Case Number: **2409466/2023**

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr J Atherton	**v**	**3DGBIRE Limited**

Heard at: **Manchester** On: **7, 8, 9, 10 April 2026**
5, 6 May 2026

Before: **Employment Judge Kenward**
Ms K Fulton
Mr N Williams

Appearances
For the Claimant: **in person**
For the Respondent: **Mr C Ushieagu** (Litigation Consultant)

FULL WRITTEN REASONS

JUDGMENT and summary oral reasons having been given at the hearing on 6 May 2026, with Judgment having been sent to the parties on 1 June 2026, and written reasons having been requested by the Claimant, full written reasons are now provided, as set out below.

Judgment

1. The Judgment of the Tribunal was as set out below.

(1) The complaints of unfavourable treatment because of something arising in consequence of disability are not well-founded and are dismissed.

(2) The complaints of indirect disability discrimination are not well-founded and are dismissed.

(3) The complaints of failure to make reasonable adjustments for disability are not well-founded and are dismissed.

(4) The complaints of breach of contract are not well-founded and are dismissed.

Introduction

2. These proceedings arise out of the Claimant having fallen asleep during an induction session for the new job which he had started for the Respondent, with this ultimately leading to his dismissal, as he was still in his probationary period. This prompted the Claimant to do some online research as to possible causes for any tendency on his part to fall asleep during the day and he subsequently appealed against his dismissal on this basis that this tendency and other difficulties which had been identified in terms of his ability to undertake the new job were caused by conditions which amounted to disabilities. In particular, his tendency to fall asleep was stated to be caused by inattentive ADHD. As such, the Claimant complains that his treatment by the Respondent amounted to disability discrimination. The Respondent contends that any treatment of the Claimant was not discriminatory and / or (where applicable) was justified.

3. The final hearing in this case was originally listed to take place over four days in February 2025 but was adjourned as the Tribunal was not satisfied that the parties had undertaken the preparation necessary for the case to be ready to be heard. It was relisted for 7 to 10 April 2026.

4. The provisional timetable had provided for the Tribunal to deal with any preliminary issues at the start of the first morning and then spend the rest of the first morning reading the written evidence before starting hearing oral evidence on the afternoon of the first day. In the event, the individual advocate originally assigned by the Respondent's representative to represent the Respondent at the hearing became unavailable at short notice due to family illness and the Tribunal agreed to the Respondent's application for the evidence to start on the second day on the basis that the Respondent's representative had identified another advocate to take over the case but that advocate, having been appointed at short notice, would not be ready to start representing the Claimant until the following day (8 April 2026). The Tribunal was satisfied that, notwithstanding the impact on the Claimant involved in departing from the planned structure for the hearing, it would not have been consistent with the overriding objective to expect the Respondent to proceed without allowing a reasonable amount of time for any new advocate to get up to speed.

5. As such, the Tribunal spent the remainder of the first day completing its reading of the written evidence in the case.

6. At the beginning of the second day, there was a short delay due to technical difficulties with the Respondent's advocate having connectivity issues. The Claimant's oral evidence started at 10.50 am on 8 April 2026 and concluded at 11.57 am on 9 April 2026 albeit some time had been allowed for the Respondent's advocate to read the bundle of medical documents with which

he had only been provided on the second day (although this bundle had previously been sent to the firm representing the Respondent).

7. On 10 April 2026, the Claimant asked for the hearing to be adjourned at the conclusion of his evidence until the following day in circumstances where he was not ready to proceed (beyond concluding his own evidence) due to the impact of family illness and having been unwell himself (although he had assured the Tribunal that he was well enough and content to finish being questioned on his own evidence). The Tribunal was satisfied that it was appropriate to adjourn the case, both in compliance with the overriding objective and as an adjustment having regard to the Claimant's disability. In the circumstances, the Tribunal found it helpful to use the extra time reviewing the evidence in chambers.

8. The consequence of having lost so much time over the course of the hearing was that it became necessary, on the fourth day, to adjourn the case part heard at the conclusion of the evidence of the first of the Respondent's two witnesses. The case was listed to continue on 5 and 6 May 2026.

9. The evidence was concluded on 5 May 2026, following which the parties made their closing submissions to the tribunal with the claimant's closing submissions being made by reference to a document which was described as setting out his closing arguments.

10. The tribunal commenced its deliberations as to its decision on 5 May 2026 with judgment being given orally on 6 May 2026 together with oral reasons for the judgment. The oral reasons which were given were announced as summary reasons. At the conclusion of the hearing, the claimant made a request for written reasons for the Judgment.

11. Having been approved on 6 May 2026, the written judgment was sent by the tribunal to the parties on 1 June 2026.

12. Following receipt of the judgment, the Claimant wrote to the tribunal on 11 June 2026 seeking to clarify the request for written reasons that he had made at the hearing on the basis that he was seeking to request full written reasons for this Judgment.

13. The Tribunal responded on 1 July 2026 explaining that where, as here, the oral reasons which were provided at the hearing were announced to be summary reasons, rule 60(4B) of the Employment Tribunal Procedure Rules requires the Tribunal to provide written summary reasons unless it considers it appropriate to provide written full reasons. Where written summary reasons are provided, rule 60(4C) states that a party can then request written full reasons within 14 days of the sending of the written summary reasons.

14. In the event, having regard to the request made by the Claimant, I have considered it appropriate to provide full written reasons.

Adjustments

15. The conditions being relied upon by the Claimant as amounting to a disability for the purposes of Equality Act 2010 were identified as autism spectrum disorder (ASD), attention deficit hyperactivity disorder (ADHD) and generalised anxiety disorder (GAD). At a preliminary hearing on 31 July 2024, before Employment Judge Buzzard, the Claimant was found to have been a disabled person at all relevant times by reason of these impairments.

16. At an earlier case management preliminary hearing on 1 February 2024, before Employment Judge Johnson, there had been discussion as to the adjustments which would need to be considered for the Claimant, both in relation to the proceedings generally and in relation to future hearings. The resultant Record of a Preliminary Hearing listed the adjustments which would need to be considered. The need for adjustments was further discussed at a further preliminary hearing on 27 February 2025, before Employment Judge Ficklin, with an updated list of adjustments being set out in the Record of a Preliminary Hearing which followed. The adjustments identified were then similarly discussed and agreed at the beginning of the final hearing on 7 April 2026, and the hearing accordingly preceded on the basis of taking account of these agreed adjustments.

Proceedings

17. The Claimant's employment had commenced on 9 May 2023. He was dismissed on 21 June 2023. In order to be able to commence proceedings, on 30 June 2023, the Claimant complied with the requirement to notify ACAS of his prospective Claim for the purposes of early conciliation, and an early conciliation certificate was issued on 11 August 2023. The ET1 Form of Claim was received by the Tribunal on 21 September 2023.

18. At section 8.1 of the ET1 Form of Claim, the Claimant ticked the applicable box in respect of bringing a complaint of disability discrimination. He also indicated that he was bringing a complaint of breach of contract.

19. At section 8.2 of the ET1 Form of Claim, the Claimant referred to attached Particulars of Claim. This document provided the details of his Claim and identified that the complaints of disability discrimination were under sections 15, 19 and 21 of the Equality Act 2010.

20. The unfavourable treatment complained about for the purposes of the complaint of discrimination arising from disability contrary to section 15 of the Equality Act 2010 was that of:

    (1) dismissing the Claimant; and

    (2) rejecting his appeal against dismissal.

21. For the purposes of his complaint of discrimination arising from disability, the Claimant identified the conduct and / or performance issues which had resulted in his dismissal (as upheld on appeal) as all being matters which arose from his disability, namely:

(1) having fallen asleep several times during induction training on 20 June 2023;

(2) his difficulties in meeting a requirement to make five phone calls to customers per day; and

(3) having walked out of a probation review meeting on 20 June 2023.

22. There were two complaints of indirect disability discrimination contrary to section 19 of the Equality Act 2010. The provision, criterion or practice (PCP) of the Respondent which was relied upon for the first complaint was identified as that of a requirement for employees to make five phone calls to customers per day. Neither the Particulars of Claim nor the List of Issues annexed to the Record of a Preliminary Hearing of 1 February 2024 identified the relevant group disadvantage arising from such a PCP. However, this was set out in the agreed List of Issues provided by the parties prior to that preliminary hearing on the basis that "*persons with … ASD or GAD*" were "*more likely to have difficulty in achieving the target and as a consequence would not qualify for the monthly bonus and / or* [would] *place themselves at risk of dismissal*". The Particulars of Claim identified the Claimant as having been put at this particular disadvantage, individually, "*because of my struggles with social interaction*", through "*failing to meet the daily target*" and so "*failing to earn the monthly production bonus during June and this also formed part of the reason for my dismissal*".

23. The provision, criterion or practice of the Respondent which was relied upon for the second complaint of indirect disability discrimination was identified as being that of the Respondent having the "*discretion to take account of short service and vary the disciplinary and capability procedures*". This referred to the wording used in the employee handbook which referred to "*short service*" but did not define what amounted to short service for these purposes. However, given the shortness of the Claimant's service, it seemed clear to the Tribunal that it would have applied to him.

24. The group disadvantage was identified as being that "*people with my disabilities are more likely to have poor performance and are therefore at greater risk of dismissal during the first few months of service*". The individual disadvantage was that "*I was at risk of dismissal without the need for the company to comply with their procedure*" and "*as a consequence … I was dismissed without having a proper opportunity to discuss the reasons for falling asleep, my disabilities and the effects of these and any adjustments that could be made*".

25. The Particulars of Claim also raised three separate complaints of a breach of the duty to make adjustments contrary to sections 20 and 21 of the Equality Act 2010.

26. The provision, criterion or practice of the Respondent which was relied upon for the first complaint of a breach of the duty to make adjustments was that of a requirement to remain awake at work. This was stated to place the Claimant at a substantial disadvantage "*because I find it difficult to stay awake when under-stimulated i.e., not actively performing a task that requires physical movement or mental stimulation*". In other words, he was less likely to be able to comply with this requirement (and more likely to be at risk of any adverse consequences through not doing so). In the agreed List of Issues, the substantial disadvantage was clarified as being that the Claimant "*had difficulty in staying awake at work when under-stimulated and this formed part of the reason for his dismissal*".

27. The Claimant's case was that the reasonable adjustments which the Respondent failed to make which would have removed or reduced this disadvantage were:

(1) allowing the Claimant to remain standing during meetings or other similar events; or

(2) allowing the Claimant to use a fidget toy at work if standing was not possible.

28. The provision, criterion or practice of the Respondent which was relied upon for the second complaint of a breach of the duty to make adjustments was the requirement to make five calls per day. This was stated to place the Claimant at a substantial disadvantage "*because I struggle with social interaction and found the phone calls difficult*". The reasonable adjustments which the Claimant contended the Respondent failed to make were:

(1) providing the training that he requested on his probationary review form;

(2) reducing the number of phone calls per day that he had to make; and / or

(3) removing the requirement for him to make phone calls.

29. The provision, criterion or practice of the Respondent which was relied upon for the third complaint of a breach of the duty to make adjustments was that of any provision applying to the Respondent's disciplinary and / or capability procedures which gave the Respondent a discretion retain discretion to "*vary*" the procedures to take account of length of service, including proceeding directly to dismissal without providing a warning. This was stated to place the Claimant at a substantial disadvantage "*because my disability affects my performance and therefore I am more likely to be at risk of dismissal during the first few months of service and the Respondent would not have to comply*

with its procedures". The reasonable adjustment which the Claimant contended that the Respondent failed to make was that of complying fully with its procedures and allowing warnings to be given and / or extending the probationary period before proceeding to dismiss.

30. The breach of contract complaint was identified as being on the basis that the Respondent's disciplinary and capability procedures were incorporated into the contract of employment, and the Respondent was alleged to be in breach of those procedures (through failing to follow them in full or at all) in dismissing the Claimant. In the agreed List of Issues, the terms which were alleged to have been breached were identified as being as set out below.

(1) "*If the nature of your job changes or if we have general concerns about your ability to perform your job we will try to ensure that you understand the level of performance expected of you and that you receive adequate training and supervision. Concerns regarding your capability will normally first be discussed in an informal manner and you will be given time to improve*".

(2) A term to the effect that the correct procedure should be used when requiring the Claimant to attend a disciplinary hearing.

31. The Response filed by the Respondent asserted that the Claimant had been dismissed on grounds of health and safety concerns surrounding his falling asleep.

32. The Respondent reserved its position as to whether the Claimant had a disability within the definition of section 6 of the Equality Act 2010, pending disclosure of evidence as to disability. It was further denied that the Respondent had knowledge of any disability at the relevant time.

33. The complaints of discrimination were denied. In relation to the complaint of discrimination arising from disability contrary to section 15 of the Equality Act 2010, the Respondent pleaded a justification defence with the legitimate aim being identified as that of keeping "*the Claimant and other employees safe whilst at work and adhering to health and safety policies in place to achieve this*".

34. In relation to the complaint of indirect disability discrimination, the Respondent was also effectively contending (albeit, in the context of dealing with the reasonable adjustments complaint) that the PCPs were justified although any defence was not outlined in specific terms.

35. In relation to the complaint(s) of breach of contract, the Respondent asserted that in "*dismissing the Claimant the Respondent followed its disciplinary process*" with reference also being made to "*the contractual term that the procedures could be varied*" on the basis of the Claimant having "*short service*".

36. A case management preliminary hearing was listed to take place on 1 February 2024. In advance of the hearing, the parties provided an agreed List of Issues. For the purposes of the justification defence being raised in defending the complaints of discrimination arising from disability and indirect disability discrimination, the legitimate aims being relied upon by the Respondent were identified in the terms set out below.

"(a) Health and Safety of the Claimant and all employees.

(b) The Respondent is a sales distribution business and as part of the Respondent's business offering telephone support is the first line of support for customers. The Claimant was engaged in this type of role.

(c) Probationary period is key to understanding whether the role is what the new employees want and to understand their ability to carry the role".

37. This wording was later incorporated into the List of Issues annexed to the Tribunal's Case Management Orders made on 1 February 2024.

38. There was some discussion at the final hearing as to whether any legitimate aims needed to be more clearly identified as (b) and (c) above seemed to be setting out the relevant context relied upon by the Respondent rather than precisely identified aims. After some discussion, it was agreed that the aims which could be extracted from this wording were the aims of:

(1) ensuring the health and safety of the Claimant and all employees;

(2) successfully running the Respondent's business;

(3) offering telephone support as the first line of support for customers (and engaging employees to provide this support);

(4) establishing, through a probationary period, the suitability of new employees to do their role.

39. A preliminary hearing took place before Employment Judge Buzzard on 31 July 2024 as to the issue of disability. As stated above, the Tribunal concluded that the Claimant was a disabled person at all relevant times by reason of the impairments the Claimant described as Attention Deficit Hyperactivity Disorder, Autistic Spectrum Disorder and Generalised anxiety disorder. The concluding paragraph of the written reasons for that Judgment emphasised the effect of that determination in the terms set out below.

"*This finding should not be read as inferring that any specific individual behaviour of the Claimant arose from his disability. In particular, whether falling asleep at work arose from the Claimant's disability. Nor is it a finding that the Respondent was either aware of these disabilities at the relevant time, or that the disability could cause any specific disadvantage to the Claimant, in particular cause him to fall asleep at work. The Claimant will need to prove* *these matters to the extent he intends to rely on them in support of the claims he makes*".

40. As stated, the final hearing was originally listed to commence on 24 February 2024 but was postponed because the case was not ready to be heard. A further preliminary hearing was listed on 27 February 2025 at which Employment Judge Ficklin made Case Management Orders as to the steps to be taken to ensure that the case was ready to be heard on the dates for which the final hearing was relisted from 7 April 2026.

Evidence

41. In terms of documentary evidence, the Tribunal was provided with a joint Bundle of 261 pages. The Claimant also provided an additional bundle of medical documents which was discussed at the beginning of the case. Although much of the documentation was relevant to the issue of disability which had already been determined, the Tribunal was satisfied that the documentation was also relevant to the issue of disadvantage and the potential issues identified by Employment Judge Buzzard in the concluding paragraph of his reasons for his decision on disability (see above) and also potentially relevant to remedy (should that issue arise). The Claimant had also provided an additional remedy bundle.

42. In terms of witness evidence, the Claimant had provided a Statement of Evidence, and the Tribunal also had the Claimant's Disability Impact Statement. The Respondent provided Statements of Evidence from Daniel Abram, General Manager, and Paul Croft, a Director of the Respondent.

43. The Tribunal heard oral evidence from all of the witnesses who had provided a Statement of Evidence.

44. This was a case where the various witnesses were in the position of seeking to recall events from nearly three years previously. This meant that it was not always possible to establish clearly what had happened. Over the course of the hearing, various inconsistencies and mistakes were identified. However, the tribunal generally found the evidence of the witnesses to be factually orientated and reliable.

Medical evidence and findings

45. Based on the Claimant's Disability Impact Statement and the medical evidence, findings have previously been made that the Claimant's mental health conditions had a substantial adverse impact (at the material time) on normal day-to day activities in the respects set out below:

(1) self-isolation through avoiding all social interaction by avoiding leaving his home;

(2) eating alone to avoid having to cope with the sounds of others eating, with this precluding the Claimant from being able to eat in a public place so that the Claimant had been unable to go for a meal out with family for many years;

(3) self-loathing resulting in self-harm, including punching himself in the face, when he makes simple everyday mistakes;

(4) becoming overwhelmed and finding himself ‘shutting down’ in reaction to situations including the limited social interactions he cannot avoid; and

(5) panic attacks triggered by activities such as going to the shops if there are other people in the shop.

46. The Claimant’s Disability Impact Statement also referred to “*Intrusive Sleep/Daytime Sleepiness*” in that “*when sitting down and under-stimulated or inactive I find it almost impossible remaining awake*”. He stated that “*I have experienced many ‘episodes’ of this since around 12 years old, it happened a couple of times at school while watching a video for the lesson instead of writing in my book, but I have most commonly experienced it while being a passenger in a vehicle on the motorway or on a train, since learning about and fully understanding what causes this I believe this would affect me if I were to pass my driving test and drive on the motorway, as a result I have cancelled any plans I had to go for driving lessons and I consider myself unfit to drive till I get appropriate medication to correct this issue*”.

47. The Claimant’s “*inability to focus attention or give close attention to detail*” had been noted as “*symptoms of a recognised attention deficit disorder*” in an educational psychologist’s report from 1996.

48. However, the Claimant’s adult medical records have very little of relevance in relation to mental health issues before 2020.

49. An entry for 19 June 2020 set out the concerns of the Claimant’s GP who described the Claimant as a recluse who rarely left the house (where he was living with his mother and brother). The GP was sufficiently concerned to decide that the Claimant required an urgent psychiatric assessment. This resulted in the Claimant being assessed by a mental health nurse who felt that the Claimant had traits of autism. The Claimant was added to a waiting list to see a consultant psychiatrist resulting in an appointment on 7 December 2020 when the Claimant was diagnosed with General Anxiety Disorder with harmful use of cannabis and a Mixed Personality Disorder “*with features of anxious avoidant and dissocial personality*”. It was further reported that the Claimant had traits of autism and would benefit from an autism spectrum disorder assessment. The Claimant was subsequently prescribed Sertraline medication in December 2020 and has taken it continuously ever since.

50. On 18 February 2021, the Claimant’s GP completed the funding request form for diagnostic assessment for Autism. The form is labelled as the “Application

for funding, GP Funding Request form Autism and ADHD 2021". However, it appears to be in relation to Autism rather than ADHD in respect of which the request for funding for an assessment was being made. No specific reference was made to ADHD. Making the request involved completing a form headed "AQ-10 Autism Spectrum Quotient" and labelled as "AQ-10 Autism and ADHD questionnaire". None of the questions on the questionnaire related to sleeping issues or daytime sleepiness.

51. It is not altogether clear from the documents what became of the funding request or the reason for the delay in any subsequent assessment taking place. However, the Claimant's the medical records are to the effect that, on 17 August 2022, the Claimant's GP was chasing up an "*ADHD assessment*". This was presumably the same assessment request since the records do not refer to any other separate assessment request.

52. On 26 June 2023 (shortly after his dismissal by the Respondent), the Claimant had an appointment with his GP at which he was recorded as wanting to discuss his mental health as he "*feels was mis-diagnosed and would like to be assessed for ADHD*". The note records that a referral was made for "*further care*" using the "Referral for further care, ADHD Haydock Referral form". The form itself is headed "Adult ADHD Service Referral" and incorporated a questionnaire which involved completing "*the table below from the Adult ADHD self-rating scale*". None of the questions on the questionnaire related to sleeping issues or daytime sleepiness. The GP records do not indicate what became of that referral.

53. Other than the printout from the Patient Access Medical Record listing current and past medical problems, medical records have not been provided for the period beyond 16 February 2024, presumably because this was the set of records obtained for dealing with the Tribunal's original Case Management Orders in respect of the issue of disability. The entry for 16 February 2024 was in respect of the Claimant's repeat prescription for Sertraline.

54. By the time of the hearing as to the disability issue, an autism assessment had still not taken place and did not do so until 18 June 2025 resulting in a report from a Clinical Psychologist dated 1 October 2025. The assessment which took place on 18 June 2025 was for a combined assessment for both ASD and ADHD, resulting in separate reports.

55. The report as to Autism set out the history which was presumably taken from that provided by the Claimant and that in the medical records. This included a history to the effect that the Claimant "*experiences excessive daytime sleepiness, which has impacted employment*". This would appear to have provided by the Claimant and was described as one of the primary referral concerns with the details provided set out as below.

"*More recently, an experience at a new job where he was dismissed for falling asleep during an induction led him to research his traits of daytime sleepiness, and he began to consider that he may also have ADHD. John hopes that a diagnosis will help him to "get things sorted", particularly in relation to managing his daytime fatigue which he feels prevents him from driving safely and impacts his employment prospects*".

56. In terms of communication, the autism report recorded that the Claimant can find holding conversations challenging unless the topic is one of his interests.

57. In terms of restricted or repetitive patterns of behaviour, interests or activities the Autism report recorded that the Claimant has several deep and long-standing focused interests, including fixing and building his own bikes, 3D printing and computers "*having built and modified his own equipment from scratch*". It was stated that he "*can become hyper-focused on these interests for more than 24 hours at a time, forgoing sleep and food*".

58. The clinical summary to the report confirmed a diagnosis of autism spectrum disorder. In order to make such a diagnosis, the report states that an individual is required to have the traits set out below.

- "*Persistent deficits in reciprocal social interaction and social communication*".
- "*Restricted and repetitive patterns of behaviour, interests and activities that are atypical or excessive for the individual's age and sociocultural context*".
- "*Hyper, or hypo reactivity to sensory input or unusual interest in sensory aspects of the environment*".

59. The report states that these traits "*must be present during the early developmental period (although they may not become fully manifest until later in life when social demands increase)*". Further, the report states that these difficulties "*must cause clinically significant impairment in social, educational, or other important areas of functioning*".

60. On this basis, in making the diagnosis, the report relied on the analysis of the evidence set out below.

"*John showed evidence of difficulties with reciprocal social communication and social interaction, evidence of restricted and repetitive patterns of behaviour, interests and activities that are atypical/excessive, and evidence of hyper/hypo reactivity to various sensory experiences. These difficulties, preferences, behaviours and sensory responses have been present from an early age and continue to impact John's functioning. John's traits are not better explained by another condition. Therefore, John was found to meet the diagnostic criteria for autism spectrum disorder (autism)*.

The assessment process and self-report questionnaires highlighted that John showed mildly elevated scores for anxiety (GAD7) and depression (PHQ9). John was also reported to have elevated sensory experiences (Short Sensory Profile), specifically with tactile, taste/smell, auditory filtering and low energy/weak traits. The Extreme Demand Avoidant Questionnaire indicated that John experiences low avoidant behaviours and the scores from the ADHD Screening Test indicate hyperactivity and inattention traits are 'likely'.

John may struggle in social situations due to his reported difficulties associated with ASD. He may benefit from structure and routine to help manage his fixed behaviour and thinking style. Given the areas of functioning his traits impact upon, it is recommended that support around his social skills, psychological wellbeing and emotional regulation for him as an individual be implemented".

61. It is to be noted that the report does not seem specifically to rely upon daytime sleepiness. One of the criteria is that the traits "*are present in the early developmental period*". In this regard, the report had noted *that during* the Claimant's middle to late childhood "(p)*atterns of activity level, sleep and appetite were fairly predictable*".

62. A separate report dated 1 October 2025 made a diagnosis of "*Attention Deficit Hyperactivity Disorder – Inattentive Presentation*".

63. Daytime sleepiness was similarly described as a primary referral concern at the outset of the ADHD report with this being explained in the terms set out below.

"*In 2023, John attempted to re-enter the workforce after a long period of unemployment but was dismissed from his new job after falling asleep during an induction meeting. This event led him to research his traits, particularly daytime fatigue, and he identified with descriptions of ADHD. Due to the lengthy NHS waiting lists for both assessments, John self-referred for a private evaluation. His primary goal is to obtain an accurate diagnosis. He is particularly motivated to address the daytime sleepiness, as he feels it is a significant barrier to being able to drive safely, which would in turn allow him to better support his mother. Ultimately, John hopes that a clear diagnosis will provide him with the understanding needed to find suitable employment and improve his overall quality of life*".

64. The ADHD report set out much the same history as the Autism report. This included, under the heading in respect to physical health, "*significant daytime fatigue, which contributed to a job loss*". The history recorded as having been provided by the Claimant also included that he "*reports becoming highly engaged and focused on work that aligns with his interests, but experiences challenges staying awake and engaged in tasks he finds uninterest*ing". The history provided was further recorded in the terms set out below.

"*During his work induction, he found it difficult to stay awake as it involved passively listening to one person speak to a group. He describes his brain "switching off" in boring scenarios, such as being a passenger on a motorway*".

65. In terms of the Claimant's sleep cycle, the report recorded the history provided as set out below.

"*John often appears persistently restless. John reports always feeling like he needs to be doing something and finds it challenging to switch off and relax. If he is unable to sleep, he will often get up and carry on with activities. To manage his sleep cycle, he sometimes has to force himself to stay awake for 24 hours to reset his pattern*".

66. The clinical summary to the report explained the different types of ADHD in the terms set out below.

"*ADHD is a neurodevelopmental condition where individuals show a persistent pattern of inattention and/or hyperactivity and impulsivity that interferes with their day-to-day functioning. ADHD is defined by types: ADHD inattentive type, ADHD hyperactive-impulsive type and ADHD combined type (where individuals experience a combination of inattention and hyperactivity/impulsivity)*".

67. The criteria for ADHD combined type were listed as set out below.

- "*Must have five or more traits of inattention and five or more traits of hyperactivity/impulsiveness*".
- "*Traits must be inappropriate to their developmental level*.
- "*Traits must have been present for at least 6 months and been in evidence prior to the age of 12 years*".
- "*Several traits must be present in John across two or more settings, e.g., home and work*".
- "*There must be evidence that traits interfere with or reduce the quality of functioning*".
- "*Traits are not better explained by a mental health condition*".

68. Again, the point can be made that the report does not refer to daytime sleepiness as being a trait which was present in childhood.

69. The report stated that a "*diagnosis of ADHD, predominantly inattentive type, is confirmed*". Essentially, this was on the basis of "*Attention Deficit*" and "*Hyperactivity and Impulsivity*". The basis for the diagnosis was further explained in the terms set out below.

"*John struggles with the characteristics of inattention. These difficulties are present in both a home and an alternative environment. The assessment process and self-report questionnaires highlighted that John showed mildly* *elevated scores for anxiety (GAD7) and depression (PHQ9). The ADHD Screening Test indicates hyperactivity and inattention traits are 'likely'.*

The impact of these characteristics gathered from the ADHD assessment and self-questionnaires are reported as being impairing for John in the following domains: family, life skills, school, self-concept, risk and social functioning (as evidenced by the assessment and the Weiss Functional Impairment Rating Scale (Self) (WFIRS)".

70. It is to be noted that the Weiss Functional Impairment Rating Scale (Parent or Self) (WFIRS) used the data provided by the Claimant to set out, in a table, the functional domains in which the Claimant's "*ability to function is impaired by some emotional or behavioural problems*". The table identified an impairment in all functional domains (Family, School, Life Skills, Self-Concept, Social, Risk) with the exception of Work.

71. In summary, it can be seen that it was only last year (approximately 2 years after his dismissal) that a diagnosis of "ADHD, predominantly inattentive type" was made (together with the confirmation of a diagnosis of autism spectrum disorder).

72. On the basis of the evidence provided, the tribunal was not satisfied on the balance probabilities that this established that any issues that the Claimant had with regard to falling asleep during the day were caused by inattentive ADHD (or other disabilities).

Findings of fact

73. This section of the written reasons sets out the broad chronology of events. Disputes of primary fact about matters central to the Tribunal's conclusions will be addressed in the section headed "Discussion and conclusions".

74. The Respondent's business involves distributing 3D printers from various suppliers to businesses across the UK and Ireland. To complement its sales activities, it also provides services such as training, technical support and repairs when needed, with the aim of ensuring the successful integration of 3D printers into professional settings and their long-term effectiveness within each business.

75. On 23 March 2023, the Claimant applied, through indeed.com for a position with the Respondent for which the job title was that of Additive Manufacturing Repair Technician. On 4 April 2023, through indeed.com, he provided a corrected version of his CV together with a covering letter. The letter provided some background, including explaining that:

(1) the Claimant had, in 2005, taken "*some time away from my career to care for my Mother who was experiencing ongoing medical issues*", but her health

"*has recovered to a state that it is possible for me to return to work and I'm ready to take on the next challenge in my career*";

(2) the Claimant had "*no previous employment experience in this type of role*" but had developed his "*mechanical knowledge, maintenance, assembly and repair abilities*" through his hobbies which included building and modifying mountain bikes, computers and 3D printing;

(3) the Claimant had "*high functioning autism which gives me the benefit of being able to think about problems differently, a high attention to detail and can usually always see room for improvement*".

76. The only previous employment referred to in the accompanying CV was that of a production operative / packer between November 2004 and February 2005.

77. Not having heard anything further, the Claimant worked up the courage to telephone the Respondent on 24 April 2023 and spoke to Karl Badkin (Technical Centre Manager) who informed him that the position was no longer available but said that the Respondent had another position open and asked the Claimant to send him his CV which the Claimant did. On 26 April 2023 Karl Badkin replied offering the Claimant an interview.

78. On 2 May 2023, the Claimant attended the interview held by Karl Badkin and Jessica Perry (Technical Customer Service). During the interview, there was some discussion as to the Claimant's autism. In particular, Karl Badkin suggested that he was aware that "*people with Autism can be very passionate about things*" and asked the Claimant if he had anything about which was really passionate, to which the Claimant replied "*mechanics*", which prompted Karl Badkin to say that "*well you're in the right place for that th*en". Karl Badkin also asked the Claimant as to "*what difficulties does your Autism cause you?*". The Claimant suggested that he had social difficulties. The Claimant explained these in terms that, if he had to go into a public house or cafe and try to make friends, he would fail, but if he had to talk to people about mountain biking, computers or 3D printing or one of his other interests, then he would not have as much of a problem.

79. The Claimant had further explained that he had only found out that he was autistic in 2020 and had not been fully diagnosed yet. He explained that he had developed a major anxiety problem in 2020 which included panic attacks. This had caused him to seek mental health help and during a subsequent telephone call with a psychiatrist, the psychiatrist had said that it sounded as if the Claimant might be autistic and had recommended that he seek an assessment to get approval for funding for a full assessment. The Claimant had been put on medication for the anxiety which had stopped the panic attacks. He had the initial autism assessment in February 2021 when he was told that it was likely that he was autistic and a request for funding was sent

off for a full assessment. Having this knowledge and understanding, had assisted in an improvement in the Claimant's mental health.

80. Karl Badkin had also raised the issue as to whether any adjustments were required for the Claimant's autism. At this stage, without knowledge of the Equality Act 2010, the Claimant only seems to have suggested that he had a tendency to get frustrated if he was having difficulties with the task and that it would help, when this happened, to be able to swap to a different task for ten or fifteen minutes. Karl Badkin had suggested that this would not be a problem.

81. Karl Badkin had also asked the Claimant as to how he was on the telephone and the Claimant had suggested that "*I think I'm ok*". At this stage, he was not aware that the job involved or required making a number of outgoing calls each day.

82. On 3 May 2023 Karl Badkin sent the Claimant an e-mail offering the Claimant "*a position here at 3DGBIRE offering technical support*". The e-mail attached a letter setting out the terms of the offer of employment, the main details of which were:

(1) starting date of 9 May 2023;

(2) starting salary of £20,000 per annum, "*plus a monthly KPI Bonus of £150 per calendar month, plus commission on sales*";

(3) a probationary period of six months;

(4) a notice period on one week.

83. The letter stated that a Statement of the Main Terms and Conditions of Employment would be supplied within two months of the commencement date. At this stage, the Claimant was not provided with a job description for the role.

84. On 9 May 2023, the Claimant started his employment. He was told by Jessica Perry that he would be working in the technical centre until Karl Badkin returned. This meant that for the initial period of his employment he mostly repaired and serviced 3D printers alone and unsupervised.

85. At the start of his employment, the Claimant was not given any documentation, job description, health and safety information or training.

86. On 16 May 2023, the Claimant was asked to go to the office where he was given a number of documents to sign including a Restrictive Covenant Agreement. He was given access to the folder on the Respondent's Google Drive where the Employee Handbook was located, which he was able to download.

87. The handbook made reference to an induction programme as set out below.

“*At the start of your employment with our Company you are required to complete an induction programme, during which all our policies and procedures (including Health and Safety) will be explained to you*”.

88. The handbook included a capability procedure which set out the various stages of the procedure which would be followed, if there were concerns regarding the employee’s level of performance, with the actions which might be considered ranging from various warnings to dismissal.

89. Provision was made for the situation in which personal circumstances were impacting upon an employee's performance, as set up below.

“*Personal circumstances may arise which do not prevent you from attending for work but which prevent you from carrying out your normal duties (e.g. a lack of dexterity or general ill health). If such a situation arises, we will normally need to have details of your medical diagnosis and prognosis so that we have the benefit of expert advice. Under normal circumstances this can be most easily obtained by asking your own doctor for a medical report*”.

90. There was also provision in the capability procedure for the Respondent to vary the procedural requirements in respect of short service staff, as set out below.

“*We retain discretion in respect of the capability procedures to take account of your length of service and to vary the procedures accordingly. If you have a short amount of service, you may not be in receipt of any warnings before dismissal”*.

91. Similarly, the handbook included a disciplinary procedure which set out the various stages of the procedure which would be applicable, together with the level of sanction which might be imposed varying from a verbal warning to dismissal.

92. In common with the capability procedure, there was a discretion not to apply the disciplinary procedure where an employee had a short amount of service, as set out below.

“*We retain discretion in respect of the disciplinary procedure to take account of your length of service and to vary the procedures accordingly. If you have a short amount of service you may not be in receipt of any warnings before dismissal*”.

93. The handbook also set out a capability / disciplinary appeal procedure. The handbook further contained the Respondent’s equal opportunities policy

94. On 22 May 2023, the Claimant was present at a morning meeting in the training room when Jessica Perry shared her screen with those in attendance

and pulled up a page on HubSpot (the support ticket platform used by the Respondent) showing employee performance information such as, number of tickets answered, number of inactive tickets, amounts for invoices created, amounts for invoices completed, and also number of calls per day, from which the Claimant learned that there was a requirement to make five calls per day.

95. On Monday 22 May 2023, Karl Badkin also returned to work. This was the first day when the Claimant was asked to work in the office and was assigned support tickets on HubSpot to start learning the system.

96. Also on 22 May 2023, the Claimant had a conversation with Jessica Perry about making outgoing calls. The Claimant had replied that he was not very good at making calls and Jessica Perry had then said that he was going to have to learn.

97. On 23 May 2023, the Claimant began to feel overwhelmed by the amount and variety of tickets he had been assigned and started to feel anxious. He then realised that, with the excitement of starting the job and only working on machine repairs for the first two weeks, he had been forgetting to take his medication for anxiety (Sertraline). At one point, Karl Badfield asked if the Claimant was okay and the Claimant explained that he had forgotten to take his medication for anxiety. Karl Badfield had a reassuring chat with the Claimant as to how he was doing at the job. At lunchtime, Jessica Perry had also been prompted to ask the Claimant as to how he was, and he had explained that he felt a little overwhelmed by the switch to working on tickets and had forgotten to take his medication for anxiety. Jessica Perry similarly provided reassurance to the Claimant.

98. On 24 May 2023, the Claimant was again working in the office, and the phone rang at the desk at which he was sitting. The Claimant answered the call but got flustered and pressed the wrong button in seeking to transfer the call. This prompted another exchange with Jessica Perry in which she was reassuring.

99. On 25 May 2023, the Claimant was sent a probation review form with a heading in respect of "Week 1" to fill out for his first probation review meeting the next day. In actual fact, the review meeting was being held three weeks after the Claimant had started. The form gave his job title as Technical Centre Customer Support and the department as Customer Support.

100. Part of the form for the employee to complete was as to whether the "*first week met your expectations of the role?*". In completing this part of the form, the Claimant clearly referred to the third week of his employment which was the first week working in the office being assigned support tickets. He described the week as below.

"*I was quite overwhelmed the first couple of days with the amount and variation of the tickets, with mainly working on machines for the first couple of* *weeks and with originally applying for a repair tech role I kind of forgot I was given the tech support role".*

101. Another box on the form asked as to "*how have you found the team/atmosphere*". The Claimant answered by saying very good and "*I have not found anyone I have not enjoyed talking to yet*".

102. In completing another box on the form which asked us to any additional support or training needed, the Claimant referred to needing more "*knowledge of the computer systems and getting a lot more used to it*".

103. On 26 May 2023, the first probation review meeting took place in the training room with Daniel Abram, Karl Badkin and Jessica Perry. In the course of the discussion, the Claimant asked if there was any documentation regarding how to use HubSpot and Unleashed (support ticket and inventory software) or how to handle different types of support tickets. Management feedback was given as recorded on the form to the effect that the Claimant's "*passion for repairs and how things work is outstanding, however compared to your original excitement for offering support … from your interview, we need to see this expressed more*", with it being stated that a "*focus on making outgoing calls to solve customer problems more efficiently will be crucial*". The list of key areas to focus on for the next week included making a log of outgoing calls.

104. From the following week, the Claimant's duties were split between working in the office on support tickets in the mornings and working on repairing machines in the technical centre in the afternoon. He was also given access to online training courses.

105. During this week, Karl Badkin asked the Claimant if he was willing to attend an industry event on 7 June 2023 at the NEC in Birmingham to which the Claimant agreed.

106. On 31 May 2023, the Claimant was given his Statement of Main Terms of Employment to sign, which he did so on the same date. The preamble to this document was to the effect that the "*Statement together with the Employee Handbook, forms part of your Contract of Employment*". The Statement confirmed that:

(1) the Claimant's job title was Technical Support trainee;

(2) the Claimant's remuneration consisted of a salary of £20,000 per annum "*plus up to £150 monthly production bonus (based on successful completion of agreed KPIs)*";

(3) the Claimants position also had the "*benefit of profit related commission and performance related bonus, details of which are shown separately*";

(4) for the period from the completion of one month's service until the completion of the probationary period, the entitlement to notice was one week;

(5) the "*disciplinary rules that form part of your contract of employment and the procedures that will apply when dealing with capability or disciplinary issues are shown under the headings "Capability Procedure" and "Disciplinary Procedures" in the Employee Handbook to which you should refer*".

107. During this week, the Claimant also had his first induction meeting led by Daniel Abram with another new employee. This consisted of Daniel Abram speaking for a short time and then sitting and watching a video which was around forty minutes long. Towards the end of the video, the Claimant states that he was "*momentarily affected by my intrusive sleep problem, though at this time I did not know what it was but I had experienced it many times in the past and it was 'normal' to me*". He had been sitting in a slouched position and when he fell asleep his head tilted backwards which was enough movement to shake him awake. He then adjusted his posture to sitting up and was not affected further that day.

108. On 1 June 2023, The Claimant was sent a probation review form to complete which was described as being for "Week 2". In describing the previous week, the Claimant stated that it "*has gotten a little easier with becoming more familiar with HubSpot and how to handle the tickets*". A further box on the form asked as to "*how have you found the training this week*?". The Claimant inserted in this box that this was "*something I do need to concentrate on with the Ultimaker Academy for specific training materials, as I prefer to learn by more practical means I find it hard to stop working to take time to use them*". A comment was added, presumably by Karl Badkin or Jessica Perry that management needed "*to block out time for John to use the training materials*".

109. On the following day, the second probation review meeting took place in the back office with Karl Badkin and Jessica Perry. The feedback provided by management on the form suggested that things were going well, in the terms set out below.

"*You've made a huge improvement in teamwork and your level of support to customers is appreciated by the whole team".*

110. The key areas to work on identified by management included training up "*immediately to deliver more confidence on phone calls*".

111. On 5 June 2023, the Claimant had a further conversation with Karl Badkin about attending the event in Birmingham and arrangements were made for Karl Badkin to give the Claimant a lift to the event. After this conversation, the Claimant explained to a colleague, Daniel Darby, that he was getting a lift rather than going by train as he had a problem with long distance travel and always fell asleep so that he was worried that if he went by train he would end up in London.

112. At the beginning of this week, the Claimant received the further training which had been mentioned by Jessica Perry at the second probation review meeting. This consisted of the Claimant sitting with Chris Hunt (Aftersales Manager) in his office while he made phone calls. However, three of these calls went unanswered, one was answered but the person did not have time to talk at that moment and one went to a voicemail service. The reason for making these calls was not explained to the Claimant or the types of tickets for which he should make calls, so he did not find this training very useful.

113. On 7 June 2023, the Claimant travelled to Birmingham with Karl Badkin. During the journey, the Claimant quickly fell asleep and then fell asleep a second and third time after each stop at a motorway service station. When walking to the NEC, Karl Badkin commented on the Claimant having slept the whole way there and the Claimant explained that he had a problem with long distance travel. The Claimant got a lift back afterwards with Eli Parry (Customer Service) with the Claimant sleeping the entire journey as there were no stops. The following day, Karl Badkin asked the Claimant as to Eli Parry's driving, with the Claimant replying that he did not know as he had been asleep which prompted Karl Badkin to laugh.

114. On 12 June 2023, Karl Badkin asked the Claimant to fill out a form which asked the Claimant to rate himself from 1 to 5 in various categories such as technical ability, customer service and phone performance. The Claimant gave himself a low score for phone performance. The form went on to ask the Claimant to list three goals that he wanted to work towards over the next month, for which the Claimant listed learning more about HubSpot to improve his phone performance, learning more about Unleashed to improve his phone performance, and learning about when to make phone calls.

115. On 15 June 2023, the Claimant attended his second induction session led by Paul Croft (Director) in the training room, with four other new employees also attending. The induction consisted of Paul Croft speaking to the group for much of the day. During the morning portion of the induction, the Claimant was getting bored and restless and started to play with a pen as a fidget toy, but he soon stopped as he realised that the noise of him doing this might distract others. However, after he put the pen down, he fell asleep multiple times and one of the other new employees had to wake him up by touching his shoulder. The same thing happened in the afternoon. When he got home that evening, The Claimant was concerned that he would have failed the induction training with having been consistently falling asleep and decided that he needed to speak to Karl Badkin about it the next day.

116. On Friday 16 June 2023, the Claimant arrived at work and spoke to Karl Badkin explaining that he was concerned that he had failed the induction due to falling asleep. Karl Badkin suggested that it was not very good doing that in front of the Claimant's boss with the Claimant explaining that he could not

help it and it was something which had affected him since school. Again, Karl Badkin sought to be reassuring by suggesting that the Claimant's probationary period was generally going well, whilst also suggesting that the Claimant should not worry about missing the targets for phone calls as he had not been properly trained.

117. The issue of the Claimant falling asleep during the induction training had also been raised with Karl Badkin (as the Claimant's line manager) by Daniel Abram as a result of Paul Croft informing Daniel Abram that the Claimant had fallen asleep multiple times during the induction meeting. It seems to have been decided to arrange a meeting with the Claimant to discuss the incident as soon as possible. This was intended by Daniel Abbott to be an initial investigation meeting in order to understand why the Claimant fell asleep during such an important meeting.

118. The Claimant's third probation review had been scheduled to take place on 16 June 2023 at the end of his sixth week, but this was moved to 20 June 2023 due to the induction taking place on 15 June 2023 and Jessica Perry and Eli Parry being away.

119. The Claimant had been sent a further probation review form to complete (this time stated to be in respect of "Week 4" although the form identified the review period as being between 1 June and 16 June 2023).

120. In completing the form, the Claimant referred to his performance suffering as he had lost some confidence in his abilities as a result of a particular piece of work which had not gone well. In terms of training, he stated that "*I've had* [the] *chance to complete a few of the courses available* [on] *the Ultimaker Academy but I still need to try to find time to complete more of them*". He also suggested that "*I really think some documentation on processes in HubSpot, Unleashed and Salesforce would help as I would be able to refer to that for more common things when I am not 100% sure what I'm doing is the right thing*". The Claimant further added that "*I also think I need more training for when to make outbound phone calls*".

121. The probation review meeting was scheduled to start at 10.30 am on Tuesday 20 June 2023, but at 10.10 am, Karl Badkin came to the office to get the Claimant and led him to the training room where Daniel Abram was sitting at the table and explained that this would be a "*documented meeting*". As the Claimant was not expecting this, he became extremely anxious and states that he started to enter a state of "*autistic shutdown*" which he describes as a "*state of withdrawal and disconnection experienced by some autistic individuals when they become overwhelmed by sensory input, emotional stress, or other triggers*". This meant that his mind became blank and he struggled to think of what to say.

122. It was explained at the outset of the meeting that its purpose was for Daniel Abram to ask questions of the Claimant so as to seek to understand why he had fallen asleep multiple times during the induction with Paul Croft. The explanation given by the Claimant was that lack of activity "*makes me switch off and fall asleep, no medical reasons, happens as a passenger in traffic, trying to keep myself awake*".

123. Daniel Abram suggested that it was "*disrespectful to fall asleep and unacceptable*". The Claimant made it clear that it was unintentional and that he apologised. There was then a discussion about the importance of the induction training with Daniel Abram stressing that the information being provided at the induction training "*is not only the strategy of the company but how we operate, policies, procedures, health and safety, all that kind of information is imparted in that meeting, by falling asleep we cannot ensure most of that information is retained*". The Claimant sought to explain that he learned "*better from reading and doing due to autism, retaining information from talking goes through one ear and out of the other*". The Claimant also referred to being "*not high functioning enough*" (which, again, seems to have been referring to his autism) in terms of struggling to absorb information. Daniel Abram then asked the Claimant as to what could be done to improve the induction process with the Claimant suggesting that too much was being crammed into a single day and that breaking up the provision of information might assist. The Claimant seems to have interpreted a further question as asking as to what could be done to stop him falling asleep and replied by suggesting sitting "*on some drawing pins to help stay awake*". The Claimant accepts that he smirked at this point because although he only meant putting one or two drawing pins on the back of a chair, an image popped up in his head of a chair with the back completely covered like a bed of nails. This had prompted Daniel Abram to comment that he did not think that the Claimant was "*taking this seriously*". After a long pause, the Claimant was recorded as stating that "*I am trying to, if you don't laugh, you cry, I do want to keep my job*". The meeting ended with the Claimant repeating his apologies.

124. Daniel Abram states that he was concerned that the Claimant seemed not to see the seriousness of the health and safety aspect of falling asleep "*around exposed electrical equipment, which he had to repair as part of his duties*", although the Claimant makes the valid point that this was not the setting in which he had fallen asleep.

125. It is significant that the note of the meeting does not specifically describe the meeting as an investigatory meeting or a meeting which formed some part of a formal process, other than describing it as a "*documented meeting*". Additionally, the notes of the meeting do not record any reference being made to any next steps or further action which might follow.

126. At the end of the documented meeting, Daniel Abram asked the Claimant to leave the room for five to ten minutes while he discussed next steps with Karl Badkin.

127. After leaving the room, the Claimant walked into the technical centre and said to a colleague, Alex Lilley, that he thought that he was about to get "*fired*" and started to change the password on his company laptop from his personal password. After a short while, Karl Badkin came into the technical centre and called the Claimant back in to the training room.

128. When the Claimant got back into the training room, Karl Badkin passed him the note which had been taken of the documented meeting and Daniel Abram asked the Claimant if the note recorded what was said during the meeting. The Claimant skim read the note, decided it was close enough and agreed.

129. The meeting then moved on to the Claimant's probation review meeting, without the Claimant really appreciating that there had been a transition from one meeting to the next.

130. At this stage, Daniel Abram was intending to revisit the issue of the Claimant falling asleep at the end of the review meeting.

131. The review meeting began positively, with a discussion as to the parts of the probation form completed by the Claimant. In his Statement of Evidence, the Claimant accepts that he cannot remember aspects of the discussion which took place regarding some of the sections of this part of the probation review form (in particular, the first and third sections).

132. The discussion included the part of the form dealing with the employee's future development. The Tribunal notes that any such discussion would have been otiose if, at this stage, Daniel Abram was intending to terminate the Claimant's employment as a result of the issue in respect of falling asleep. However, from this discussion, Daniel Abram understood that the Claimant ultimately wanted to work exclusively on machine repairs. Daniel Abram clarified that while machine repairs were part of the Technical Support Trainee role, assisting customers by making five phone calls per day was a mandatory part of the role, and all team members were expected to be trained in all aspects of technical support. The Claimant then stated that he was not comfortable communicating with customers, particularly over the phone. Daniel Abram's version of events is that he expressed concern to the Claimant, saying, "*I'm struggling to see how we can bridge this gap*", expecting the Claimant to engage in finding a solution. Instead, the Claimant abruptly got up and walked out of the building.

133. Not long after the meeting, Daniel Abram recorded his version of the discussion on the probation review form in the box for management feedback. This records that there was a discussion about the "*alignment of John's*

current role and his ambitions". The note recorded that the role to which the Claimant had "*agreed*" was "*on tickets*", whereas the Claimant wanted to be on "*machine repairs*" but this was an area where the Respondent had "*no availability*". Daniel Abram advised that, unfortunately, machine repairs was only a "*small aspect of the role*" to which the Claimant had agreed and that "*talking to customers on the phone and via e-mail is the job*" (which appears to be inconsistent with the job description in so far as the job description states that the "*core of this role is to carry out servicing and repairs*"). The note records that the Claimant admitted that he did not feel comfortable communicating with customers at all but specifically on the phone. At this point, the probation review form records that Daniel Abram "*advised that I could not see how we could bridge the gap and John walked out of the meeting and left the premises*".

134. This is the main area of factual dispute in relation to the events in this case. The Claimant's version of events is that, after Daniel Abram had suggested that the role accepted by the Claimant was not one which exclusively involved repairs but was "*on tickets*", then in "*my near non-verbal low mental state the only thing I could think of in response was "I prefer working on machines" as I don't need to talk to them*". Daniel Abram had said "*the job is what it is*", and had then said, "*you're not good with the phone are you?*" When the Claimant accepted this, he claims that Daniel Abram then said, "*I don't think you are a good fit for the company, I think we should part ways*".

135. The Statement of the Claimant states that "*when I heard that I had the impression that my employment had been terminated*". The Claimant saw Karl Badkin put his head into his hands. The Claimant then became extremely emotionally overwhelmed to the point he feared that he would have an "*autistic meltdown*", which he describes as "*a complete loss of behavioural control resulting from feeling overwhelmed, often due to sensory overload or emotional distress*". His Statement further explains that it is "*a physical reaction, not a tantrum, and is involuntary, stemming from an inability to cope with the situation*" and that meltdowns "*can involve verbal outbursts, physical actions, or a combination of both*". The Claimant felt that he could not allow himself to have a meltdown in the building and he felt that he had to leave as soon as possible. His Statement of Evidence is to the effect that "*I think I said something like "I was expecting this, I have changed the password … so you are not locked out of it" gesturing towards the laptop, I stood up and pushed the chair in and I said "thank you for the opportunity you gave me" and left the room quick*".

136. The Tribunal was satisfied that whatever was said by the Claimant at this point in time was not said clearly and, as result, was not clearly heard by Daniel Abram who thought that he had heard the Claimant say that he was quitting.

137. It is also to be noted that the comments in the box for management feedback concluded with Daniel Abram stating that "*I would like to have addressed again formally the conversation had earlier in the day regarding John falling asleep multiple times during his induction but there was no opportunity for this after John abruptly left*".

138. The Tribunal considered that both witnesses were doing their best to remember the conversation. Ultimately, the Tribunal concluded that the description of the conversation provided by Daniel Abram was more likely to be accurate. It is consistent with the version of events recorded on the feedback section of the probation review form. It is consistent with what happened subsequently. If Daniel Abram had stated words which amounted to informing the Claimants that he was being dismissed, then he would not have treated the situation as one in which the Claimant appeared to have left his employment of his own accord and then given the Claimant an opportunity to confirm that he had not walked out of the job and resigned.

139. Above all, the Tribunal thinks that the Claimant's mental state at this point in time was probably not conducive to having an accurate recollection as to what was said. This possibility was raised with the Claimant in the questions asked by the members of the Tribunal. In relation to whether Daniel Abram had suggested that the Claimant was not a "*good fit*" and they should "*part ways*", the Claimant was asked if he was in emotional state and so may have misheard. His answer to the Tribunal was that he was in a calm state until he had heard Daniel Abram say this at which point his brain had clicked that his employment had been terminated, so that it was only at that point that his mental state became impacted.

140. However, this appeared to be inconsistent with the Claimant's Statement of Evidence which was clearly referring to an earlier point in the discussion when "*my state of autistic shutdown progressed to being near non-verbal and it felt like my mouth did not want to move and I was having to force myself to speak*", so that "*I do not remember what Daniel said in response to the fourth section but it caused me to state that I originally applied for the repair role but I don't remember exactly what I said*" (this is in addition to his Statement of Evidence having also conceded not remembering aspects of the discussion which took place regarding the first and third sections of the probation review form). The Claimant describes, at this point, being in a "*near non-verbal low mental state*", which was before Daniel Abram had said anything to cause the Claimant to walk out of the meeting and premises.

141. As such, the Tribunal has concluded that the Claimant had misheard or misinterpreted what he had been told by Daniel Abram and this had caused him to have the impression that he had been dismissed.

142. Having left the room, the Claimant quickly walked into the office, picked up his bag, then hurried to the technical centre where his bicycle was stored and collected it and left the building very quickly. As he was getting ready to ride away, Karl Badkin came rushing out of the building holding the Claimant's wireless mouse. The Claimant made it clear that he did not want the mouse and rode away.

143. Daniel Abram had also initially followed the Claimant to check if he was okay, but having got to the door he could see that Karl Badkin was with the Claimant in the car park and assumed that Karl Badkin was trying to get the Claimant back. However, Karl Badkin came back and said that the Claimant had left.

144. The Claimant states that he does not remember the ride home. It then took him some time to be able to feel up to doing anything. At some point, he realised that he should log out of the company systems and remove any data on his phone and computer. He also left a message in the "Tech wizards" WhatsApp group as to thanks "*for the opportunity you gave me, if you need anything from me Karl has my personal email and my number, John*". While logging out and removing data from his computer, the Claimant saw that his HubSpot account had been deactivated and this reinforced his belief that his employment had been terminated.

145. Later, the Claimant gathered up the company property in his possession such as his work shirt, company branded pen and identification lanyard and returned to the Respondent's premises where he rang the bell and waited until Eli Parry came to the door and handed over the items

146. In the meantime, following the Claimant's abrupt departure, Daniel Abram had discussed the situation with Paul Croft and William Brown as the other members of the Respondent's senior leadership team. They were unclear as to whether the Claimant had, himself, intended to end his employment, by his actions and whatever he had said, which had not been clearly heard by Daniel Abram. They reviewed the circumstances of the Claimant falling asleep multiple times during his induction meeting and, when asked, having not disclosed any medical conditions and having stated that there was nothing that the Respondent could do to address the issue. They assessed what they considered to be the risks of a Technical Support Trainee falling asleep on the job and were concerned that, if this occurred while repairing machinery, it could pose a serious hazard in terms of potential dangers, which included electrocution, and which could result in serious injury or even death.

147. This resulted in the Respondent deciding to speak to its HR advisors at Peninsula to discuss both the perceived health and safety implications and the lack of clarity as to whether the Claimant's employment had been brought to an end.

148. As a result, a discussion took place between Daniel Abram and Kayleigh Kite of Peninsula. The Tribunal considers that it is likely, given subsequent developments, that Daniel Abram was making it clear, no doubt as a result of the discussion that he had had with Paul Croft and William Brown, that the Respondent's preferred outcome was for the Claimant's employment to come to an end, if it had not already ended.

149. The Respondent was advised by Peninsula, as a first step, to seek clarification from the Claimant as to whether he had intended to resign. A draft letter was sent by Peninsula to Daniel Akram at 1.49 pm. Accordingly, Daniel Abram e-mailed the Claimant at 6.37 pm on 20 June 2023 attaching a letter requesting confirmation of his position. The letter reflected the understanding of Daniel Abram that the Claimant had resigned but expressed concern that any decision may have been reached in the heat of the moment and effectively gave the Claimant an opportunity to reconsider any such decision, although it was pointed out that, he would "*continue to be the subject of our formal procedures*".

150. The Claimant spent some time drafting a reply to Daniel Abram which was then e-mailed at 3.25 am on 21 June 2023, saying that he had not intended to resign. The e-mail set out a description as to the Claimant's circumstances Including making reference to his autism. He apologised "*for misunderstanding and leaving the meeting*". Having sent the e-mail, the Claimant then went to sleep.

151. Daniel Abram forwarded the Claimant's e-mail to Peninsula at 6.54 am. In forwarding the letter, Daniel Abram told Kayleigh Kite that "*I am quite sure that we want to terminate John's employment but would like the best advice on how to proceed … especially as he has now raised some medical concerns*".

152. The Claimant's Statement of Evidence says that he woke up at around 7.30 am and got ready to go to work. Just before 8.00 am he received a response from Daniel Abram, which thanked him for his "*explanations*" and stated that Daniel Abram with seeking HR advice and "*I believe it would be best for you to remain at home today whilst we understand the correct disciplinary procedure*".

153. At 9.22 am on 21 June 2023, Kayleigh Kite emailed Daniel Abraham asking for notes of the meeting that he had previously had with the Claimant and suggesting that the respondent "*may have to have a further meeting after this to discuss the concerns, capability for him to carry out the role and to address any health issues he may have before we can get to a safe dismissal*".

154. Daniel Abram sent the minutes of the documented meeting to Kayleigh Kite at 12.13 pm adding that the Respondent "*would like to follow the correct process if you can advise*".

155. Kayleigh Kite replied at 2.13 pm in an e-mail which suggests that a discussion had taken place in that she thanked Daniel Abraham for "*explaining the implications to me*". As a result, she stated that, having considered this and "*the severity and importance of the role I do believe a probationary dismissal will be safe regardless of any health issues John may have so long as we base the reasons for dismissal on performance and health and safety implications*". Accordingly, she attached a probationary dismissal template letter for Daniel Abram to amend accordingly. She recommended stating within the letter "*the severity of the health and safety regulations … if John was to fall asleep during shift*".

156. Daniel Abram then seems to have sent a draft dismissal letter to Kayleigh Kite which was approved.

157. In his Statement of Evidence, the reasons given for the dismissal by Daniel Abram were explained in the terms set out below.

"*I considered the Claimant's performance, his conduct in falling asleep during the Induction, including Health and Safety meeting, his conduct at the investigation meeting and the fact that he did not offer us any way to address the issue of him falling asleep at work. I also felt that he did not grasp the seriousness of the situation and the fact that his conduct in falling asleep at his post raises serious Health and Safety concerns for him, and others around him. I felt I had no choice but to write to the Claimant terminating his employment*".

158. Later that evening, the Claimant received an e-mail from Daniel Abram titled "Letter of notice". The letter was in the terms set out below.

"*Further to the probation review meeting held on 20/06/23, I am writing to confirm my decision.*

As you are aware, when you started work with us we had high hopes and expectations that you would meet the standards we require. Unfortunately, this has not proved to be the case.

As you are aware our concerns were:

We have observed clear indications of inadequate performance on your part, including your admission of such and the act of abruptly leaving a meeting.

At the meeting, your explanation was:

There was no reasonable explanation given as to why you fell asleep during your induction, only that it sometimes happens to you and that you were sorry.

I believe this to be unsatisfactory for the following reasons:

The greatest concern here is the nature of your job role and Health and Safety concerns. Your responsibilities encompass the repair of electronic machinery, which presents significant health and safety implications. The potential consequences of your dozing off while working on our most frequently repaired equipment in the service centre extend to the risk of life-threatening situations, particularly considering the exposure to electrical transformers within the machine. It is essential to recognise that numerous other health and safety risks are associated with working in our repair centre, and should you fall asleep, the ramifications could have long-lasting impacts on individuals' well-being. Additionally, you are entrusted with operating technologies that reach temperatures exceeding 450 degrees Celsius, and some of the materials involved are irritants that require COSHH authorisation. It is vital to acknowledge that the potential of your falling asleep in this context could result in severe and enduring health consequences.

Having given careful consideration to the above points we have reached the conclusion that you have failed to demonstrate your suitability for your role during your probationary period.

It is with regret that I confirm that your employment is terminated with immediate effect. You will be paid in lieu of notice".

159. After his initial anger at having lost his job in this way, the Claimant undertook a Google search using terms like "*falling asleep while sitting*" and "*falling asleep during the day*". After a while he found an article called "Do You Have ADHD And Daytime Sleepiness?" Further reading took the Claimant to a link to another article called "Inattentive ADHD". These articles caused the Claimant to think that he had found the explanation for the issue in respect of falling asleep.

160. On the following day, 22 June 2023, the Claimant drafted and e-mailed a reply to the letter of notice. The e-mail stated that the Claimant was now planning to appeal against his dismissal on the basis of new information. He explained that, following his dismissal, as a result of being "*quite unhappy that I could not provide a valid explanation for falling asleep … I began looking for answers for why this was happening and I believe I now know why, it seems my mental health diagnosis for anxiety was incorrect and it is much more likely that I have Inattentive ADHD*". In addition to including the links to the two articles referred to above, the Claimant cut and pasted various extracts from the articles to the effect that a "*problem for some ADHDers is falling asleep during the daytime at unusual times*" and the "*people who experience this often have inattentive ADHD*".

161. In his e-mail, the Claimant took issue with the suggestion that his tendency to fall asleep during the day gave rise to health and safety concerns in that he

suggested that the issue only arose at times of low activity and would not arise when his level of interest was high such as when working with a machine.

162. The Clements e-mail further set out the steps that he was proposing to take "*to take to ensure it NEVER happens again*", which were stated to include:

(1) contacting his GP in order to seek a mental health reassessment taking account of the information which he had discovered with a view to being put on medication for ADHD;

(2) standing in any future meetings and similar events;

(3) use of a fidget toy where standing was not possible;

(4) taking notes and keeping lists.

163. At 17.35 pm on the same date, namely Thursday 22 June 2023, the Claimant sent a letter of appeal to William Brown of the Respondent. In summary, the grounds of appeal were as set out below.

(1) The sanction of dismissal was unduly harsh because his inadequate performance in falling asleep during the induction had been caused by a previously unknown mental health issue.

(2) The dismissal decision "*should be reconsidered as a result of new evidence which has come to light*", namely that "*I am now aware that my previous mental health diagnosis of 'General Anxiety Disorder' was very likely incorrect and it is much more likely that I am affected by 'Inattentive ADHD' and I am physically incapable of staying awake during times of inactivity and require constant mental stimulation and know steps I need to take to ensure this does not happen again*".

164. As detailed earlier, the Claimant's medical records show that he attended his GP on 26 June 2026 with it being recorded that the Claimant "*wanted to discuss his MH, feels was mis-diagnosed*" (at that point the Claimant had a current diagnosis of Personality Disorder and Generalised anxiety disorder) "*and would like to be assessed for ADHD*".

165. The Claimant seems to have gone from his GP appointment to the Respondent's premises, as he was concerned that he had not heard anything back regarding his appeal. Because of this, the Claimant had decided to print out a copy of the letter of appeal and deliver it by hand to William Brown at the Respondent's premises. He undertook the journey to the Respondent's premises by bicycle wearing a cycle helmet which had a mounted camera. Shortly before he arrived at the Respondent's premises, he switched the recording on as he wanted proof of delivery. As a result, the Claimant recorded the exchange which took place with Daniel Abram who took receipt of the appeal letter. Daniel Abram indicated that the Respondent would be replying that day by e-mail.

166. A letter dated 26 June 2023 was subsequently e-mailed to the Claimant setting out the decision of Paul Croft which was to the effect that the original decision taken by Daniel Abram was upheld. It was made clear that there was no further right of appeal. In summary, the reasons relied upon in dismissing the appeal were as set out below.

(1) The Claimant's responsibilities included the repair of electronic machinery which presented significant health and safety implications and the potential consequences "*of your dozing off extend to the risk of life threatening situations*".

(2) The health and safety risks associated with falling asleep whilst working in the Respondent's repair centre "*include injuries that cause long lasting impacts on individuals well-being*".

(3) The role required a level of trust when operating machinery that reaches temperatures exceeding 450°C, and some of the materials involved are materials that require COSHH authorisation so that falling asleep "*in this context could result in severe and enduring health consequences*".

167. The Claimant replied to this letter by e-mail dated 27 June 2023. He stated that "*I have Inattentive ADHD, which causes me to fall asleep at VERY specific times of extremely low mental and physical activity which I now FULLY understand and am FULLY aware of how to prevent until such time as I have been fully medically assessed and put on the appropriate medication*". The Claimant suggested, for the first time, that his treatment amounted to disability discrimination.

Relevant law

Knowledge of disability

168. Under section 15(2) of the Equality Act 2010 ("EA 2010"), an employer (A) cannot be liable for discrimination arising from disability if "*A shows that A did not know, and could not reasonably have been expected to know, that B had the disability*".

169. Equality Act 2010 Schedule 8 paragraph 20 provides that the duty to make adjustments does not arise if the employer "*does not know and could not reasonably be expected to know*" that the employee has a relevant disability and "*is likely to be placed*" at the disadvantage in issue.

170. In Pnaiser v NHS England [2016] IRLR 170, EAT, it was explained that, in respect of knowledge of disability, these provisions "*do not require knowledge (whether actual or constructive) of the precise diagnosis of the disability in question*" but do "*require knowledge (actual or constructive) of the facts constituting the disability*" namely that "*the individual is suffering from a physical or mental impairment which has substantial and long-term adverse*

effects on his or her ability to carry out normal day-to-day activities", and the "*question what a Respondent knew or should reasonably have been expected to know is one for the factual assessment of a Tribunal*".

171. Paragraph 5.15 of the Equality and Human Rights Commission's statutory Code of Practice on Employment states that employers must "*do all they can reasonably be expected to do*" to find out whether a Claimant has a disability. What is reasonable will depend on the circumstances. However, this is an objective assessment.

Burden of proof in discrimination cases

172. Equality Act 2010 section 136 provides for a shifting burden of proof, as set out below.

"*(2) If there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

173. Equality Act 2010 section 136 provides that the burden of proof shifts to a Respondent once the Claimant proves facts from which the Tribunal could decide (in the absence of adequate explanation) that there has been a breach of the relevant provision of the EA 2010 There is a two-stage test. The burden is first on the Claimant to prove facts from which the Tribunal could, in the absence of any other explanation, reach the requisite conclusion. The Tribunal can consider at that first stage the impact of the Respondent's evidence on, for example, the credibility or context of the Claimant's evidence. At the second stage, it is for the Respondent to provide an explanation for the prima facie discriminatory acts which shows that those acts were "*in no sense whatsoever*" (see <u>Igen Limited v Wong [2005] IRLR 258</u>, approved by the Supreme Court in <u>Royal Mail Group Limited v Efobi [2021] IRLR 811</u>). At the first stage, it is not enough for a Claimant merely to show a difference in status and a difference in treatment. He or she has to show something more (see <u>Madarassy v Nomura International plc [2007] IRLR 246</u>, at paragraph 56).

Discrimination arising from disability (Equality Act 2010 section 15)

174. Discrimination arising from disability is defined by EA 2010 section 15(1) on the basis that "*person (A) discriminates against another (B) if, A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim*".

175. Accordingly, the Claimant must have been treated unfavourably. Moreover, the unfavourable treatment must also be "*because of something arising as a consequence of*" the Claimant's disability.

176. In Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, EAT, Langstaff P explained that this involved considering causation at two different stages, as set out below.

"*The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" — and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B*".

177. If the unfavourable treatment was because of something arising as a consequence of the Claimant's disability, the question then becomes that of whether it was justified as a proportionate means of achieving a legitimate aim.

178. In *Chief Constable of Gwent Police v Parsons and Roberts (2020) UKEAT/0143/18 (unreported)*, the EAT summarised the applicable principles in considering a justification defence. Once a *prima facie* case of discrimination arising from disability is shown the onus is on the employer to establish justification. This involves showing that the unfavourable treatment was a reasonably necessary and proportionate means of achieving a "*legitimate aim*". Saving money is not in itself a legitimate aim but preventing a "windfall" could in principle be one.

179. To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so (see Homer v Chief Constable of West Yorkshire [2012] UKSC 15).

180. In Hensman v Ministry of Defence [2014] EqLR 670, EAT, Singh J held that when assessing proportionality, while a Tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business

181. Thus, it is for the Tribunal to balance the reasonable needs of the business against the discriminatory effect of the employer's actions on the employee (see Land Registry v Houghton [2015] UKEAT/0149/14).

Indirect discrimination

182. The statutory definition of indirect discrimination is set out at Equality Act 2010 section 19 as set out below.

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

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if —

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim”.

183. In Chief Constable of West Yorkshire Police v Homer [2012] ICR 704, SC, it was explained that the “*law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic*”.

184. The burden to show application of a PCP, particular disadvantage caused by that PCP to the group, and like disadvantage to the Claimant all rests upon the Claimant. It is only if the Claimant satisfies those three burdens that it is for the Respondent to justify the PCP (see Dziedziak v Future Electronics [2012] UKEAT/0270/11, at paragraph 42).

185. To succeed on a complaint of indirect discrimination pursuant to EA 2010 section 19, the Tribunal must be satisfied that all of the following elements have been met as set out below.

(1) The Respondent applied the PCP. The first step is to determine what the PCP is, and if it has been applied to the Claimant, by whom it was applied. This is a matter of factual inquiry.

(2) A group disadvantage exists. Group disadvantage can be established in a number of ways. This was considered by the EAT in Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] ICR 1699, where (at paragraph 56), the EAT held that:

(a) the absence of statistical evidence does not necessarily mean that particular disadvantage cannot be shown;

(b) whilst group disadvantage may be inferred from the individual's own disadvantage, care has to be taken as the individual's disadvantage may arise in circumstances that are unusual or unique to the Claimant, and which do not exist in the wider group;

(c) the disadvantage may be inherent in the PCP; or

(d) the disadvantage may be established having regard to matters of which judicial notice should be taken.

(3) The Claimant suffered an individual disadvantage because of the PCP. There has to be a causal link between the PCP and the individual disadvantage. It is fanciful to suppose that people who suffer a disadvantage because of their own conduct have suffered any harm as a result of the PCP (see Essop v Home Office (UK Border Agency) [2017] ICR 640 SC, at paragraph 32). It must be permissible for a Respondent to show that the individual has not suffered harm as a result of the PCP in question.

(4) The Respondent could not justify the PCP. A PCP is justified if the employer can show that it is a proportionate means of achieving a legitimate aim (Homer v Chief Constable of West Yorkshire [2012] UKSC 15, paragraphs 19 to 20). The EAT in City of Oxford Bus Services Ltd v Harvey [2018 UKEAT/0171/18, at paragraph 22, derived the following principles from the authorities in relation to the defence of justification:

(a) there needs to be a critical evaluation of whether the Respondent's reason demonstrates a real need to take the action in question;

(b) if there was a need, then consideration must be given as to the seriousness of the impact of those sharing the relevant protected characteristic;

(c) proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment;

(d) a Respondent need not prove there was no other way of achieving its objectives. Further, it should be remembered that the requirement to justify a PCP should not be seen as placing an unreasonable burden upon Respondents (Essop (see above) at paragraph 29).

Duty to make reasonable adjustments (Equality Act 2010 sections 20 and 21)

186. Equality Act 2010 section 20 sets out the duty to make adjustments in the terms set out below.

"*(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.

187. Equality Act 2010 section 21 provides simply that a failure to comply with the above requirements is a failure to comply with the duty to make reasonable adjustments, and that a failure to comply with the duty gives rise to discrimination against the disabled person.

188. Guidance was provided by Employment Appeal Tribunal (Elias P) in Project Management Institute v Latif [2007] IRLR 579, EAT, as set out below.

"*The … Claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the Claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the Respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not*".

Breach of contract

189. The contractual jurisdiction of Employment Tribunals is governed by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623. For a Tribunal to be able to hear a complaint of breach of contract brought by an employee, that complaint must arise or be outstanding on the termination of the employee's employment, and must seek one of the following:

(1) damages for breach of a contract of employment or any other contract connected with employment;

(2) the recovery of a sum due under such a contract; or

(3) the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

Discussion and conclusions

Respondent's knowledge and causation

190. The Claimant had only provided the Respondent with knowledge that he had symptoms of autism and anxiety. This would not have provided the Respondent with notice that falling asleep was a symptom of any disability. However, in his communications to the Respondent after his dismissal, the Claimant suggested that the symptom of having fallen asleep multiple times during a training session might have been caused by a mental health condition, namely inattentive ADHD and provided the Respondent with access to online information which he was suggesting was consistent with such an analysis on his part. Whilst the Tribunal recognises that this involved self-diagnosis on the part of the Claimant, the Tribunal also considers, having regard to the significant concerns which such symptoms understandably gave rise to, in terms of health and safety, that the Respondent could reasonably have been expected at this point in time to have made further enquiries, which potentially would have put the Respondent in the position of identifying that the Claimant had symptoms of ADHD. It would not have been unreasonable for the Respondent to have sought occupational health advice. It was receiving advice of an HR kind from in relation to an issue in respect of which occupational health advice would also clearly have been appropriate.

191. However, the likelihood is that, in June 2023, this would simply have established that the Claimant considered that he might have ADHD and had some symptoms which might be consistent with ADHD with the further information that, by that point in time, the Claimant had seen his GP with a view to a referral being made in respect of his suspected ADHD. The Tribunal doubts that this would have established that the daytime sleepiness to which the Claimant refers was caused by ADHD. This is because the Tribunal is not satisfied on the balance of probabilities that the material now available establishes that the Claimant's daytime sleepiness was caused by inattentive ADHD.

192. None of the medical evidence that is in the bundle which predates the hearing before Employment Judge Buzzard in July 2024 refers to the Claimant's daytime sleepiness. At that time an ADHD referral had been made, although it is unclear what became of that referral. Additionally, a request for funding for an autism assessment had previously been made. The evidence would seem to suggest that this resulted in the autism and ADHD assessments in June 2025 resulting in the assessment reports and confirmed diagnosis of autism and further diagnosis of inattentive ADHD in October 2025.

193. Employment Judge Buzzard in July 2024 had been specific about the burden of proof on the Claimant. Whilst the Tribunal found that the Claimant was disabled by reason of autism, General Anxiety Disorder and ADHD, the

Tribunal stated that this "*finding should not be read as inferring that any specific individual behaviour of the Claimant arose from his disability*", in particular, "*whether falling asleep at work arose from the Claimant's disability*", and the Tribunal's conclusion on the issue of disability was not "*a finding that the Respondent was either aware of these disabilities at the relevant time, or that the disability could cause any specific disadvantage to the Claimant, in particular cause him to fall asleep at work*". It was stressed that the "*Claimant will need to prove these matters to the extent he intends to rely on them in support of the claims he makes*".

194. However, the evidence in the diagnostic reports does not establish that the Claimant's daytime sleepiness was caused by inattentive ADHD or that, specifically, the Claimant falling asleep on 15 June 2023 was caused by his disability.

195. Properly analysed, what these reports do is set out a history which was presumably provided by the Claimant regarding experiencing excessive daytime sleepiness. This was stated to be one of the primary referral concerns. There is no reference in the clinical summary, which sets out the reasoning for any diagnosis, to the effect that the Claimant's daytime sleepiness was caused by ADHD or autism or caused him to meet the criteria for either condition.

196. One of the criteria is that the traits are present in the early developmental period. While the Claimant has referred to issues with daytime sleepiness going back to the start of his teenage years, the autism report notes that during the Claimant's middle to late childhood "*patterns of activity level, sleep and appetite were fairly predictable*".

197. The ADHD report relied on the Weiss scale using data provided by the Claimant to set out, in a table, the functional domains in which the Claimant's ability to function is impaired by emotional or behavioural problems. It is noteworthy that the table identified an impairment in all functional domains with the exception of work. This would appear to be despite the fact that the Claimant had referred to falling asleep at work as a primary referral concern.

198. The simple point is this: daytime sleepiness is only referred to in the report as part of the history given by the Claimant. It is not referred to specifically as part of the evidence relied upon in making the diagnosis. Nor do the reports say that any daytime sleepiness was a symptom of the Claimant's autism or ADHD.

199. The Tribunal recognises the possibility, from the Google printouts provided by the Claimant, that individuals with inattentive ADHD can experience daytime sleepiness.

200. Demonstrating that something is possible is far removed from satisfying the burden of proof that it is likely on the balance of probabilities. The Tribunal was not satisfied on the evidence before the Tribunal, that it was in a position to conclude that the Claimant's issues with falling asleep were disability related.

Discrimination arising from disability

201. Clearly, the Respondent treated the Claimant unfavourably by dismissing the Claimant and by rejecting the Claimant's appeal against dismissal.

202. Deciding whether this was unfavourable treatment which arose from the Claimant's disability involves considering the reason for the dismissal.

203. The Claimant's case relies upon three possible reasons: falling asleep, difficulty using the telephone and walking out of the probation meeting.

204. The Claimant's case is based partly upon his version of events regarding what he was told by Daniel Abram immediately before he left the probation meeting but the Tribunal prefers the version of events of Daniel Abram in relation to the discussion at that point in time, not least because, based on the Claimant's own Statement of Evidence he was already in a state which he described as amounting to an autistic shutdown, at the point in time when any conversation regarding those issues would have been taking place.

205. The letter giving notice does set out or make reference to concerns as to inadequate performance on the Claimant's part, without identifying the inadequate performance concerned other than suggesting that it had been admitted by the Claimant. It does also refer to the Claimant's act of abruptly leaving a meeting.

206. Having heard the evidence of Daniel Abram, the Tribunal was satisfied that those were, undoubtedly, concerns which the Respondent had, but were not ultimately the reason for its decision.

207. The reference to inadequate performance must be referring to the Claimant falling asleep which was something which he admitted. The other issues which had arisen regarding his performance were not issues which, the Tribunal considers, would, at that point in time, have resulted in a decision to dismiss him. Indeed, prior to the Claimant having the problem with falling asleep, the evidence suggests that the Respondent was being relatively supportive in relation to any performance issues that the Claimant had.

208. The focus of the notice letter in terms of outlining the Claimant's explanation and then explaining the Respondent's position as to that explanation being unsatisfactory is entirely on the issue in respect of the Claimant falling asleep. The Respondent was not satisfied that any reasonable explanation had been given. Indeed, the Claimant had specifically stated that there were no medical

reasons for him having fallen asleep. The reason that the Respondent considered the Claimant's explanation to be unsatisfactory was because of the health and safety implications. Those reasons for considering the explanation to be unsatisfactory only apply to the issue in respect of falling asleep. As such, the Tribunal is satisfied that it is consistent with the other evidence, namely the documentation and the evidence heard from Daniel Abram, that the reason the Claimant was considered to have failed to demonstrate his suitability during the probationary period was because of the issue in respect of him falling asleep.

209. Was this an issue arising from the Claimant's disability? For the reasons already given, the Tribunal has concluded that it was not satisfied on the balance of probabilities that this was the case.

210. In any event, the Tribunal would have found the dismissal to be justified.

211. Ultimately, ensuring health and safety was a legitimate aim. The Tribunal was satisfied that, given the nature of the job of repairing machines, there would be significant health and safety risks having an employee with a propensity to fall asleep. The Respondent could not be satisfied that such a risk only applied in situations where the Claimant was not potentially exposed to the dangerous parts of machinery. Moreover, the Tribunal was satisfied that dismissal was proportionate. The Tribunal notes that, on the Claimant's case, he had had issues with daytime sleepiness for many years and, in these circumstances, the Tribunal considers that the Respondent could not have been confident when the Claimant asserted following his dismissal that he was in a position to ensure that it never happened again. At the time of the meeting with Daniel Abram, the Claimant had said that there was nothing that the Respondent could do about it. In his letter to Daniel Abram intimating his appeal, the only practical solutions that the Claimant suggested were either standing up or using a fidget toy. The Tribunal was satisfied that it had been open to the Claimant to use both of these strategies during the training session itself. From the description of Paul Croft, it was a relatively informal session where there would have been no difficulty with the Claimant standing up, whether he did or did not bring the need to do so to the attention of Paul Croft. Paul Croft referred to other individuals in other training sessions standing up because of their own particular needs. The Claimant had been using a pen, effectively as a fidget toy, during the training session, but that does not seem to have worked in terms of stopping him from falling asleep, because he abandoned the use of the pen in that way because he thought that it was distracting others. The Tribunal was also satisfied that it was not just a question of the Respondent being concerned about the Claimant falling asleep whilst attending to machinery or in close proximity to machinery, but also in other contexts, such as in situations where instructions needed to be communicated to him, either by way of training or by way of some other means.

212. The Tribunal was not satisfied that there were adjustments which the Respondent could put in place to mitigate these potential health and safety concerns. The medical evidence has not resulted in any different sort of adjustment being suggested from those which the Claimant had suggested so that it is difficult to see that further medical inquiry would have identified a more proportionate means of dealing with the health and safety concerns. Similarly, it is difficult to see that further investigation as to the cause of the episodes would have resulted in the health and safety concerns being addressed. The Claimant suggested that the Respondent's should have trialled alternatives. However, the Tribunal accepted the evidence of Paul Croft that, having identified the risk, the Respondent was not going to take the risk of those concerns actually coming to fruition.

Reasonable adjustments

213. In terms of identifying a provision, criterion or practice (or "PCP") in respect of which a duty to make adjustments arose, the Claimant relied upon the following PCPs:

(1) requiring employees to remain awake while at work;

(2) requiring employees to make five calls per day;

(3) being able to take account of an employee's probation period when exercising the Respondent's disciplinary and grievance procedure and to proceed directly to dismissal without providing a warning and / or extending the probationary period.

214. The Respondent accepted that these were PCPs which applied to the Claimant's employment.

215. In relation to the PCP of a requirement to remain awake at work, the Claimant claimed that he was at a substantial disadvantage compared to someone without his disability in that he suffered from daytime sleepiness / intrusive sleep so that he had difficulty in staying awake at work when under-stimulated and this formed part of the reason for his dismissal. However, for the reasons already explained, the Tribunal was not satisfied that any disadvantage was due to the Claimant's disability.

216. Even if the Claimant had established that he was substantially disadvantaged compared to someone without the Claimant's disability, so as to cause a duty to make adjustments to arise, the Tribunal would not have been satisfied that there was any breach of any such duty.

217. The first proposed adjustment relied upon by the Claimant was allowing the Claimant to remain standing during meetings or other similar events. However, the Tribunal accepted the evidence of Paul Croft that there had been nothing stopping the Claimant standing during the training session in

issue, with Paul Croft having given an example of another employee with an injury who had done just that in another training session. This was also consistent with Paul Croft's description of the training session as a relatively informal and relaxed session.

218. The second proposed adjustment relied upon by the Claimant was allowing the Claimant to use a fidget toy at work if standing was not possible. However, the Tribunal accepted the point made by the Respondent that there was nothing stopping the Claimant using a fidget toy. Indeed, on the Claimant's evidence, he had been using a pen as a fidget toy during the training session in question. He was not stopped from doing so. He himself chose to stop using the pen as he was concerned that it might be distracting others. However, nobody had suggested that there was a problem with the Claimant's using his pen as a fidget toy.

219. In relation to the second PCP, namely the requirement to make five phone calls per day, the Claimant claimed that he was placed at a substantial disadvantage compared to someone without his disability, in that he found the phone calls difficult because he struggles with social interaction (in contrast to comparable neurotypical employees). Whilst the Tribunal accepted that the Claimant struggled with social interaction, the Tribunal was not satisfied that the PCP as to phone calls actually placed the Claimant at a substantial disadvantage compared to someone without the Claimant's disability. In his Disability Impact Statement, the Claimant described having to call customers, by way of following up tickets, as being difficult and awkward and gave the example of having to find out whether a customer wanted to send their machine in for a service or buy a replacement part. However, the specialist autism report set out a history whereby the Claimant finds holding conversations challenging unless the topic is one of his interests. In his oral evidence to the Tribunal, and in his interview, the Claimant gave the example of finding it difficult if he was expected to go into a cafe or public house and make friends, whereas if he was asked to talk with somebody about one of his interests such as mountain biking or computers, that would not be something which caused him difficulty. In his Statement of Evidence, the Claimant described in interview being asked by Karl Badkin "*how are you on the phone*" to which he replied by saying "*I think I'm OK*". The Tribunal considered that phone calls with customers following up repair tickets would have involved conversations about something which the Claimant was interested in and very knowledgeable about so that he would not have been at a substantial disadvantage in discussing with a customer the options which a customer might have in terms of any steps to be taken with regard to the customer's 3D printer.

220. Again, even if the Claimant had established that he was substantially disadvantaged compared to someone without his disability, so as to cause a

duty to make adjustments to arise, the Tribunal would not have been satisfied that there was any breach of any such duty.

221. In contending that there was a breach of duty in relation to this PCP, the first proposed adjustment relied upon by the Claimant was that of providing the training that he requested on his probationary review form.

222. In the probation reviews the issue of training was raised, considered and addressed by the Respondent in those meetings in a way which suggested that there was no impediment to meeting the training needs identified. At the point in time of the probation review meeting on 26 May 2023, the training focus was on the development plan which was still to be delivered. in the probation review record for 2 June 2023, there was reference to the Claimant accessing online training materials through the Ultimaker Academy but needing to block out more time for him to do so. It was further noted that his level of support to customers was appreciated by the whole team. A key area to focus on for the next four weeks was stated to be that of training up to deliver more confidence on phone calls. It is not entirely clear from the documentation what was envisaged in terms of this training, but the Claimant describes shadowing phone calls made by a colleague with this being of limited assistance as some of the phone calls which were shadowed were not effective. However, there was no indication in the probation review records that this was a significant issue which was causing the Claimant to be placed at a substantial disadvantage, at least not until the probation review meeting on 20 June 2023 when the Claimant was stating that he thought that he needed more training for when to make outbound phone calls rather than actually making the phone calls themselves. In other words, his focus was not on what should be said during the phone call, but the point in time at which the phone call should be made. It was during this meeting that the Claimant referred to not feeling comfortable communicating with customers on the phone and Daniel Abram had anticipated being able to discuss finding some solution or way forward with the Claimant, but this was overtaken by events as the Claimant walked out of the meeting before it was possible to address this issue. In other words, in summary and on balance, the evidence was of an employer seeking to address any issues rather than failing to do so.

223. The second proposed adjustment in relation to this PCP was that of reducing the number of phone calls per day that the Claimant had to make. The Tribunal has already found that the requirement to make telephone calls to customers did not give rise to a substantial disadvantage so as to cause there to be a duty to make reasonable adjustments. In any event, insofar as there was an issue involved in this requirement, the possible extent of any issue only became apparent during the probation review meeting on 20 June 2023 and Daniel Abram was not able to discuss further with the Claimant the extent to which the issue might have been addressed, or some sort of

accommodation reached, as the Claimant walked out of the meeting and, shortly afterwards, his employment was terminated. In any event, the Tribunal was satisfied that contacting customers regarding their requirements in respect of repairs or machines that were being serviced by the Respondent was an unavoidable part of the job and it would not have been reasonable to have expected the calls to be made by another employee in circumstances where it was the Claimant who was the one who was best placed to communicate with the customer regarding any issues in respect of the customer's machine.

224. The third proposed adjustment in relation to this PCP was that of removing the requirement for the Claimant to make phone calls. For the same reasons as the Tribunal concluded that there was not a breach of any duty to make adjustments by not reducing the number of calls required, the Tribunal was satisfied that there was not a breach of duty through failing to remove the requirement altogether.

225. In relation to the PCP of being able to take account of an employee's probation period when making decisions under the disciplinary and capability procedure, the Tribunal was not satisfied that the Claimant was placed at a substantial disadvantage in this regard compared to someone without the Claimant's disability as the Tribunal did not consider that the Claimant was likely to find it more challenging to meet his performance requirements than a non-disabled employee. The Claimant was doing a job in an area in which he was highly interested. The probationary reviews up until the last review all suggest that the Claimant had made a reasonable start to his employment. These probation reviews do not suggest that the Claimant was struggling to meet performance requirements because of his disability. Insofar as issues had arisen, these were issues which might have arisen in respect of a non-disabled employee and / or were issues which were being dealt with in a supportive way by the Respondent.

226. It follows the Tribunal was not satisfied that a duty to make the adjustments proposed by the Claimant arose. In any event, in the Claimant's case, a decision was made that because of the health and safety implications, dismissal was appropriate. On the basis of the Tribunal having accepted the justification defence put forward by the Respondent, so that it was justified in dismissing the Claimant, the Tribunal was not satisfied that following any procedure laid down in the employee handbook would have made a difference. The Tribunal was not satisfied that this was a situation where the Respondent should simply have given the Claimant some kind of warning. Effectively, the risk was assessed as too great. This was an assessment which the Respondent was entitled to make. The whole point about conducting a risk assessment, even on the basis of an informal decision-making process, was not to be in the position of reacting after a risk had

become reality, but to be in the position of taking proactive steps to avoid the risk in the first place.

Indirect disability discrimination

227. Again, it is not disputed that the Respondent applied the PCPs of requiring the Claimant to make five phone calls per day and maintaining a discretion to take account of short service and vary the usual disciplinary and capability process used by the Respondent for employees such as by not providing a warning before proceeding to a dismissal.

228. In relation to the requirement in respect of phone calls, the group disadvantage was stated to be that "*persons with … ASD or GAD*" were "*more likely to have difficulty in achieving the target and as a consequence would not qualify for the monthly bonus and / or* [would] *place themselves at risk of dismissal*". The Tribunal was concerned that it was effectively being invited to make assumptions as to group disadvantage in the absence of evidence specifically directed to the point and in circumstances where the group identified covered a very wide spectrum.

229. For the same reasons as applying to the equivalent PCP considered in dealing with the Claimant's complaint as to a breach of the duty to make reasonable adjustments, the Tribunal was not satisfied that the PCP in question placed the Claimant at a relevant disadvantage.

230. In any event, the Tribunal was satisfied that the PCP was a proportionate means of achieving a legitimate aim. The Tribunal was satisfied that being able to be in telephone contact with customers whose machines were being repaired or serviced was an integral part of the Respondent's business. The Tribunal was satisfied that communicating with customers in this way was fundamental to being able to meet their requirements in terms of ensuring that those machines were repaired or serviced to their satisfaction. As such, it was an integral part of the job which the Claimant was engaged to do. Whilst it is possible that some of the telephone calls which the Claimant might have been expected to make could have been made by other employees, the nature of the Respondent's business meant that it was going to be more efficient and cost effective for the employee who was directly involved with a customer's machine or with the customer to speak directly with that customer rather than going through a third party as some kind of go between.

231. The second complaint of indirect disability discrimination involved the PCP of the Respondent having the "*discretion to take account of short service and vary the disciplinary and capability procedures*". It was not disputed that this PCP was in place.

232. The group disadvantage was identified as being that "*people with my disabilities are more likely to have poor performance and are therefore at*

*greater risk of dismissal during the first few months of servic*e". The individual disadvantage was that "*I was at risk of dismissal without the need for the company to comply with their procedure*" and "*as a consequence … I was dismissed without having a proper opportunity to discuss the reasons for falling asleep, my disabilities and the effects of these and any adjustments that could be made*".

233. The Tribunal was similarly not satisfied that group disadvantage was established given the very general terms in which it was asserted in relation to a potentially wide and diverse group of people and the lack of evidence before the Tribunal as to group disadvantage. The reasoning for the conclusions already reached by the Tribunal on the issue of whether a causative link was established between the Claimant falling asleep and his disabilities, and on whether the equivalent PCP gave rise to a duty to make adjustments, similarly has the effect that the Tribunal was not satisfied that the Claimant had established individual disadvantage for the purposes of this complaint of indirect discrimination.

234. In dealing with the Respondent's justification defence in respect of the discretion that the Respondent retained to disapply its capability and disciplinary procedure, the same reasoning applies as that applied by the Tribunal in concluding that it was not a reasonable adjustment that the Respondent was under a duty to make. The Tribunal was satisfied that it was proportionate for an employer such as the Respondent to be in the position of being able to take capability or disciplinary proceedings in relation to employees who had short service or were within their probationary period, or who had not acquired employment law rights in respect of unfair dismissal, in appropriate cases, without having to meet the full requirements of the procedure otherwise set out in its handbook.

Breach of contract

235. The Tribunal considered the Claimant's case in respect of breach of contract to be misconceived. The Claimant's case is that there was a breach of contract through the Respondent not applying provisions in its handbook which potentially applied to capability issues or disciplinary issues. However, the effect of the handbook was to give the Respondent a discretion to disapply these provisions in cases where the employee has short service. Whilst it did seem to the Tribunal that reference was being made to short service without precisely defining what short service meant, the Tribunal was equally satisfied that the reference to short service could only sensibly be interpreted as covering somebody within their probationary period. The meaning of "short service," in the context in which it was used, was probably referring to an employee who had not acquired sufficient service to have employment law rights in respect of not being unfairly dismissed. The handbook is reserving to the employer the discretion as to not following the procedural requirements

set out in the handbook which are clearly designed to ensure compliance with the requirement for dismissing an employee fairly. This was allowed by the contract, so there was no breach in exercising that discretion.

Outcome

236. The outcome is that the complaints are not well-founded and must be dismissed.

Approved by
Employment Judge Kenward

Dated 4 August 2026

Sent to the parties on
Date: 5 August 2026

....
For the Tribunal office