moore's authority, as he held no power to accept or decline my resignation. Furthermore, all parties acknowledged that no resignation had been submitted at that time.*
>
> *On the 6th of June, I was informed by the Chairman that my access to our corporate bank account was revoked based on his unfounded assertion that I had 'gone rogue'. A letter addressed to me was removed from my office by the Chairman and returned, opened, three weeks after original receipt.*
>
> *[REDACTED SECTION]*
>
> *On the 15th of August, the board of directors conducted a capability hearing, circumventing normal disciplinary procedures, where they presented no written or tangible evidence for their claims against my performance or capability…"*

86. The claimant went on to assert that a capability warning letter was issued with a number of procedural errors, including that there was no indication as to why the warning was issued, not having breached any contract terms; there was no tangible evidence that would justify the warning being issued; he was not given sufficient guidance as to the authority under which the warning was issued, he was not told formally how to appeal against the decision and he was not told what the implications would be for his future employment.

87. He raised the possibility that Mr Morton may have voted on the original capability warning, and therefore that he had a conflict of interest in handling the appeal.

88. With regard to the appeal process, the claimant complained that Mr Morton had not interviewed all relevant parties; that he had confirmed that he supported the Board's initial decision and yet still attended and conducted

the appeal hearing; Mr Morton failed to consider the points raised in the appeal hearing and failed to provide reasons for the dismissal of the points in the appeal; he failed to provide evidence or an explanation for the refusal of the appeal; and, with regard to the capability procedure as a whole, the claimant said that the length of time it took and the lack of transparency and interest in establishing a mutually satisfactory outcome, and *"the fact that the board of directors showed no interest to remain unbiased and avoid a situation of conflict of interest suggest the board of directors' very clear intention to break down the implied term of trust and confidence between employer and employee."*

89. He continued: *"Looking at all these circumstances objectively, the members of the board of directors showed a clear intention to refuse to perform the contract agreed with me on the 1st of June 2023. A series of events left me in uncertainty around my compensation package, threatening my option pool on multiple occasions, allegations were made regarding my performance without tangible evidence supporting these claims, in cases acknowledging the fact that evidence is not required to prove subjective views on one's performance, which I utterly reject. I had to spend the last 6 months worrying about unjust disciplinary/capability processes [REDACTION] and occasions of bullying and harassment. These members of the board put me under tremendous amounts of stress and pressure, causing me health issues, which they outright ignored, forcing me to go through an unnecessary occupational health examination to prove my conditions. The members of the board have acknowledged the increased stress level in writing, yet, failed to provide support to alleviate this in any shape or form. They have repeatedly burdened me with HR decisions concerning my employment during my international travels. Altogether, leaving me with no option but to hand in my immediate resignation as a response to the outcome of my appeal against the board's decision to issue a written warning."*

90. The claimant went on to criticise the Board's "misgovernance", asserting that a number of successes were in jeopardy due to inadequate board oversight.

91. Mr McLellan replied to the claimant on 7 November, to express sadness and disappointment in his resignation. He pointed out that under his contract, the claimant was required to provide 6 months' notice of termination, and by leaving immediately he was in breach of his contract. He would therefore receive no further pay from 7 November 2024 (942).

92. Following the claimant's resignation, he was unable to secure alternative employment. He made a number of applications for positions as senior executive and director level, from November 2024 until September 2025, in

respect of 5 of which he was requested to attend for interview. He was unsuccessful in each of these interview processes, which, in his evidence, he said required very considerable and detailed preparation.

93. The claimant complains that he suffered very considerable injury to feelings following his resignation, as a result of what he maintains was sustained discrimination against him culminating in a constructive dismissal.

94. The claimant presented medical records from his General Practitioner (1182) relating to the period from 29 August 2019 until 8 July 2024. He also produced a letter from his GP dated 12 July 2024 (1183) identifying more frequent and troublesome migraines, which the claimant attributed to triggers such as dehydration and stress.

Submissions

95. The parties each made full submissions on their own account. These submissions, which are not repeated here, were of assistance to the Tribunal in our deliberations, and are referred to in our decision section below where appropriate.

The Relevant Law

96. Section 123(1) of the Equality Act 2010 provides that:

"Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."

97. Section 123(3)(a) provides that *"conduct extending over a period is to be treated as done at the end of the period."* Section 123(3)(B) provides that *"failure to do something is to be treated as occurring when the person in question decided on it."*

98. We had reference to the well-known case of ***Robertson v Bexley Community Centre t/a Leisure Link*** [2003] IRLR 434, in which the court confirmed that it is of importance to note that time limits are exercised strictly in employment and industrial cases. *"When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to*

extend time. So, the exercise of discretion is the exception rather than the rule."

99. We also considered the important decision in ***British Coal Corporation v Keeble and Others*** [1997] IRLR 336, in which the EAT set out the factors which the Tribunal should consider in determining whether or not to exercise its discretion, namely the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued had cooperated with any requests for information, the promptness with which the claimant acted once she knew of the facts giving rise to the action and the steps taken by the claimant to obtain advice once she knew of the possibility of taking action.

100. We had regard to ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] EWCA Civ 640. as demonstrating that the discretion is intended to be broad and unfettered. The discretion is intended to be broad, with which the appellate courts should be slow to interfere (***Jones v Secretary of State for Health and Social Care*** [2024] EAT 2). The respondent referred to the explanation, in paragraph 15 of ***Morgan***, where it was said that *"If time began to run on [the date an adjustment was requested], a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to address the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became or should have become apparent to the claimant that the employer was in fact sitting on his hands, the primary time limit for bringing proceedings would already have expired."*

101. We also referred to ***Kingston-Upon-Hull City Council v Matuszowicz*** [2009] IRLR 288, as authority for the proposition that the failure to make adjustments is an omission, and not a continuing act. This decision was considered in ***Fernandes v Department for Work and Pensions*** [2023] EAT 114, by HHJ Beard. At paragraph 34, he stated:

"In the absence of a finding that the employer has made a specific decision not to alleviate a disadvantage there must be judicial analysis to identify the notional date. It appears to me that this analysis must begin with the identification of the feature which causes disadvantage. This could be a PCP but could also be a physical feature or auxiliary aid. This will be a fact which dates the start of disadvantage. The next element to be considered is when it would be reasonable for the employer to have to take steps to alleviate the disadvantage. This is a factual finding and will vary. For instance, the date by which it would be reasonable to have to provide a chair could depend on whether a chair is already commercially available or the chair in question must be purpose built. That date would also amount to a finding of fact as to when a breach occurred. As such it would also assist the judge in identifying the notional date. The ET would then have to ask if

there are facts which would allow it to conclude that the employer has acted inconsistently with the duty to make adjustments, if there are, then the notional date would arise at that point. Finally, if there is no inconsistent act, there will come a time when it would be reasonable for the employee, on the facts known to them, to conclude that the employer is not going to comply with the duty."

102. At paragraph 37, he stated:

"I conclude that the Employment Judge did misdirect himself as to the law when he indicated that it was the ET's function to determine when the respondent might reasonably have been expected to make the adjustments as the start date for bringing the claim. It was appropriate for him to determine when the reasonable employer would have made the adjustment, however the ET would need to go on to consider when the reasonable employee, based on the facts known to the claimant, would conclude that the duty would not be complied with."

103. Section 13(1) of the 2010 Act provides:

"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."

104. Section 20 of the 2010 Act sets out requirements which form part of the duty to make reasonable adjustments, and a person on whom that duty is imposed is to be known as A. The relevant sub-sections for the purposes of this case are sub-section (3) and (5). Sub-section (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."* Sub-section (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."*

105. Section 21 of the 2010 Act provides as follows:

"(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…"

106. Section 19 of the Equality Act 2010 provides:

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

(2) For the purposes of sub-section (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."

107. Section 23(1) of the 2010 Act provides that *"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."*

108. The Supreme Court decision in ***Essop & Others v Home Office (UK Border Agency)*** [2017] ICR 640 is an important authority in these circumstances. We refer primarily to paragraphs 24 and 25, though paragraph 23 is important for context:

"23. It is instructive to go through the various iterations of the indirect discrimination concept because it is inconceivable that the later versions were seeking to cut it down or to restrict it in ways which the earlier ones did not. The whole trend of equality legislation since it began in the 1970s has been to reinforce the protection given to the principle of equal treatment. All the iterations share certain salient features relevant to the issues before us.

24. The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons <u>why</u> a particular PCP puts one group at a disadvantage when compared with others. Thus there was no requirement in the 1975 Act that the claimant had to show why the proportion of women who could comply with the requirement was smaller than the proportion of men. It was enough that it was. There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.

25. A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal

link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot."

109. In addition, we considered paragraphs 28 and 29 of the Judgment:

"28. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. That was obvious from the way in which the concept was expressed in the 1975 and 1976 Acts: indeed it might be difficult to establish that the proportion of women who could comply with the requirement was smaller than the proportion of men unless there was statistical evidence to that effect. Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the "particular disadvantage" might not be capable of being proved by statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.

29. A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question - fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in Essop, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result."

110. The Tribunal also had reference to section 26(1) of the 2010 Act:

"A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of-

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…"

111. Section 27(1) of the 2010 Act provides:

"A person (A) victimizes another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act."

Discussion and Decision

112. We addressed the issues as they were set out in the List of Issues in turn.

Time Limits

1. **Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 9 August 2024 may not have been brought in time.**

2. **Were any discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010 (EqA)? The Tribunal will decide:**

    a. **Was the claim made to the Tribunal within three months (as extended by early conciliation) of the act to which the complaint relates?**

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

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

    d. **If not, were the claims made within such further period as the Tribunal considers to be just and equitable? The Tribunal will decide:**

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

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

113. The respondent conceded that the unfair dismissal claim was presented in time.

114. They did not concede that the discrimination claims were made in time, and argued that any claims relating to acts prior to 9 August 2024 were out of time.

115. However, they made very little of this in submissions.

116. We considered that the reason for the delay, though not expressly stated in detail by the claimant in evidence, was that he was engaged in lengthy correspondence with the respondent which was brought to a head by the capability process, and subsequently his own resignation.

117. In our judgment, the primary issue for consideration here is where the balance of prejudice would fall, and we have concluded that there is little prejudice to the respondent in allowing the claimant's discrimination claims to proceed. They have been able to present a full defence to each of the claimant's allegations, and have had available to them all the witnesses and documents they required to rely upon in defending themselves against the claimant's claims. If we were to exclude some or all of the claimant's discrimination claims, the prejudice to the claimant would be significant. We considered that it was just and equitable to allow those claims to proceed to a full hearing, and to be determined according to their merits rather than on jurisdictional grounds.

118. Accordingly, we concluded that the Tribunal had jurisdiction to hear all of the claimant's claims, including the discrimination claims.

Unfair Dismissal

3. Was the claimant dismissed?

4. Did the respondent do the following things:

a. Allege that the claimant had resigned in May 2024;

b. Allege that the claimant had issued an ultimatum that if Par Equity did not replace the Chair, Ewan McLellan, he would resign;

c. Subject the claimant to an unwarranted capability procedure;

d. Conduct the capability procedure unfairly;

e. Issue the claimant with a written warning for capability on 12 August 2024;

f. Require the claimant to work with a leadership coach, as a condition of the formal warning;

g. Fail to uphold the claimant's appeal against his capability warning on 24 October 2024;

h. Initiate the capability process without the proper authority of the Board;

i. Vary the claimant's terms of employment by imposing mandatory coaching, and if so, did this require investor consent? If it did, was investor consent obtained;

j. Did that breach the implied term of trust and confidence? There are a number of points that the Tribunal will require to decide:

i. Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;

ii. Whether it had reasonable and proper cause for doing so;

iii. Whether that breached any other term of the contract;

iv. Whether the breach was a fundamental one, and if so, whether it was so serious that the claimant was entitled to treat the contract as being at an end;

v. Whether the claimant resigned in response to the breach;

vi. Whether the claimant affirmed the breach or the contract before resigning;

vii. If the claimant was constructively dismissed, what was the breach of contract;

viii. Was it a potentially fair reason;

ix. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

119. The Tribunal considered the claimant's constructive dismissal claim. It is appropriate to determine the points under issue 12 in order to establish the basis for this claim.

120. The respondent submitted that Mr Moore was not an employee of the respondent, and therefore that they could not accept vicarious liability for

his actions. Mr Moore was a director of the respondent, but an investor via Par Equity.

121. However, it was not merely Mr Moore who alleged that the claimant had resigned.

122. Mr Atkinson did not go so far as to allege that the claimant had resigned, but stated that in a telephone call the claimant he said that it was “him or the chair”, understood to mean that either he would leave or the Chair of the Board would.

123. Mr Moore said that he had a call with the claimant in which he had said that if there was no change to the Chair position he would not be able to continue much longer; and that later the claimant said to him in another conversation that if they did not change the Chair they would have to find a new CEO. He repeated that comment to Mr Moore and Mr Atkinson on 30 April 2024 in a meeting. In a further meeting on 24 May 2024, Mr Moore and Mr Atkinson said that the claimant agreed with the proposition that the decision had to be made between finding a new Chair and a new CEO.

124. Mr Moore then spoke to the claimant and told him that he should meet with Mr McLellan to begin the transition process. The claimant, however, emailed on 14 May 2024 to advise that he was not resigning. Mr Moore replied to confirm that there had been no miscommunication, and that the Board had accepted his “offered resignation”. The claimant replied again, denying that he had resigned.

125. In addition to Mr Moore’s assertion that the claimant had resigned, Mr McLellan emailed the claimant on 16 May to say that as far as the Investor Majority and the Board were concerned he had put his resignation to Par Equity as an “either/or” demand.

126. As a result, it is plain that Mr Moore and Mr McLellan did both assert to the claimant that he had resigned, in the face of his denials that he had done so, until the point when they took legal advice which told them that any resignation required to be in writing.

127. In our judgment, Mr Moore and Mr McLellan were speaking to the claimant on behalf of the respondent: it is quite clear that they were referring, in their assertion about resignation, to the claimant’s employment with the respondent. In purporting to accept his resignation, they were accepting it on behalf of the respondent. We do not therefore accept that the respondent had no liability for their actions in doing so.

128. This is, however, stated to be a breach of the claimant’s contract. We have concluded that it did not amount to a breach of the claimant’s contract,

particularly as it was not followed through or implemented. There was no evidence that the claimant actually resigned, though as we will see there was evidence that he had threatened to do so. His position was always stated to be in the future, rather than as a decision which had already been made. It was contingent upon the respondent's actions with regard to the Chair.

129. While it was incorrect to suggest that the claimant had resigned, it was, in our view, understandable that the respondent considered that they were being placed in an either/or situation, and that their unwillingness to remove the Chair immediately would be met with the claimant's resignation. The legal advice which they received, however, stopped the process before the disagreement led to a termination of the claimant's contract. This did not demonstrate that the respondent no longer intended to be bound by the fundamental terms of the contract of employment. It represented a misunderstanding as to the precise position being taken by the claimant.

130. We do consider this as part of the overall position at the point of the claimant's resignation below.

131. We turned then to consider the question of whether or not the claimant had issued an ultimatum to the respondent that if they did not replace the Chair he would resign.

132. It is our judgment that the claimant did issue an ultimatum to the respondent in these terms, and repeated it several times:

- In a telephone conversation with Mr Atkinson on or around 18 April 2024, he said that if they could not find a way of resolving the ongoing situation he would have to find something else to do;
- In that conversation, he made clear it was "him or the Chair";
- In a call with Mr Moore, he said that if there was no change to the Chair position he would not be able to continue much longer; and if they did not do anything they would have to find a new CEO, and that if they did not change the Chair he could not continue as CEO;
- In a meeting on 13 May 2024, the claimant agreed with Mr Atkinson that the Board had a decision to make between getting a new Chair or getting a new CEO.

133. The claimant was adamant before us that he had never issued an ultimatum, and certainly refuted any suggestion that he had used that word. However, we rejected the claimant's evidence in the face of the clear

statements of Mr Atkinson, Mr Moore and Mr McLellan, and his acceptance before us that he was very frustrated with the Chair and had expressed that frustration in conversation with the investors.

134. In our judgment, it was entirely reasonable for the respondent to allege that the claimant had issued them with an ultimatum, or a "me or the Chair" choice. We preferred the evidence of the respondent's witnesses, who were clear and consistent not only in their evidence before us on this point but also in the correspondence which they passed to each other and to the claimant. The claimant's denials were unconvincing, in our judgment, in the face of such evidence, but also as he did not seem to deny that he had spoken critically of the Chair and of the need to move forward with a new Chair. Indeed, in an email dated 17 September 2024 to Mr Atkinson and Mr McLellan, the claimant once more denied that he had offered an ultimatum or said that he had resigned; however, he went on to say "I appreciate the message could have been misinterpreted". There was no reason for him to say this except that he had recognised that the respondent's position did have some justification.

135. Next, we considered whether the respondent subjected the claimant to an unwarranted capability procedure.

136. The Board issued the claimant with an invitation to a capability meeting on 12 August 2024, to consider his decision to issue the investors with an ultimatum on the basis that they dismiss the Chair or he would resign, and relating to Board and investor concerns about his leadership and judgement.

137. The respondent's view was that the claimant's communications with the investors and the Board gave rise to concerns, and that his leadership of the organisation warranted scrutiny. The matter of the ultimatum was taken as a capability rather than a disciplinary issue, and the manner in which he had communicated with the investors rather than the directors caused the respondent concern. In addition, the issue of the job offer to DH had caused the respondent further concern, given that despite the claimant's denials, DH was clear that he had been offered a position with the respondent, for which Board approval had never been secured. It was reasonable, in our view, for the Board to treat the claimant's denials with some scepticism, given DH's clear statement that he had tendered his notice from his existing job because he understood that he had been offered the job by the claimant. At no stage did the Board authorise him to offer the position to DH, and it was notable, in our view, that on 1 April 2024, the claimant emailed Mr McLellan and the Board to attach DH's CV, "who has been offered the CPO role".

138. In our judgment, the claimant's position on this was contradictory and unclear both at the time and in evidence before us, and we considered that it was appropriate that the respondent take steps to address the claimant's communications and actions in a capability process.

139. We do not consider that the claimant regarded this as a breach of contract: what offended him was the outcome of the process, rather than the process itself. He attended the capability meeting without protest, though sought to defend himself robustly at it.

140. In our view, the intentions of the respondent were appropriate in this process. Their evidence, which we accepted, was that they did not want to lose the claimant, having lost several previous CEO's, but saw that he was inexperienced (by his own admission) (616) and that steps should be taken to assist him to improve his performance. A CEO is answerable to his Board, and in light of what we found to be genuine concerns about his performance, it cannot be considered a breach of his contract to have sought to address those concerns formally through the capability procedure.

141. The claimant, next, argued that the capability procedure was conducted unfairly. In our judgment, the claimant was given notice of the meeting and the subject matter, was given the opportunity to be accompanied and to put forward his perspective to the hearing, and was given reasons for the respondent's decision following the hearing. We concluded that the capability procedure was not conducted unfairly.

142. The claimant complained that he was issued with a formal warning, and also required to work with a leadership coach as a condition of the warning.

143. In our judgment, the issuing of a formal warning did not amount to a breach of the claimant's contract of employment. There was justification given by the respondent for what they considered to be issues relating to his capability, and the misgivings they had about his performance as CEO were such as to justify a written warning. The requirement to work with a leadership coach was not, of itself, something the claimant found unacceptable: he was willing to participate, but he was not prepared to do so if the warning remained in place.

144. It did not amount to a repudiatory breach of contract for the respondent to issue the claimant with a written warning under the capability process. It is understandable that a CEO might feel unhappy or hurt that he was the subject of such criticism that a warning was required, but that does not

mean that it was a breach of his contract. The respondent followed the contractual and procedural requirements in reaching this decision.

145. In the Tribunal's view, the claimant's conduct in issuing an ultimatum to the Board was such that it could have justified disciplinary action against him, but the respondent chose to take the less punitive route of capability, and while issuing a warning, sought to provide support and assistance in the form of leadership coaching for the claimant.

146. The claimant then complained that the respondent failed to uphold the claimant's appeal against his warning. Again, that decision of itself did not amount to a breach of contract. It was not a capricious decision made without basis, but following a hearing at which the claimant was again able to attend, be accompanied and put forward his appeal. There is no basis upon which the Tribunal could conclude that the respondent did not take the appeal process seriously or did not address its mind to the points being made by the claimant. In our view, they did so.

147. The claimant, next, complained that the respondent had initiated the capability process without the proper authority of the Board. We were unable to sustain this complaint. The company relied upon non-executive directors to deal with the capability procedure. It is a relatively small company, and it is not clear what else the claimant proposes should have been reasonably done by the respondent in these circumstances. We did not uphold this complaint.

148. The claimant's next complaint was that the respondent had varied the terms of his contract of employment by imposing mandatory coaching. The respondent's position is that the claimant had already had leadership coaching with a different coach as part of his terms of employment. That may be so, but in our judgment, the requirement that the claimant attend leadership coaching was an outcome of the contractual capability procedure, and within the authority of the respondent to impose. It did not alter the claimant's terms and conditions, but amounted to a reasonable management instruction arising out of a capability process in which issues with the claimant's performance had been reasonably identified by the respondent.

149. Taking into consideration all of these points, it is our conclusion that the claimant did not resign in response to a breach or breaches of contract which went to the root of the contract. We have not identified any fundamental breaches of the claimant's contract, and we reject the claimant's assertion that the respondent acted in a manner calculated to destroy or seriously damage the trust and confidence between them. We have found that the respondent considered that the claimant had resigned,

but this arose from some confusing correspondence from the claimant, and from the ultimatum which they were justified to consider he had given them, and fell short of any form of breach of contract by the respondent. The respondent identified areas of concern with the claimant's performance and sought to address them through their contractual capability process. That the claimant was unhappy with the outcome of that process does not mean that this was repudiatory conduct on the respondent's part. We considered that the decisions taken by the respondent were taken in order to improve the claimant's performance, not to try to destroy the trust and confidence between them.

150. In addition, we accepted the evidence of the respondent that the purpose of the engagement with the claimant was to assist him in the performance of his duties, and that they did not wish to lose him as CEO. It is clear that the respondent has had a number of individuals in that position over a period of recent years, and they were understandably anxious not to lose another CEO at that time.

151. In the absence of any breach of contract, or a series events leading to a reasonable conclusion that the respondent no longer intended to be bound by the material terms of the contract of employment, we have concluded that the claimant was not constructively dismissed, nor that he resigned in response to any breach of contract.

152. The claimant's claim of unfair dismissal therefore fails, and is dismissed.

Disability

5. Was the claimant a disabled person within the meaning of section 6 of EqA at the material time? The Tribunal will decide:

a. Whether he had a physical or mental impairment;

b. Whether it had a substantial adverse effect on his ability to carry out normal day-to-day activities;

c. If not, whether the claimant had medical treatment, including medication, or take other measures to treat or correct the impairment;

d. Whether the impairment would have had a substantial adverse effect on his ability to carry out normal day-to-day activities without the treatment or other measures;

e. Whether the effects of the impairment were long term. The Tribunal will decide:

i. Whether they lasted at least 12 months, or were likely to last at least 12 months;

ii. If not, whether they were likely to recur?

153. The condition which the claimant relied upon in this case was that he suffered from migraines.

154. There was evidence, primarily from the claimant himself, that the impact upon him of travelling other than by first or business class was that he would suffer illness on long-haul flights. On 30 April he told the respondent that he had a fear of flying and that he got very ill on long-haul flights. The effect he disclosed at that time (597) was that he could feel nauseous for a couple of days around the flights.

155. He said in July 2024 that he had decided to fly on higher class flights for medical reasons, which he would prove in due course (734).

156. He was told by Mr McLellan on 30 July 2024 (767) that if he had a medical condition which meant that he was unable to carry out his role, there would be a process for the company to assess it.

157. The claimant was diagnosed in February 2024 (693) as having migraine with aura. It was noted that the claimant was concerned that migraines were becoming more frequent, and were now once monthly, and sometimes affected work.

158. He was prescribed Sumatriptan in order to manage his migraines.

159. On the basis of the evidence before us (and taking into account the claimant's disability impact statement), it is not clear to us that the claimant's condition had a substantial adverse impact upon him on a long-term basis. It appears that, so far as the respondent was aware, the condition affected him only occasionally, and especially relating to long-haul flights. His GP provided a letter dated 12 July 2024 (733) in which she advised that he had reported to a colleague (of hers) that he was having more frequent and troublesome migraines which were a typical pattern for which triggers were dehydration and stress. He reported that his stress was reduced when he travelled in premium class flights. Again, therefore, the claimant's migraines appeared to be focused on long-haul flights, and it is unclear from the evidence to what extent his migraines affected him at other times.

160. In our judgment, the claimant has not proved on the balance of probabilities that he suffered from migraines to such an extent as to justify a finding that it had a substantial adverse long-term impact upon his ability

to carry out normal day-to-day activities. Other than around the time when he was travelling on long-haul flights, it is not apparent from the evidence that the claimant would suffer from migraines to such a significant extent that it would have a discernible impact on his normal day-to-day activities. His absence record with the respondent was not significant, and accordingly we draw from that that he was able to carry out his working duties.

161. As a result, it is not clear to us that the condition was anything other than relatively minor, and sporadic, or that it was likely to last more than a year, or had done so, at the material time.

162. It is therefore our finding that the claimant was not a disabled person within the meaning of section 6 of the Equality Act 2010 for the material time in this case.

163. We have, in fairness to the parties, addressed the remaining issues notwithstanding our conclusion on the claimant's disability status.

Direct Discrimination: Age, Disability

6. At the material time, the claimant's age was 29, and he compared himself with his predecessors who were, he says, "considerably older" than himself.

7. Did the respondent do the following acts:

a. Subject the claimant to a capability process;

b. Decide that he should receive mandatory leadership coaching as part of the outcome of the capability process;

c. Was that less favourable treatment than his comparators received from the respondent;

d. The claimant's comparators are:

i. Alan Faichney (aged 65 when employed as CEO);

ii. Fedor Karpushko (aged 66 when employed as CEO); and

iii. Tom Walls (aged 61 when employed as CEO).

e. If it was less favourable treatment, was it because of his age or disability;

f. Did the respondent's treatment of the claimant amount to a detriment;

Age Only

g. Was the treatment a proportionate means of achieving a legitimate aim? The respondent argues that the legitimate aim was to ensure that the Chief Executive Officer of the respondent had suitable communication skills when dealing with customers, staff and investors;

h. The Tribunal will decide:

i. Was the treatment an appropriate and reasonably necessary way to achieve those aims;

ii. Could something less discriminatory have been done instead;

iii. How should the needs of the claimant and the respondent be balanced?

164. We addressed these issues in turn.

165. The claimant was subjected to a capability process. The respondent admitted this, and it is clear from the evidence.

166. It was a part of the outcome of the capability process that the claimant should receive leadership coaching, beyond that which he had already received.

167. The Tribunal considered whether the evidence justified any finding that the claimant had been treated less favourably in this regard than the 3 comparators whom he named, all of whom were previously employed by the respondent as CEO, and were each over 60 years of age. In our judgment, it did not. We heard very little evidence about the treatment of the previous CEOs; their status as comparators was difficult to assess since they were no longer employed by the respondent.

168. However, it is plain that it was a condition of the claimant's employment that he was required to work with a leadership coach at the start of his employment, on the basis that he had no prior experience as a CEO. The reason for requiring him to work again with a coach was that the respondent had justifiably reached the conclusion that he was inexperienced in the role, and that his conduct had given them cause for concern about his capability. We have already found that the respondent was entitled to reach this conclusion. Mr Hanson's evidence was that had any of the other CEOs displayed similar difficulties with communication they would have been required to work with a leadership coach

themselves. The claimant had also acknowledged that he had displayed some inexperience, and while he believed that the respondent over-emphasised this point, we concluded that it was reasonable for them to take it into account as a recognition that he needed some help to do his job.

169. In our judgment, the requirement to work with a leadership coach was unrelated to age or disability, and the claimant brought no evidence to demonstrate this. We did not consider that it amounted to a detriment, and indeed, the claimant himself in evidence made clear that he would have accepted this requirement without its being attached to a warning. Of itself, he did not consider it a detriment, on the evidence. In any event, the requirement to work with a leadership coach was to provide assistance to the claimant to improve his work and enable him to carry out the role of CEO more effectively.

170. Accordingly, it is our judgment that the claimant's claim of direct discrimination on the grounds of age and disability must fail, and is therefore dismissed.

171. Notwithstanding our finding above that the requirement to work with a leadership coach was unrelated to age or disability, we went on to consider the claim of discrimination on the grounds of age alone. We deliberated on whether the treatment of the claimant amounted to a proportionate means of achieving a legitimate aim. The respondent's position was that their aim was to have a CEO with suitable communication skills to deal with customers, staff and investors. In our view, this is a legitimate aim for the respondent to have, particularly in light of their justified concerns about the manner in which the claimant had been carrying out his duties.

172. The treatment – requiring the claimant to work with a leadership coach – was, in our view, a proportionate means of achieving that legitimate aim. It was reasonably necessary for the respondent to act upon their concerns about the claimant's performance. We did not consider this to be a discriminatory act, in the sense that it was not done on the grounds of the claimant's age, but upon his performance, and therefore there was no "less discriminatory" decision which could have been taken in the circumstances. The needs of the respondent to have their most senior executive officer carrying out his role in an appropriate manner are not overemphasised in this decision; the claimant's actions justified their decision, and since (a) it was to assist and benefit the claimant in his performance and (b) the claimant himself clearly regarded it as appropriate, since he would not have disputed the decision unless it had

been attached to the warning, the Tribunal has concluded that the balance of interests has been properly accounted for.

173. Accordingly, the claimant's claim of direct discrimination on the grounds of age alone fails and is dismissed.

Indirect Discrimination

8. A "PCP" is a provision, criterion or practice. Did the respondent apply the following PCP: to require all employees, including the claimant, to travel economy class on long-haul flights;

9. Did the respondent apply the PCP to the claimant;

10. Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic of age, or would it have done so;

11. Did the PCP put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, in that he is more likely to suffer the symptoms associated with migraines, which made him unwell and impaired his ability to perform his work duties effectively following the flight;

12. Did the PCP put the claimant at a disadvantage;

13. Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were: ensuring that travel costs in a small, loss-making business were kept to a reasonable level and that they would not attract investor criticism for excessive expenditure;

14. The Tribunal will decide in particular:

a. Whether the PCP was an appropriate and reasonably necessary way to achieve those aims;

b. Whether something less discriminatory could have been done instead;

c. How the needs of the claimant and the respondent should be balanced?

174. There was evidence that the respondent had, and applied, a PCP that all staff must travel by economy class where possible, though this was based on 2017-18 guidelines (1191/2) which also provided that they should be adhered to where possible, and any variation should be agreed with a manager in advance.

175. The PCP was therefore slightly broader than that alleged by the claimant, in that there was plainly discretion to vary the requirements. The evidence demonstrated, in our judgment, that while there was a considerable amount of correspondence between the respondent and claimant about the need to book economy class, he was, on each occasion, permitted to travel first or business class. As a result, the evidence does not prove that the PCP was applied to the claimant in the manner alleged. They wanted to obtain medical evidence to support his contention that travelling other than by first or business class air travel was detrimental to his health.

176. The claimant did express some scepticism about the guidelines, suggesting that they could have been edited. However, he provided no basis upon which the Tribunal could make any such finding, and it was contradicted by the respondent's evidence about the guidelines. Essentially, the claimant was implying strongly that the guidelines had been falsified, but such a serious suggestion was not supported by the evidence and must be rejected by the Tribunal.

177. Once the OH report arrived, the respondent did not have the opportunity to discuss it with the claimant in detail as he resigned before they could do so.

178. Even if the PCP had been applied to the claimant, there is no basis upon which the Tribunal could find that the PCP placed the claimant at any disadvantage, since he was in fact permitted to travel business class pending the outcome of the OH report.

179. We should observe that the issues above have conflated age and disability, when we understood that the indirect discrimination claim made by the claimant related to the protected characteristic of age. In order to ensure that we have dealt with the issue, we have proceeded on the basis that it may also relate to disability as well as age.

180. However, it is entirely unclear to us how the claimant could be suggesting that suffering from migraines was in any way related to his age, and we do not consider that there was any basis in the evidence for such a suggestion.

181. In our judgment, therefore, the claimant's claim of indirect discrimination either on the grounds of age or disability has not been made out, and must be dismissed.

Reasonable Adjustments

15. Did the respondent know, or could they reasonably have been expected to know, that the claimant suffered from a disability? If so, from what date;

16. Did the respondent apply the following PCP:

a. Requiring the claimant to travel economy class by aeroplane and standard class by rail?

17. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

18. What was that substantial disadvantage?

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

20. What steps could have been taken to avoid that disadvantage? The claimant suggests: Permitting the claimant to travel in a premium cabin (business or first class) on long-haul flights;

21. Was it reasonable for the respondent to have taken those steps, and if so, when?

22. Did the respondent fail to take those steps, in particular relating to the claimant's trip to the United States of America in October 2024?

182. We have not found that the claimant was disabled by reason of his migraines. Accordingly, there is no basis upon which it could be found that the respondent knew or ought reasonably to have known that the claimant was disabled at the material time.

183. Notwithstanding this finding, we addressed the remaining issues under this heading.

184. The PCP under this heading is very similar to the PCP considered above in the indirect discrimination claim. We have found that the PCP was not applied to the claimant, in relation to first class or business class air travel, and there was no evidence that the claimant was not permitted to travel first class by rail.

185. Accordingly, we do not find that the respondent applied the alleged PCP to the claimant.

186. The claimant was not, therefore, placed at a substantial disadvantage by the PCP being applied to him in the circumstances.

187. In our judgment, the respondent did permit the claimant to travel first or business class on long-haul flights, and in particular the trip to China. With regard to the USA trip in October 2024, the claimant undertook the booking for that trip himself, and the respondent was unaware as to the class of travel he booked. In our judgment, it is not demonstrated that the respondent required the claimant to travel economy class on that trip, and accordingly it cannot be said that the respondent failed to make such an adjustment. Mr McLellan's evidence was that he assumed that the claimant had booked the flight business class.

188. We accepted that the claimant was not forced to travel economy class by the respondent.

189. The claimant's claim that the respondent failed to make reasonable adjustments must therefore fail, and it is dismissed.

Harassment: Age, Disability

23. Did the respondent do the following:

a. On 12 August 2024, did Ewan McLellan and Mark Hanson state: 'You've never been a CEO before or done a commercial role before'?

b. On 24 October 2024, in the formal appeal outcome letter, did David Morton state that the claimant's alleged behaviour could be 'put down to inexperience' as a basis for upholding the capability warning?

c. Fail to provide the claimant with evidence in support of their concerns;

d. On 15 August 2024, the act of imposing mandatory leadership coaching as part of a formal capability warning in contrast to the treatment of older, poorer performing predecessors;

e. If so, was that unwanted conduct?

f. Did that unwanted conduct relate to age, or to disability?

g. Did the conduct have the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

h. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case

and whether it was reasonable for the conduct to have that effect.

190. Mr McLellan and Mr Hanson did say to the claimant on 12 August 2024: "You've never been a CEO before or done a commercial role before".

191. On 24 October 2024, Mr Morton stated that the claimant's alleged behaviour could be put down to inexperience, as a basis for upholding the capability warning.

192. We did not find that the respondent failed to provide the claimant with evidence of their concerns. They highlighted to the claimant that they had concerns about his communications and discussed these issues with him. We accepted that the respondent's concerns were genuine and justified.

193. The respondent denied that a leadership coach was imposed upon the claimant on a mandatory basis, but accepted that a change of coach was required. We did find that it was a condition of the respondent's capability warning to the claimant that he work with a new leadership coach.

194. Issues (d) and (f) were essentially repetitions of (a) and (b).

195. The conduct of the respondent, in making these comments, was unwanted by the claimant.

196. The conduct of the respondent, in requiring him to work with a leadership coach, was not clearly unwanted conduct. The claimant had previously worked with a leadership coach by agreement, and indicated that had it not been attached to the warning, he would have agreed to work with a new coach.

197. We then had to consider whether these acts were related to age or disability.

198. To say that the claimant had not been a CEO or carried out a commercial role before amounted, in our judgment, to a mere statement of fact. There is no basis upon which it can be said to have been related to disability, and in our view, nor can it be said to have been a reference to the claimant's age. He had worked as a senior engineer within the company and had performed sufficiently well to be appointed to be CEO.

199. To say that the claimant's actions may be down to inexperience was a justifiable expression of opinion. The reality was that the claimant was inexperienced in the role which he was employed to perform, and had acknowledged that in his own correspondence. He was employed to be the senior executive officer within the company, and it was, in our view,

entirely justifiable for the respondent to raise their concerns about his behaviour and to attribute it to inexperience in that role. There was no reference to age or disability nor could it be inferred that it was related to age.

200. It is entirely unproven by the claimant that failing to provide written evidence in support of the respondent's concerns amounted to an act of unwanted conduct which was related to age or disability. We accepted that the respondent did not want to lose the claimant from the position of CEO, but that they had justifiable concerns about his performance which had to be addressed.

201. To require the claimant to participate in leadership coaching does not amount to a detrimental act, in our judgment, and nor does it amount to unwanted conduct in this case. However, we considered that this requirement was one which was warranted by the claimant's conduct, and also by his acknowledgement of his own inexperience. It was intended to assist the claimant in the performance of his duties.

202. We considered that the conduct which the claimant complains of here did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The respondent's intentions were to assist the claimant to improve his performance in the most senior executive position within the company.

203. Further, we considered that the conduct which the claimant complains did not have that effect either. The comments made fall very far short of violating the claimant's dignity or creating the kind of environment which would amount to harassment under section 26. They could not be reasonably taken to have had that effect.

204. That the claimant was upset at the criticisms made of him in his position does not mean that the respondent's actions amounted to harassment under section 26.

205. The claimant seeks to compare his treatment to that of previous CEOs in the company. As the respondent says, two of his predecessors were dismissed and a third resigned, and therefore it is impossible to find that he was treated less favourably than any of them. However, such a comparison does not arise under section 26.

206. Accordingly, it is our conclusion that the claimant's claims under section 26 do not succeed, and are therefore dismissed.

Victimisation

24. Did the claimant do a protected act, namely: making a complaint about his medical needs being ignored on 31 July 2024?

25. Did the respondent:

a. Subject the claimant to a capability procedure 7 days afterwards?

b. In doing so, did the respondent subject the claimant to a detriment?

c. If so, was it because the claimant did a protected act?

d. **Was it because the respondent believed that the claimant had done, or might do, a protected act?**

207. The claimant did make a complaint about his medical needs being ignored on 31 July 2024.

208. In their submissions, the respondent did not specifically address the question of whether this amounted to a protected act, though they denied that the claimant had made clear what the medical needs he had were.

209. What the claimant said in his email of 31 July (768) was to ask Mr McLellan and the Board to let him know if they were unable to support his medical needs. In our judgment, this falls short of a protected act under section 27 of the Equality Act 2010. He did not make an allegation that the respondent or any other person had contravened the 2010 Act, and his statement does not approach such an allegation. He did not do anything in connection with the 2010 Act, nor did he raise proceedings or give evidence or information in connection with proceedings under the 2010 Act.

210. Notwithstanding our finding that the claimant did not do a protected act, it is our judgment that the respondent did not react to the claimant's email of 31 July by convening a capability procedure. They did so because of relatively longstanding concerns about the claimant's conduct, and in particular his ultimatum to the Board, the unauthorised offer to DH and his communications with the respondent, which we considered to have been justified by the claimant's conduct.

211. We are unable to conclude that the respondent acted in response to the claimant's suggestion that they were ignoring his medical needs. They were uncertain as to precisely what medical needs he was referring to, but in any event, we are satisfied that they proceeded to a capability process

because of their genuine concerns about the claimant's capability and performance in his role as CEO.

212. Accordingly, it is our finding that the respondent did not subject the claimant to victimisation under section 27 of the Equality Act 2010, and the claimant's claim under this section fails, and is therefore dismissed.

Remedy for Unfair Dismissal

26. Does the claimant wish to be reinstated to their previous employment?

27. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

28. Should the Tribunal order reinstatement?

29. Should the Tribunal order re-engagement?

30. What should the terms of the re-engagement order be?

31. If there is a compensatory award, what should it be? The Tribunal will decide:

a. What financial losses has the dismissal caused the claimant?

b. Has the claimant taken reasonable steps to replace their lost earnings, by mitigating his losses, for example by seeking alternative employment?

c. If not, for what period of loss should the claimant be compensated?

d. Does the Tribunal conclude that the claimant might have been fairly dismissed in any event, had a fair procedure been followed, or for some other reason?

e. If so, should the claimant's compensation be reduced, and by how much?

f. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

g. Did the respondent or the claimant unreasonably fail to comply with the ACAS Code of Practice?

h. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

i. If the claimant was unfairly dismissed, did he cause or contribute to that dismissal by blameworthy conduct?

j. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

k. Does the statutory cap of 52 weeks' pay of £86,444 apply?

l. What basic award is payable to the claimant, if any?

m. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Remedy for Discrimination

32. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What recommendation should it make?

33. What financial losses has the discrimination caused the claimant?

34. Has the claimant taken reasonable steps to replace lost earnings, by mitigating his losses, for example by looking for alternative employment?

35. If not, for what period of loss should the claimant be compensated?

36. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

37. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

38. Is there a chance that the claimant's employment would have ended in any event? Should his compensation be reduced as a result?

213. Given the findings above, no award is due to be made to the claimant.

214. We would wish to record our regret that this Judgment has taken such a long time to issue, which has been caused by the need to take time to deliberate carefully upon all of the evidence which we heard as well as other commitments.

Date sent to Parties 16 April 2026