



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

5

**Case No: 8002002/2025**

**Final Hearing held in Glasgow on 11 – 15 May 2026**

10

**Employment Judge A Kemp**

15

**Mr R Murphy**

**Claimant  
In person**

20

**Scottish Courts and Tribunals Service**

**Respondent  
Represented by:  
Ms K Smith  
Solicitor**

25

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

30

**The decision of the Tribunal is that**

35

- (i) The claim under the Equality Act 2010 is within the jurisdiction of the Tribunal;**
- (ii) The claimant was not unfairly dismissed under section 94 of the Employment Rights Act 1996;**
- (iii) The claimant is a disabled person under section 6 of the Equality Act 2010;**

- (iv) **The respondent knew of that no later than when it dismissed the claimant and**
- (v) **The respondent did not fail to make a reasonable adjustment under sections 20 and 21 of the Equality Act 2010.**

5 **The claims therefore do not succeed and are dismissed.**

## **REASONS**

### **Introduction**

1. This was a Final Hearing into the claims made by the claimant set out below.

### 10 **Claims**

2. The claimant claims that he was unfairly dismissed, and that there were breaches of the duty to make reasonable adjustments for a disabled person. The respondent admits dismissal, arguing that the reason was capability or some other substantial reason. It has not admitted disability status nor has it accepted that the respondent had knowledge of that if the claimant is a disabled person. It denies that it failed to make any reasonable adjustment required of it. An issue of time bar is also taken in relation to the reasonable adjustments claim, as to which issues of when the duty arose, whether or not there was conduct extending over a period, and what is just and equitable, under section 123 of the Equality Act 2010 are to be determined.
3. A Preliminary Hearing had been held before me on 4 December 2025 after which case management orders were made.
4. The claimant prepared a Schedule of Loss seeking a sum (prior to any award of interest for discrimination and grossing it up for tax) of a little under £100,000.

### **Issues**

5. The parties had not agreed a List of Issues but one had been drafted by the respondent which the claimant suggested required slight modification as discussed at the commencement of the hearing. It is referred to below with that modification.

### **Evidence**

6. The parties had agreed and the respondent had prepared a file or Bundle of Documents.

7. Evidence was given first by Ms Natasha Russell for the respondent, and then by the claimant himself.
8. Before the evidence was heard I explained to the claimant how it would be given, about cross examination of the respondent's witness covering any matter considered not correct or where she had not addressed a point he would give in his evidence she would be expected to know about. I explained about re-examination, and that when it came to his own evidence he could use an aide memoire. I explained that all evidence required to be given at this hearing, and that seeking to do so after it was concluded was very unlikely to be considered. I set out the position as to documents not being considered unless referred to in the evidence. I finally outlined the position that he could but need not give a submission.
9. During the second day the claimant stated that the documents had been seen by him on 8 May 2026, and did not include all of the email trails. I gave him overnight on that day to find what he wished to rely on, send them to the respondent, and stated that whether they would be allowed would be determined on the following morning. He did not appear that morning, and a message was sent by him by email stating that he had become unwell. The Tribunal clerk sent a reply asking if he was able to attend remotely, which did not attract a response. An attempt to call him by the clerk was made at 11.20 and a voice message left for him. He called back to the Tribunal at about 4pm and left a message with a clerk saying that he had only just received that message.
10. On the fourth day the claimant attended with a number of documents, which he had not sent to the respondent. Once they were copied and time given to the respondent to take instructions on them, including from the witness in respect of which permission was given to do so as she was still to complete her evidence, the respondent confirmed that no opposition to receipt of the documents was made, albeit that there was frustration that many of them were duplicates of what had already been provided. The documents were received and the evidence resumed.
11. The evidence was concluded on the fifth day of the hearing and, after an adjournment to allow preparation, submissions were given by the parties.

## **Facts**

12. I considered all the evidence led before me not all of which is narrated in the Judgment. I found the following facts, which I consider material to the issues, to have been established:

### *Parties*

13. The claimant is Mr Ronald Murphy

14. The respondent is the Scottish Courts and Tribunals Service. It is a body corporate under section 60 of the Judiciary and Courts (Scotland) Act 2008.
- 5 15. The claimant was originally employed by Her Majesty's Courts and Tribunals Service. His employment commenced on 19 April 1999. In about November 2022 his employment transferred to that of the respondent as part of a series of such transfers of staff to the respondent when certain social security matters transferred to the Scottish Government. Those transferring were chosen by a ballot.
- 10 16. The claimant was employed as an Executive Officer of the respondent, also known as a Team Leader. As such he was responsible for managing a number of staff who operated as Tribunal clerks. He worked at the Glasgow Tribunal Centre.
- 15 17. The claimant was sent a terms and conditions of employment document by the respondent dated 5 April 2024. It included a provision for sick pay which was for six months on full pay and six months on half pay subject to a maximum of twelve months in any rolling four year period. It was a condition of receipt that the claimant comply with the Attendance Management Policy.
- 20 18. The respondent manages the operations of a number of Tribunals in Scotland amongst its other functions. It is funded by the Scottish Government.

*Unpaid leave*

- 25 19. The claimant was at the time of the transfer of his employment to the respondent on a form of career break, which involved an extended period of unpaid leave which commenced in or around 2022. At the point of transfer he requested an extension of that which was granted on two occasions, which was granted for the period up to 29 February 2024. The extensions were granted as at that point there was not sufficient work for someone in the claimant's position as the volume of work was materially less than had been anticipated and planned for.
- 30
- 35 20. As the end of the extended period approached the respondent sought to contact the claimant by email on 18 December 2023 and 10 January 2024. The respondent wished the claimant to return to work as the need for his services was by then clear, as the level of work had increased and was anticipated to increase further. After the initial attempts to do so failed the respondent wrote to the claimant by post in late January 2024.

*Claimant's medical condition*

21. In about October 2023 the claimant attended his GP when he had a fluttering sensation in his groin and stomach. He was told that it might be a hernia. He attended again in January 2024 after suffering a coughing fit which left him with a lump in his groin and pain. He was placed on an urgent list for surgery, and told that that may take a period of about 14 weeks.
22. The claimant sent an email to the respondent on 29 February 2024. He informed the respondent that he had “a inguinal hernia where my bowel has come through the muscle it is extremely painful and I’m waiting on an op[eration] date was told within 16 weeks that was about 4 weeks ago so just waiting.....”.
23. The claimant was advised of a need to provide a GP fit note and that matters would be managed by the respondent’s Attendance Management Policy.
24. By further email dated 11 March 2024 he informed the respondent that he had been asked to book the operation.
25. In about April 2024 he attended a pre-op appointment at Gartnavel Hospital. He was told that he had a rare inguinal hernia which left him with a strangulated bowel, in which part of his bowel had come through the stomach, which had then closed behind it leaving a section of bowel strangulated. That caused him extreme pain particularly when moving his bowels. He was informed that the condition was such that it required a consultant surgeon to perform it rather than a general surgeon and that the waiting list for the consultant, who worked for the NHS half a day a month, was 40 weeks.
26. Due to an administrative error between the hospital and the secretary of the surgeon involved he was not operated on within the anticipated timeframe. He was not, unbeknown to him, on any waiting list.
27. The claimant was prescribed medication that included analgesia in the form of co-codamol and tramadol, amongst other medications. He took these analgesic medications when required for pain. They had the effect of either causing him to sleep or to feel very lethargic.

*Absence*

28. The claimant did not attend for work on 1 March 2024. He provided a fit note on 11 March 2024, dated from 1 March 2024. The claimant has not been fit for work from 1 March 2024 until the dismissal referred to below.
29. The claimant commenced a period of six months on full pay as sick pay.

30. The claimant could not lift anything whilst seated, drive or walk any distance. He could not stand fully upright. He was regularly in severe pain and require to take pain relief.
- 5 31. His GP certified him as unfit for work from 1 March 2024 onwards, and provided a series of fit notes stating that for the period to the dismissal.
- 10 32. The claimant's line manager at that time was Ms Natasha Russell. She sought to arrange a meeting with him on 19 March 2024 by Teams but the claimant had contact problems. A form of test was undertaken later that day to check that the claimant could attend which was successful but not discussion on detail took place.
- 15 33. She tried to re-arrange it for 21 March 2024 but the claimant did not attend. She wrote to him later that day to re-arrange it for 28 March 2024, and attached the said Policy. The meeting did not proceed. The claimant emailed Ms Russell to state that no one had let him in it and attached a screenshot of his screen referring to his being required to be let in. She replied to say that she was there, with an HR colleague, and sent the link again. He did not attend and she wrote to him again that day with further proposals for a meeting on 2 April 2024. The claimant did not attend it.
- 20 34. The claimant emailed Ms Russell on 5 April 2024 to explain why he had not been able to attend a further meeting that had been arranged for 3 April 2024. The meeting was arranged for 15 April 2024 but again the claimant did not attend.
- 25 35. After further correspondence including an email from the claimant dated 30 May 2024 explaining further issues that had arisen, a meeting by Teams was arranged for 3 June 2024. The claimant did not attend. The respondent wrote to him on 7 June 2024 stating that sick pay would be paused for him. The claimant responded on 9 June 2024 to apologise. He said that his partner had been in hospital and he had been struggling. The respondent wrote further on 12 June 2024 stating that the meeting would be re-arranged and offering dates and times, and setting out what would be discussed.
- 30 36. A meeting on 21 June 2024 proceeded by Teams. The claimant attended, as did Ms Russell of the respondent and a colleague from HR. No note of that meeting was prepared. The claimant said that he would not be returning to work after the current period of absence. He said that he was waiting for an operation and was not fit to return to work until it had taken place. He was on a waiting list for that, he said, and after it took place there would be a recovery period of several weeks. Ms Russell said that she would arrange to meet him on a regular basis to review matters.
- 35 37. A further meeting took place by Teams on 2 July 2024, but one on 16 July 2024 was not attended by the claimant, nor did he do so when rearranged
- 40

for on 19 July 2024. He did attend when rearranged for 2 August 2024. A meeting arranged for 23 August 2024 he did not attend.

38. On 1 September 2024 the claimant commenced a period of six months on half pay as sick pay.

5 39. There was a further meeting on 4 September 2024 again by Teams with the same attendees. The position had not changed. Ms Russell explained about an article she had seen with details of a benefit as to healthcare for the respondent's employees, which she sent him by email afterwards.

10 40. The next meeting was scheduled to take place on 1 October 2024 but did not proceed as the claimant did not appear. After further correspondence it was in effect re-arranged for 9 January 2025. At that point the claimant was still waiting for an operation and there was no material change in his circumstances.

15 41. Further meetings arranged for 11 and 23 December 2024 did not proceed as the claimant did not attend.

42. On 3 February 2025 the respondent wrote to the claimant stating that a further fit note was due from that day. The claimant replied the following day to state that he had it, and sent it on 7 February 2025.

20 43. The respondent sought to arrange a Teams meeting for the morning of 10 February 2025 and sent him the details in advance of that. At 8.04am on that day the claimant emailed to say that he had been up most of the night with "painkillers just kicking in" and asked to rearrange it for later in the day. Ms Russell replied at 12.40 and suggested 3pm. The claimant did not attend. He emailed at 17.38 that day saying "Sorry Natasha painkillers  
25 knocked me out just came out my coma lol" and suggesting other times.

30 44. The re-arranged meeting took place by Teams on 13 February 2025. No note of it was taken. After it Ms Russell emailed the claimant to confirm that as discussed she would make an occupational health referral. The claimant was due shortly to go to nil pay, when the period of six months half pay ended, and she wished to ascertain if there was anything that the respondent could do in relation to the claimant. She sought information from the claimant to do so.

35 45. The claimant did not immediately reply and she sent a reminder on 18 February 2025, to which the claimant responded. She in turn replied to state that occupational health would contact him on 20 February 2025 at 12.30. She sent a reminder on the day of the appointment at 11.44. The occupational health provider was an external organisation named Optima. Contact with it was made by the respondent via a portal. The referral the respondent made to Optima was not before the Tribunal but included  
40 issues as to whether the claimant was a disabled person and as to any proposed reasonable adjustments.

46. When those at occupational health did call him which was at around 12.30 he did not answer. They informed Ms Russell via the portal that the appointment had not been successful by a message sent at 12.39 that day. The claimant spoke to the occupational health provider at around 5 4pm but they told him that the referral had been closed. Ms Russell wrote to him by email on that date with regard to the failed appointment, proposing alternatives on 24, 25 and 26 February 2026.
47. Ms Russell wrote again on 25 February 2025 noting that she had not had a reply. She did the same on 27 February 2025 to similar effect. The 10 claimant did not respond to any of those messages nor did he email or call Ms Russell about the failed appointment. On 4 March 2025 she emailed him further and asked him to confirm his status as his last fit note had expired and “providing any date/time you will be available for an occupational health telephone call.” The claimant replied late that same 15 evening to state that he had had his phone fixed and just got the messages, and said he was “available anytime now”.
48. Ms Russell did not consider that it was appropriate to arrange a further occupational health appointment. She decided to proceed to consider dismissal in light of the length of absence, that the claimant was on nil pay, 20 and the circumstances overall.

#### *Dismissal process*

49. On 10 March 2025 Ms Russell prepared a Sickness Absence Report in relation to the claimant, summarising matters as she understood them.
50. There was a further meeting between Ms Russell and the claimant to 25 review matters by Teams on 11 March 2025. No material change to matters had taken place.
51. On 18 March 2025 Ms Russell wrote to the claimant calling him to a meeting under a formal stage of the said Policy. She stated that
- 30 “You should be aware that depending on the facts established at the meeting, the outcome of this could be your dismissal from SCTS but please be assured that I will not make a decision on this until you have had an opportunity to put forward your case and the meeting has been fully concluded.”
52. Attached to it was the said Report she had prepared, and supporting 35 documentation being the Civil Service Management Code, the said Policy, and a Leaflet about being accompanied at such meetings
53. The meeting, which was an Attendance Review Meeting under the said Policy, took place on 27 March 2025 by Teams. The claimant attended as did Ms Russell and Ms Kerr from HR. A Note of it was taken and sent 40 to the claimant on 1 April 2025. He had an opportunity to comment on it

but did not do so timeously. He said in an email that he had prepared notes for it but could not enter them on the form, and was told that he could send the notes separately but did not do so within the extended time allowed for that. The said Note is a reasonably accurate record of the discussion held. It took about an hour.

5

54. During the hearing the claimant confirmed that he was waiting for an operation. He said that the waiting list was 40 weeks for the urgent list that he was on, adding "that 40 weeks timeline went after pre-op". He said that there was "no timescales", that he was sick with the pain, and that it was getting worse and wearing him down. He said that he did not know when the consultant was available. He referred to having considered having it done privately but "it starts at £5,000 I can't do that." When asked whether there was anything the respondent could do to assist him achieve some form of return to work in the near future he said "get this out of me." He said that he could do something, "I could make calls". He said that there was uncertainty about how much he could do until pain struck him. He explained that the painkillers were strong, made him lethargic, and after he had taken them "there's no sense out of me for the next few hours".

10

15

55. During the course of that meeting the claimant requested that the respondent send him a text to alert him to an email having been sent. Ms Russell arranged to do so, sending such messages from and after 1 April 2025.

20

56. A meeting was arranged by Teams for 15 April 2025 to inform him of the outcome but he did not appear.

25

30

35

57. A letter of outcome was sent to the claimant on 15 April 2025 by email and post. It confirmed his dismissal with effect from that day on the grounds of efficiency, and set out the reasons for that decision. It referred to the length of the claimant's absence, then at 289 working days, that there was no timescale for the operation he could provide, that he could not advise of days and times he could carry out any work such as answering calls, and about the effect of medication. He had confirmed that without the operation he could not work in any other capacity. It referred to his lack of compliance with the said Policy in a number of respects including not submitting some fit notes timeously and not communicating fully, which affected the ability to plan.

58. It stated that he was to be paid in lieu of notice, although the respondent has not made any payment in lieu of notice to him. He was told that he had a right of appeal which should be in writing within 10 working days to Malcolm Graham the Chief Executive Officer setting out grounds of appeal.

40

*Appeal*

59. On 22 April 2025 the claimant emailed Ms Russell and stated “my intention is to appeal this decision”. Ms Russell replied on 23 April 2025 and reminded him “of the appeal provisions and timescales outlined in the letter.”

5 60. On 17 June 2025 the claimant sent a letter of appeal to Mr Graham. It stated that a first copy was sent on 29 May 2025 but no such copy had been received by the respondent. It referred to his having an appointment later that month and an operation due in mid July 2025. He stated that he would be “fit to return to work 4 weeks later.”

10 61. Mr Graham wrote to the claimant on 23 June 2025. The letter noted that the claimant had had until 1 May 2025 to appeal, [which the claimant had not done] stated that the claimant had an appropriate timescale to submit his appeal and that there were no grounds for him to consider his appeal. The decision to dismiss remained.

15 *Surgery*

62. The claimant had an appointment with his surgeon Mr Robert Drummond on 27 June 2025, paid for privately by his parents. The claimant discovered that he had not been placed on Mr Drummond’s list for surgery because of an administrative error made between his secretary and the NHS. The matter was rectified, and an apology given to him, and the operation to correct the hernia took place on 22 July 2025 under the NHS at Gartnavel Hospital. It involved the correction of the inguinal hernia on the left side, and a different hernia discovered on his right side.

25 63. He was reviewed by the surgeon on 1 October 2025. He was noted to have made an excellent recovery following the operation but described some intermittent pain in both groins and an episode of relatively sharp pain on the right side about three weeks after the operation. Mr Drummond explained to him that he was still only around 8 weeks following surgery and it was not uncommon to have some lingering pain, which was expected gradually to improve.

30 64. The claimant has had an MRI scan and has a further appointment with the surgeon on 30 July 2026.

*Earnings*

35 65. The claimant’s gross weekly wage when working with the respondent and being paid full pay was £679.46 per week. The employer pension contributions were £197.32 per week.

66. The claimant received Universal Credit in the period from and after 14 December 2025.

*Alternative Employment*

67. The claimant started a part time role making deliveries in March 2026. He works 16 hours per week, paid at £12.61 per hour.
68. The claimant has had an interview for a full time post as General Manager, and if successful would earn about £35,000 per annum.

*Early Conciliation*

69. The claimant commenced Early Conciliation on 13 July 2025. The Certificate was issued on 5 August 2025. The Claim Form was presented on 15 August 2025. The claimant's email to seek to amend the claim to include a claim under sections 20 and 21 of the Equality Act 2010 was first made on 21 October 2025.

*Other matters*

70. When the respondent became aware that the claimant was not fit to work a member of the team he was the Team Leader for was promoted into the role of Team Leader on a temporary basis, initially for a period of three months. That was extended on a number of occasions. The person acting in that capacity raised concerns at the temporary nature of the role on occasions with Ms Russell, and had discussions including whether to seek a permanent post elsewhere in the respondent as the role being performed remained a temporary one.
71. The workload for the team that the claimant would have been Team Leader for increased after an initial period when it was less than had been planned for.
72. The claimant would have required a measure of training in the respondent's procedures and practices and related matters before returning to work as a Team Leader or otherwise. If fit for work he would have been able to do so.

**Submissions**

73. The respondent produced a written submission, which Ms Smith adopted and did not wish to supplement orally. In very brief summary she argued, under reference to a number of authorities some of which are addressed below and some further ones, that the dismissal was fair and that there had not been a breach of the duty to make reasonable adjustments. She accepted, for the first time, that the claimant was a disabled person and that the respondent had known of that.
74. The claimant made an oral submission, and the following is a very brief summary of it. He should have been offered a career break. He could have done some work for the respondent had there been a full discussion, and

5 had it been properly investigated including by an occupational health report. The decision to move straight to dismissal had been a drastic step. He had 26 years service. Matters could have been looked at again when he had appealed, by which time he had a date for the operation. He set out the various issues that were affecting him at the time in addition to the impact of illness and the medications he was taking. He also set out the difficulties he had had when seeking advice, as he did not know what to do. Both the respondent and NHS were part of the Scottish government, and a mistake in one area had impacted his job in another. He considered  
10 that there had not been an investigation into his medical situation or as to any reasonable adjustment.

75. I was grateful to both parties for the manner in which they had conducted the hearing, and for their submissions.

## Law

15 (i) Unfair dismissal

76. The right not to be unfairly dismissed is set out in section 94 of the Employment Rights Act 1996 (“the 1996 Act”).

77. The respondent accepts that it dismissed the claimant, and argues that the reason for that was capacity. That is a potentially fair reason for the  
20 dismissal under section 98(1) and (2).

78. It is for the respondent to prove the reason for dismissal. The reason for the dismissal is the “set of facts known to the employer, ... or of beliefs held by him, which [caused] him to dismiss the employee”, a test set out by Cairns LJ in ***Abernethy v Mott Hay and Anderson [1974] IRLR 213*** later approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] IRLR 314***  
25

79. Whether or not the dismissal is fair depends on the terms of section 98(4) of the 1996 Act. How that was to be applied in a capacity case involving ill health was set out in the EAT decision in ***Spencer v Paragon Wallpapers Ltd [1976] IRLR 373*** which emphasised the importance of scrutinising all the relevant factors.  
30

35 “Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?”

80. The EAT added that the relevant circumstances include “the nature of the illness, the likely length of the continuing absence, and the need of the employers to have done the work which the employee was engaged to do.”

81. In ***Lynock v Cereal Packaging Ltd [1988] IRLR 510*** the EAT commented further as follows:

5 "The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment—sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own facts, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following—the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding."

- 25 82. In ***BS v Dundee City Council [2014] IRLR 131*** the Inner House reviewed the law in this area, and concluded that the test should be addressed as follows:

30 "First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasise, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."

83. The Inner House also addressed the extent to which length of service was a factor and stated as follows:

5 “The critical question in every case is whether the length of the employee's service, and the manner in which he worked during that period, yields inferences that indicate that the employee is likely to return to work as soon as he can. In the present case the tribunal did not address this question; they merely treated length of service as a factor that in itself was automatically relevant. In our opinion that is not the correct approach. On the other hand, it may be said  
10 that length of service was clearly not one of the primary factors that influenced the tribunal. Nevertheless, in view of the disposal that we propose for the case, we consider that this is a matter that merits reconsideration by the tribunal.”

- 15 84. In ***Monmouthshire County Council v Harris EAT 0332/14*** the EAT applied that decision and confirmed in relation to the assessment by the Tribunal of the unfair dismissal element of a claim as follows:

20 “ It was here concerned with the unfair dismissal claim and was bound to apply the range of reasonable responses test to the Respondent's decision making process up to the effective date of termination. “

(ii) Discrimination

85. The law relating to discrimination is found in statute and case law, and account may be taken of guidance in a statutory code from the Equality and Human Rights Commission on Employment.

25 (i) *Statute*

86. Section 4 of the Equality Act 2010 (“the 2010 Act”) provides that disability is a protected characteristic. What disability is is set out in section 6 and Schedule 1. Guidance has been issued on factors to take into account when assessing whether or not a person is disabled under those  
30 provisions.

87. Section 20 of the Act provides as follows:

**“20 Duty to make adjustments**

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

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial

disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.....”

88. Section 21 of the Act provides:

5                   **“21 Failure to comply with duty**

(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....”

10 89. Section 39 of the Act provides:

**“39 Employees and applicants**

.....

(1) An employer (A) must not discriminate against a person (B) –

.....

15                   (d) by subjecting B to any other detriment.”

90. Section 123 of the Act provides

**“123 Time limits**

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

20                   (a) the period of 3 months starting with the date of the act to which the complaint relates, or

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

(3) For the purposes of this section—

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

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

91. Section 136 of the Act provides:

30                   **“136 Burden of proof**

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the

contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.”

92. Section 212 of the Act defines “substantial” as “more than minor or trivial.”

93. Provisions as to reasonable adjustments and the actual or constructive  
5 knowledge of the respondent are in Schedule 8.

94. The provisions of the Act are construed against the terms of the **Equal Treatment Framework Directive 2000/78/EC**. Its terms include Article 5 as to the taking of “appropriate measures, where needed in a particular case”, for a disabled person, “unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.”  
10

95. The Directive is assimilated law by the Retained EU Law (Revocation and Retention) Act 2023.  
15

(ii) *Case law*

#### **Provision, criterion or practice**

96. The provision, criterion or practice (PCP) applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In **Hampson v Department of Education and Science [1989] ICR 179** it was held that any test or yardstick applied by the employer was included in the definition. Guidance on what was a PCP was given in **Essop v Home Office [2017] IRLR 558**. Further guidance was given in **Ishola v Transport for London [2020] IRLR 368**  
20  
25  
**Substantial disadvantage**

97. Guidance is given in **Sheikholeslami v University of Edinburgh [2018] IRLR 1090**. Substantial has the section 212 meaning. It is applied to disabled persons, and the claimant himself, separately. The former is measured on an objective basis by comparison with what the position would be if the disabled person did not have a disability.  
30

#### **What are reasonable adjustments**

98. Guidance on a claim as to reasonable adjustments was provided by the EAT in **Cosgrove v Caesar and Howie [2001] IRLR 653**, **Royal Bank of Scotland v Ashton [2011] ICR 632**, and by the Court of Appeal in **Newham Sixth Form College v Saunders [2014] EWCA Civ 734**, and **Smith v Churchill’s Stair Lifts plc [2005] EWCA Civ 1220**. The reasonableness of a step for these purposes is assessed objectively, as confirmed in **Smith v Churchill**. The need to focus on the practical result  
35

of the step proposed was referred to in **Ashton**. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in **Muzi-Mabaso v HMRC UKEAT/0353/14**.

5 99. The Court in **Saunders** stated that:

“the nature and extent of the disadvantage, the employer’s knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot ... make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP.”

10

15

100. In **Tarbuck v Sainsbury’s Supermarkets Ltd [2006] IRLR 664** the EAT held that the failure to carry out an assessment did not of itself constitute a failure to make a reasonable adjustment. If the employer makes such adjustment as in fact is reasonable, then whether that is achieved by chance or even in ignorance of the relevant legal duty, there is no breach of the law even though there was no assessment.

20

101. The duty to make reasonable adjustments does not therefore extend to a duty to carry out any kind of assessment of what adjustments ought reasonably to be made. A failure to carry out such an assessment may nevertheless be of evidential significance. In **Project Management Institute v Latif [2007] IRLR 579** the EAT stated that

25

“...We observe in passing that we very much doubt whether the burden shifts at all in respect of establishing the provision, criterion or practice, or demonstrating the substantial disadvantage. These are simply questions of fact for the tribunal to decide after hearing all the evidence, with the onus of proof resting throughout on the claimant. These are not issues where the employer has information or beliefs within his own knowledge which the claimant cannot be expected to prove. To talk of the burden shifting in such cases is in our view confusing and inaccurate.....

30

35

a failure to carry out a proper assessment, although it is not a breach of the duty of reasonable adjustment in its own right, may well result in a respondent failing to make adjustments which he ought reasonably to make. A respondent, be it an employer or qualifying body, cannot rely on that omission as a shield to justify a failure to make a reasonable adjustment which a proper assessment would have identified.....

40

We accept, however, that the proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, as here, not even until the tribunal hearing. Indeed, in certain circumstances we think it would be appropriate

for the matter to be raised by the tribunal itself, particularly if the employee is not represented. To take a simple example, where a code provides an example of an adjustment which on the face of it appears appropriate, that is something the tribunal should take into account. We think that it would be perfectly proper for a tribunal to expect an employer to show why it would not have been reasonable to make that adjustment in the particular case, although of course the employer must have a proper opportunity of dealing with the matter.”

5  
10 102. An adjustment is reasonable if there is a chance that it alleviates the substantial disadvantage – ***South Staffordshire and Shropshire Healthcare NHS Foundation Trust v Billingsley UKEAT/0341/15.***

103. The Code of Practice includes the following:

15 6.1 “The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

20 6.2 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are  
25 reasonable.

30 6.3 Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

35 6.4 Many adjustments do not involve making physical changes to premises. However, where such changes need to be made and an employer occupies premises under a lease or other binding obligation, the employer may have to obtain consent to the making of reasonable adjustments. These provisions are explained in Appendix 3.

40 6.5 If making a particular adjustment would increase the risk to health and safety of any person (including the disabled worker in question) then this is a relevant factor in deciding whether it is reasonable to

make that adjustment. Suitable and sufficient risk assessments should be used to help determine whether such risk is likely to arise.

5 6.6 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- 10 • the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- 15 • the type and size of the employer.

6.7 Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case."

20 *Jurisdiction*

104. For the section 21 claim, the time period for jurisdiction runs from the date when the respondent might reasonably have been expected to make the adjustments if there has been no decision not to do so or an act inconsistent with making an adjustment – ***The Scottish Ministers v Blair [2025] EAT 74.***

105. Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant - ***Barclays Bank plc v Kapur [1989] IRLR 387.*** The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (***Hendricks v Metropolitan Police Commissioner, [2003] IRLR 96.***). Only acts of discrimination can fall within conduct extending over a period for this purpose – ***South West Ambulance Service NHS Foundation Trust v King [2020] IRLR 168.***

106. Where a claim is submitted out of time, there is no formal burden of proof for a claimant to show that it is just and equitable to allow it to be received

is on the claimant, but there is a burden on a claimant to persuade the Tribunal to exercise its discretion (**Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327** and **Polystar Plastic Ltd v Liepa [2023] EAT 100**).

- 5 107. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194** the Court of Appeal held:

10 “First, it is plain from the language used (‘such other period as the employment tribunal thinks just and equitable’) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been

15 suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see **British Coal Corporation v Keeble [1997] IRLR 336**), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of

20 account: see **Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800**, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see **Dunn v Parole Board [2008] EWCA Civ 374; [2009] 1 WLR 728**, paras [30]-[32], [43], [48]; and **Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72**, para [75].

30 That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).”

- 35 108. That was emphasised in **Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23**, which discouraged use of what has become known as the **Keeble** factors as form of template for the exercise of discretion. Section 33 of the Act referred to is in any event not a part of the law of Scotland.

- 40 109. Some cases at the EAT held that even if the tribunal disbelieves the reason put forward by the claimant for delay it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278**, **Pathan v South London Islamic**

**Centre UKEAT/0312/13 and Szmidt v AC Produce Imports Ltd UKEAT/0291/14.**

110. The EAT decided that issue differently in **Habinteg Housing Association Ltd v Holleran UKEAT/0274/14**. There it was held, in brief summary, that a failure to provide a reasonable explanation for the delay in raising the claim was fatal to the issue of what was just and equitable.

111. In **Rathakrishnan**, there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of **London Borough of Southwark v Afolabi [2003] IRLR 220**, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, an English statute in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to **Dale v British Coal Corporation [1992] 1 WLR 964**, a personal injury claim, where it was held to be to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded

“What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see **Hutchison v Westward Television Ltd [1977] IRLR 69**) involves a multi-factoral approach. No single factor is determinative.”

112. In **Edomobi v La Retraite RC Girls School UKEAT/0180/16** a different division of the EAT (presided over by a different Judge) in effect preferred that approach, with the Judge adding that she did not “understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay.”

113. In **Wells Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman: EA-2020-000801** the EAT did not directly address those authorities but stated that, in relation to the issue of delay, “it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason”. A more recent authority from the EAT – **Concentrix CVG Intelligent Contact Ltd v Obi [2022] EAT 149**, supported that same conclusion, although that authority is another at the same level as those in the **Habinteg** line, such that it does not resolve the matter finally.

114. In **Accurist Watches Ltd v Wadher UKEAT/0102/09** the EAT stated that, whilst it is good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce

evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents.

- 5
- 10
- 15
- 20
- 25
115. There is a further matter to consider, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). Provisions as to the effect Early Conciliation has on timebar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which creates section 140B of the 2010 Act. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 give further detail as to early conciliation. The statutory provision provide in basic summary that within the period of three months from the act complained of, or the end of the period referred to in section 123 if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable, but there remains the possibility of a just and equitable extension where it has taken place albeit late.

### Observations on the evidence

116. My assessment of each of the witnesses who gave evidence is as follows:
- 30 117. **Ms Russell** was I considered a credible and reliable witness. She gave her evidence clearly and consistently, and explained what she had done and why in a convincing manner. It was not entirely clear that obtaining an occupational health report before deciding to dismiss was deliberately decided on, but given the emails sent particularly that on 4 March 2025 it appears to me that that was in her mind. The claimant replied to say any time would work, and explained his lack of reply earlier. I address that further below. For reasons I shall come to although it would have been far preferable to have obtained that report, and doing so was certainly in accordance with best practice, that is not the test I apply for either claim.
- 35
- 40 118. The **claimant** was clearly seeking to give honest evidence. It is also clear that he genuinely believes firstly that as he is not at fault for being ill he should not have been dismissed, secondly that as ultimately it is the Scottish Government that manages both his employer and the NHS in

Scotland which thus far has not provided the surgery he needs that he should have been provided with greater consideration and thirdly that he could have done some work at home and that was a reasonable adjustment to make. I have however concluded that his evidence was materially less reliable than that of Ms Russell.

5

119. It is perhaps not entirely surprising that for some matters the claimant's recollection was in my opinion not correct. He had a very painful condition and in addition to managing the pain had the effect of strong analgesia. He did accept that for some matters he could not recall detail and dates. He latterly accepted that his evidence that the pre-op had been in November 2023 was wrong, and that it was in or around April 2024. He denied that some of the details in the notes of the meeting on 27 March 2025 were accurate, but I preferred Ms Russell's evidence that they were, including that some remarks he is said to have made were so made.

10

120. Whilst there were reasons for some of his not attending meetings that had been arranged, that did not apply for several of them. For some at the time he apologised. For others he gave a reason, but it seemed to me that the reason was not always a complete one. On a number of occasions he did not respond to messages, including both emails and phone calls, not just at the time but for in some instances many days afterwards. That was not adequately explained, and it appears to me that, even taking account of the medical situation he faced and the other issues that arose, he did not act sufficiently to respond to matters that the respondent sought to raise with him, which they were entitled to do.

15

20

121. The claimant did not accept that the date of the operation was not known, or could not be ascertained, but I consider that that evidence is simply not correct. I accept Ms Russell's evidence that during the 27 March 2025 meeting he stated specifically that he did not know when the operation would be, and that he did not tell her when the pre-op had been. Even if one takes his own evidence that he had said that it was in April 2024, and told her then or the following month, if one adds 40 weeks to that, the period he latterly gave and which I consider he had not mentioned beforehand, that period ended well before the 27 March 2025 meeting. The position simply is that as at that meeting he did not know when the operation would be, and had said that without it he was not fit for work. That was also the detail provided on the fit notes from his GP – that the claimant was not fit for work.

25

30

35

122. The claimant said that the occupational health provider had not called him at 12.30 on the date arranged, but had done so at 10.30 and then around 4pm. I have concluded that that evidence is not reliable, firstly as for such a matter it is surprising that he did not produce his own phone records to prove that, secondly that as the call was made to his mobile he did not have it with him or reasonably close to hand, thirdly that Ms Russell emailed him later that morning to remind him of the 12.30 appointment

40

and he did not reply that they had tried to call him at 10.30, fourthly that he did not call or email Ms Russell on that day to explain what had happened, fifthly that it is not consistent with the occupational health provider message at 12.39 for them to have called him at around 4pm as he suggested, rather that he may have called them, sixthly that his missing that appointment is consistent with other evidence of his missing meetings, including that for earlier in February 2025, and finally that he did not mention those timings to Ms Russell at the meeting on 27 March 2025.

123. The claimant alleged that he had asked to be sent text messages when an email was sent to him well before the 27 March 2025 meeting, but Ms Russell denied that, and said that she had acted when the request was made at the meeting on 27 March 2025 which was why the texts started on 1 April 2025. It appeared to me far more likely that her evidence was correct.

124. The claimant alleged that he had told Ms Russell in about April 2024 that he may struggle to attend meetings that had been organised because of his condition, but Ms Russell denied that and again I accepted her evidence. There was no meeting in April 2024, the first one that proceeded (other than as a trial on 19 March 2024) was not until June 2024. Whilst the claimant points out that none of these discussions were minuted they were essentially to discuss his current condition and if there had been any progress with the operation. They were informal ones to keep in touch with him during absence. His evidence was that he had been trained to minute all meetings, but Ms Russell explained that her training was not the same. He had been trained by HMCTS and not by SCTS which is the body employing Ms Russell.

125. On a point of detail, the claimant gave evidence that he had started with HMCTS on 9 April 1999. The respondent argued that it was 19 April 1999. The claimant said that he had not seen a statement of terms and conditions document, but on the face of it that document which the respondent produced, albeit unsigned, was a standard term one which did have the date of 19 April 1999 on it. The normal expectation would be that that date was accurate. The claimant accepted that his evidence of 9 April 1999 was given from memory. I pointed out to him that he had put as the start date on the Claim Form the date of 17 April 1999. He said that he did not know where that had come from. In all the circumstances it seems to me that the respondent's date is most likely to be accurate, and his memory is not.

126. He also said that he had no memory of receiving the letter calling him to the meeting on 27 March 2025. But that was obviously an important letter, with several attachments, and it seems to me clear that he did receive it as he attended the meeting. His lack of memory of receiving such a letter is I consider further evidence that his recollection is not reliable in at least a number of instances.

127. Whilst therefore looking at his evidence overall I do have much sympathy for the claimant who had to endure both a very painful condition and the fact that it was not resolved as quickly as would have been hoped for, neither of which were matters under his control, I consider that there are aspects where he did not deal with issues as well as he could, and that where there is a dispute between his evidence and that of Ms Russell I prefer hers over his.

## Discussion

128. I answer each of the issues from the List of Issues, amended slightly from that provided by the parties as noted above, as follows:

### Disability status

1. *Was the Claimant disabled on account of the hernia he had at the relevant time?*

129. The answer to this is clearly yes and the respondent latterly admitted that.

2. *Did the Respondent know or ought reasonably to have known the Claimant was so disabled at the relevant time?*

130. I consider that it is clear that the respondent knew that he was disabled at the relevant time. Latterly that was also admitted.

### Time bar (reasonable adjustments claim)

3. *The Claimant's position is that the Respondent ought to have further explored the option of the Claimant working from home. The Claimant's position is that the breach occurred on or before 1 September 2024, and that it was ongoing until his dismissal. Was the reasonable adjustments claim made to the Tribunal within three months (plus early conciliation extension) of the breach, as per section 123 of the Equality Act 2010?*

131. ACAS Early Conciliation started on 13 July 2025, and the certificate was issued on 5 August 2025. The Claim Form was issued on 15 August 2025. On that basis the "cut-off" date for these purposes is 13 April 2025. The issue of adjustments as referred to below was raised at the meeting on 27 March 2025. It was on 15 April 2025 that the decision to dismiss was made. The application to amend was not made until 21 October 2025. It is not therefore one made timeously.

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

132. In my opinion, no. For reasons I shall come to there was no breach of the duty to make adjustments for the matter the claimant contended for, which was about working from home.

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

133. Not applicable.

6. *If not, were the claims made within a further period that the Tribunal thinks is just and equitable?*

134. I have concluded that it is just and equitable to allow the claim to be made. There was no prejudice on a forensic basis suggested by the respondent. Whilst the claim did not succeed, it was statable. The reason for the delay was the claimant not understanding the law in relation to disability discrimination. Given its complexity and the dismissal that later took place, which he challenged timeously, and that he is a party litigant, in all the circumstances I consider that it is just and equitable to extend jurisdiction under section 123 of the 2010 Act, and the claim is within the jurisdiction accordingly.

Unfair dismissal

7. *It is agreed that the Claimant was dismissed.*

135. No comment is necessary, but it is also not in doubt that this aspect of the claim was presented timeously.

8. *What was the reason or principal reason for dismissal? The Respondent contends it was capability or in the alternative, some other substantial reason, namely the Claimant's long-term absence and inability to provide regular and effective service.*

136. It is I consider proved that the sole or principal reason for dismissal was capability, on the basis of the claimant's absence from work from 1 March 2024 until the point of dismissal, and there being no date identified when he may be expected to be able to return. That was the genuine belief of Ms Russell who decided dismissal. Other matters were involved, including some failures of communication, but they were subsidiary ones.

9. *Was it a potentially fair reason?*

137. Yes.

10. *Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? In particular:*

i. *Did the Respondent genuinely believe the Claimant was no longer capable of performing their duties?*

ii. *Did the Respondent adequately consult with the Claimant?*

iii. *Did the Respondent carry out a reasonable investigation, including finding out about the up-to-date medical position?*

*iv. Could the Respondent have reasonably been expected to wait longer before dismissing the Claimant?*

*v. Was dismissal within the range of reasonable responses?*

5 138. In this regard there are arguments both ways. The claimant was a long-serving employee who was off work through no fault of his own. There was no suggestion that his service had been other than excellent up to the point of his going off work through illness. That is a factor in his favour, as it supports the view that he would return to work as soon as he was reasonably able to do so following the surgery he needed, and his recovery from it, although as noted in **BS** not a particularly strong factor. He clearly feels that what has been done to him was unfair, and from his point of view one can see why he feels that way. But the focus in a claim such as this is set out in authority above, and that is largely but not wholly on the position of the employer, which decided to dismiss when not knowing when the claimant would be able to return to work in circumstances where another employee was temporarily promoted to cover his role.

20 139. In my opinion the decision to dismiss was one that a reasonable employer could have decided upon. The respondent genuinely believed that the claimant was no longer capable of performing the duties of the role, and also that there was no date identified when that could change, as noted above. Whilst the claimant argued that the respondent should have known that there was a 40 week period running from his pre-op appointment in April 2024, that was at best not clear at the time of the meeting on 27 March 2025, in any event the 40 week period had come and gone without the operation being undertaken, it was in the context of his later comments in the meeting that he did not have a timescale and did not know when the surgeon would be available, and he had not stated clearly any date, or suggested period of time when it would take place, during that meeting. It appeared to me a matter that arose later.

35 140. At the time of the dismissal the claimant had been off work through sickness caused by the hernia for over a year. Without the operation he said that he was not fit for work. That is what the GP fit notes also stated, in effect. He mentioned a role from home in making calls, and there was some discussion about that (over both making and answering calls), but he could not say when he could do so, because he could not predict when he would suffer pain and require medication. That medication in effect meant that for several hours afterwards he could not be fit for any work. Ms Russell was concerned that his making or answering calls in such circumstances would be a reputational risk for the respondent, and it appears to me that that must be right. When he would be fit, or not, to carry out work was also not something that could be confirmed in advance – it all depended on when the pain commenced, which was entirely unpredictable.

141. In my opinion the respondent did adequately consult the claimant. They sent him a letter before the meeting with attachments setting matters out fully, and warning him that dismissal was a possibility. They addressed matters during that hearing, including in effect what alternatives there might be and whether he could give a date for a possible or likely return. He did not do so. That was not any fault of the claimant, simply the state of affairs. At that time it was not known by either him, or therefore the respondent, when the required operation would take place.
142. The respondent did have a reasonable basis to make that decision from the discussions held with the claimant. Whilst it was best practice to have followed up on the occupational health appointment it would not have changed the fundamental facts at that stage. The claimant could tell them no more than he told the respondent directly, that he was on a waiting list but when the operation would be undertaken was not known. It was not the decision of occupational health as to whether the claimant could carry out some work from home, that was for Ms Russell. Given all the circumstances it appears to me that there was no realistic possibility of the claimant being able to do so in a manner that worked for the respondent.
143. Matters were compounded by problems in communicating with the claimant. They were many and varied. Not all of the issues were his fault. Some he had explanations for, such as when he had taken medication or was in severe pain. He did send some messages to re-arrange meetings in advance, and on the face of it did try to attend some Teams meetings but had technical issues.
144. The claimant is however responsible for lack of communication in part. The claimant did not provide all fit notes timeously. That was a condition of the Absence Management Policy and his receipt of sick pay. He did not respond to several of the messages sent to him, nor did he attend various meetings. For some missed meetings he apologised. I appreciate that he had a serious health condition and suffered from severe pain on occasions, but it appears to me that that does not explain all of the many matters that arose in this regard as noted above.
145. It seems to me that he ought to have been prepared for a call from occupational health during that day, and when it was missed he ought to have been in touch with Ms Russell.
146. It appears to me relevant that the period of absence was reasonably lengthy in that it commenced on 1 March 2024 and continued for over a year thereafter, with no date by which it would end being known, but also that before it the claimant had been on an extended period of leave, a form of career break initially when with HMCTS, totalling very roughly two years (the claimant was unsure exactly when it had started). Not only therefore had the employing entity changed, but the absence from work from both of the career break and illness was for about three years.

147. This is all also in the context of another employee being temporarily promoted to undertake the Team Leader role, and that then was extended on a number of occasions. The uncertainty as to the future, which is an important factor telling against the employee as the Inner House discussed, was impacting that person and the business itself, and the claimant was not on pay at that point as all sick pay had been exhausted. The claimant's several issues of inadequate communication made the problem worse both in planning whilst he was off, and in considering any possible alternative.
148. It seems to me that the impact on the other employee covering for him temporarily is also a significant matter. The continuing uncertainty over when the claimant could return to work impacted that person detrimentally, and as a result exacerbated the difficulties for the respondent. There was a risk of that employee moving to another permanent role because of the fact that the temporary role was simply that, which would have affected the respondent detrimentally.
149. The third aspect of the test set out in the Inner House case of **BS** is as to medical information. The respondent did seek to obtain an occupational health report. Arrangements were made, but not successfully. What I consider the strongest point for the claimant is that the respondent did not make a second set of arrangements for an occupational health report. Having some form of medical evidence is normally part of what is involved for a fair dismissal.
150. That the cause of the incapacity was the hernia was clear, explained both by the claimant and in the fit notes from his GP. The claimant and his GP in those fit notes both stated that he was awaiting an operation. Whilst the medical evidence was basic, it was there. At the meeting with him it was in my opinion clear to Ms Russell that there was no date which was at that stage known when the operation required would take place, and after that when the recovery period would end. It was in simple terms an ongoing position with no end date known, but where the probability of there being an end date at some time was there.
151. I considered whether the respondent ought simply to have delayed deciding matters until it did receive such an OH report – not least as the claimant had indicated on 4 March 2025 that he could do so any time. I have concluded that in the circumstances of this case however that the respondent remained within the band of reasonable responses in deciding as it did. That is as there was no doubt over the diagnosis, which was of an inguinal hernia, that it was a condition causing the claimant much pain, and that he required surgery. It was simply a case of knowing when that surgery was to take place. The claimant did not know, entirely understandably. He accepted in cross examination that if there had been another reference to occupational health he would have said the same to them.

152. The matter was also discussed in some detail at the meeting on 27 March 2025. The claimant made it clear at that meeting that no date for the operation had as yet been given to him, and when it would be was uncertain. The respondent was not in a position to go directly to the consultant who was to be undertaking it to check that detail. The claimant only found out about the fact of his not being on a waiting list after the dismissal, when there was a private consultation. Against that background, it seems to me that there was, just, sufficient enquiry into the medical situation in the unusual circumstances of this case.
153. The assessment of fairness must be made at the time of that decision. What I am not entitled to do is to use information that became available later to assess fairness. I consider that in all the circumstances, but particularly having regard to the impact on the other employee and respondent more widely of not knowing when the claimant would be able to return to work, the respondent could not reasonably be expected to wait any longer before dismissing as it did not know how much longer it would be required to wait before the claimant might be able to return, it had consulted the claimant sufficiently, and it was adequately informed, at least as well as it reasonably could be, on the medical circumstances of the claimant at that time.
154. I appreciate that ultimately the source of the funding for both the respondent and NHS Scotland is the Scottish Government, but each of those bodies are separate entities in law. The claimant was waiting for the NHS to resolve his hernia, and the pain associated with that, and the NHS or consultant's secretary appear, from the evidence before me, to have made an administrative error in relation to placing him on the waiting list. But these are not matters I regard as sufficient to make the respondent's decision to dismiss unreasonable.
155. I then considered the appeal. The claimant did refer initially to his proposal to make an appeal in a message to Ms Russell, and that was in time, but it was not in accordance with the requirements in the outcome letter as it was not sent to Mr Graham and did not include grounds of appeal. I do not consider that the first email was an appeal.
156. The claimant suggested that he had sent an appeal on 29 May 2025. But the respondent did not receive it, and it was in any event about a month late. When he sent the appeal that was received, which was on 17 June 2025, it was in effect rejected for being out of time. It appears to me that that was a decision a reasonable employer could have made – there was a clear process for the appeal set out in the letter, and it was the subject of a reminder by Ms Russell. The failure of the respondent to consider the out of time appeal is within the range or reasonableness and that does not itself render the dismissal unfair in my opinion.

157. Having considered all the circumstances of this case I have concluded that the dismissal was not unfair, and the claim under section 94 of the 1996 Act must fail because of that.

5 Failure to make reasonable adjustments

**11.** *It is accepted that the Respondent had an Attendance Management Policy i.e. the PCP relied upon by the Claimant.*

158. No comment is necessary.

10 **12.** *If it did, did the PCP place the Claimant at the following disability-related substantial disadvantage in comparison with the Respondent's staff who did not have his disability?*

*i. Dismissal*

159. It did.

15 **13.** *If the Claimant was put at that disadvantage, did the Respondent know or ought to reasonably to known – that the Claimant had been put (or was likely to be put) to that disadvantage?*

160. Essentially for the reasons given above, the answer again is yes.

**14.** *Would the Respondent further exploring the option of the Claimant working from home have avoided the Claimant's dismissal?*

20

161. The issue is framed from the terms of the application to amend, and the hearing to address it. The claimant's application to amend was set out in emails on 21 and 30 October 2025. The former stated, relevantly for this purpose

25 "I believe my employers failed to make any reasonable adjustments to accommodate my disability and that my dismissal itself was a form of disability discrimination."

162. The latter added, in answer to a letter from the Tribunal dated 29 October 2025 seeking clarity on whether an application to amend was made for disability discrimination, and using his text,:

30

35 "I wish to answer yes to im applying to have disability discrimination which was not picked up by original form and breach of contract for non payment of notice this was the legal advice i received and what i was advised to do. I do not have any representation i could only afford an appt for some advice."

163. What the adjustment proposed was had been set out in the Note following the Preliminary Hearing, and was an argument that “the respondent ought to have explored further with him the option of working from home, raised at an attendance support meeting, which meant that he would not have been dismissed.”  
5
164. But it was explored. The claimant made mention of his making calls, and that was then discussed with him. He argued that it was not a discussion but I did not agree.
165. He could not say when he would be able to carry out the work, and there was the difficulty from his taking strong medication and its impact on him addressed above. That was exemplified by the exchanges on 10 February 2025. He argued that that was an exceptionally difficult day, but it was broadly consistent with the representations he made in his appeal letter.  
10
166. It seems to me from all before me that having the claimant carry out some work from home prior to the operation being undertaken was not a realistic possibility, and was not a reasonable adjustment required of the respondent. The claimant did not know how long he would not be able to work for, when it would happen, and what the impact each time would be. In his evidence he sought to downplay the impact, but in my opinion it would have been sufficiently material that managing work for someone at home in such circumstances was not realistic. That was exemplified by the fact that the claimant missed 12 meetings arranged with him in the period of one year from 1 March 2024, as well as that with occupational health. There were some reasons given for some of them, but not generally in advance, and for many there was no communication afterwards, or any explanation. Managing someone remotely in such circumstances in my opinion is not practicable, and I accepted Ms Russell’s evidence in this regard. Doing so, as the claimant argued should have been done, was not a reasonable adjustment having regard to the statutory provisions, the case law and the statutory guidance in the EHRC Code of Practice.  
15  
20  
25  
30
167. There are two further matters. The first is an argument that the claimant made in effect that his dismissal should not have taken place, but that the respondent should have worked out that 40 weeks from his pre-op meant that he would return to work in about September 2025. He argued that they should have waited until then. But the dates he used for that argument were wrong, the pre-op was in about April 2024 and the 40 week period for that ended in December 2024 or January 2025, and was therefore expired before the meeting on 27 March 2025.  
35
168. That separately was not the basis on which he had set out the argument at the hearing before me, when amendment was allowed under reservation. The Note stated that the terms of the claim made by the claimant were narrated in it and if the claimant wished to expand on them,  
40

or amend them, in any way he must set that out in writing by email to the Tribunal and respondent no later than 4pm on 8 January 2026, which failing the terms of the Note were to be taken to be the detail of the claim he seeks to make under the 2010 Act. He did not respond within that time.  
5 I consider that it is not a matter that I can consider as it has not been properly placed before me.

169. In any event, even if it had been permitted I do not consider that extending the period until such a time was a reasonable adjustment. The evidence from Ms Russell, which I accepted, was that she was not aware of when  
10 the 40 weeks started from, nor that it was a definite date which may not in practice be met. Her understanding from the claimant's overall comments was that he did not know when the operation would take place. I consider that her evidence is correct, and that having a form of entirely open-ended deferment of a decision, in circumstances which negatively impacted the  
15 person who was in a temporary role and had been on a series of extensions for a long time, as well as the impact on the respondent itself, was not a reasonable adjustment having regard to the statutory provisions, the case law and the statutory guidance in the EHRC Code of Practice.

170. The second matter is in relation to the appeal. What the claimant did not  
20 suggest when explaining his proposed amendment at the Preliminary Hearing was anything in relation to the appeal he had attempted to make late, either that receiving it late was itself a reasonable adjustment, or that having regard to the information then disclosed by him in his appeal that that appeal should have been allowed. As stated he did not follow up the  
25 Note of the Preliminary Hearing which allowed the amendment subject to reservation as to jurisdiction. It seemed to me that making that kind of argument, which the claimant had not himself set out, was not something I was permitted to do. It would be entering the arena on one side of the dispute and not acting judicially.

30 171. The respondent separately had had no notice of that issue, which arose only during the Final Hearing itself. It had not arranged to call the appeal officer, a decision that was certainly open to it given the case it understood was being made against it. It seemed to me therefore that the question of how the appeal was addressed was not before me as a matter of the  
35 reasonable adjustments claim, and was only so in relation to the unfair dismissal claim where it is a matter arising from the nature of that separate claim and has been addressed above.

***15. If so, did the Respondent make that adjustment?***

172. Clearly they did not, but that is now not a matter that is relevant.

40 ***16. If not, did the Respondent thereby breach any duty arising to have to make that adjustment for the Claimant? If so, on what date did the breach occur?***

173. Again this issue does not now arise. Nor do the matters related to remedy.

**Conclusion**

174. This is a particularly sad case, with a very long serving employee having a medical condition which led to the termination of his employment. I have  
5 much sympathy for the claimant, who has obviously been suffering from a very painful illness, and had been waiting for corrective surgery for a very long time after what appears to have been a most unfortunate administrative error in not placing him on the correct waiting list. That surgery took place after that was discovered, which was quite some time  
10 after the dismissal.

175. I cannot however let that sympathy decide the case. I must apply the law as I consider it to be, which I set out above, to the facts as I have found them, also as set out above.

176. I have concluded, having carried out that exercise, that the Claim is within  
15 the jurisdiction of the Tribunal, that the claimant is a disabled person and that the respondent knew of that (these latter two matters having been conceded), but that both claims do not succeed and are dismissed on their merits.

20

**Date sent to parties**

2nd June 2026

---