Case Number: 6008017/2024

EMPLOYMENT TRIBUNALS

Claimant: **Mr F Rotaru**

Respondent: **GXO Logistics UK Limited**

Heard at: **Leeds ET** **On:** **15th-19th June 2026**

Before: **Employment Judge Bridge**
D Eales
R Webb

Representation
Claimant: In person

Respondent: Miss Clayton (counsel)

JUDGMENT

1. The Respondent's response to the claim is amended to concede that, at the material time, the Claimant was a disabled person within the meaning of the Equality Act 2010.

2. The claim for unfair dismissal is dismissed upon withdrawal.

3. The claim for breach of contract is dismissed upon withdrawal.

4. The claim for detriment arising out of a protected disclosure is not well-founded and is dismissed.

5. The claim for detriment arising out of a flexible working request is not well-founded and is dismissed.

6. The claim under section 15 of the Equality Act 2010 (discrimination arising from disability) is well-founded and succeeds.

7. The claim for failure to make reasonable adjustments is not well-founded and is dismissed.

FULL WRITTEN REASONS

Introduction

1. The Claimant commenced ACAS Early Conciliation before presenting these proceedings. An Early Conciliation Certificate was subsequently issued.

2. The Claimant presented his claim to the Tribunal by ET1.

3. The Respondent presented a response on Form ET3 resisting the claims.

4. The matter proceeded to a final hearing before the Tribunal.

5. At the conclusion of the hearing, the Tribunal delivered an oral judgment.

6. By correspondence dated 9 July 2026, the Claimant requested written reasons for the judgment in accordance with Rule 60 of the Employment Tribunal Procedure Rules. These are the Tribunal's written reasons prepared in response to that request.

7. In preparing these reasons, the Tribunal has considered all the evidence, both oral and documentary, together with the submissions made by the parties. Not every matter raised in evidence or submission is referred to expressly. The omission of any specific reference should not be taken to indicate that it has not been considered.

The Complaints

8. At the commencement of the final hearing, the Claimant pursued the following complaints:

   (1) Failure to make reasonable adjustments contrary to sections 20 and 21 Equality Act 2010;

   (2) Discrimination arising from disability contrary to section 15 Equality Act 2010;

   (3) Detriment on the ground of having made a protected disclosure contrary to section 47B Employment Rights Act 1996; and

   (4) Detriment related to the exercise of flexible working rights contrary to section 47E Employment Rights Act 1996.

9. The Claimant had also advanced claims of unfair dismissal and breach of contract. Those complaints were not pursued at the final hearing, and no findings were required in respect of them.

The Issues

Protected Disclosure

10. The Tribunal was required to determine whether the Claimant made one or more qualifying disclosures within the meaning of section 43B Employment Rights Act 1996.

11. In particular, the Tribunal was required to determine:

    (a) what, if anything, the Claimant said or wrote;

    (b) when any disclosure was made and to whom it was made;

    (c) whether any communication constituted a disclosure of information;

    (d) whether the Claimant believed any disclosure was made in the public interest and whether that belief was reasonable;

    (e) whether the Claimant believed the disclosure tended to show a breach of a legal obligation or a danger to health and safety and whether that belief was reasonable; and

    (f) whether any qualifying disclosure was a protected disclosure.

12. The disclosures relied upon by the Claimant were:

    (a) an alleged verbal report made to Joanna Standik on or around 17 September 2023 that a Quality, Health and Safety Environment Audit completed by the claimant had been altered from 64% to 91%;

    (b) an alleged verbal report made to Mark Prince on or around 17 September 2023 that Safe and Legal compliance checks were not being fully completed because the Yellow Pack Section was not being checked; and

    (c) an alleged verbal report made to the Senior Operations Manager, Gemma, on or around 17 September 2023 raising the same concern regarding compliance checks.

13. If the Claimant established that he made a protected disclosure, the Tribunal was required to determine:

    (a) whether the respondent subjected him to the capability process identified in the List of Issues;

    (b) whether that amounted to a detriment; and

    (c) whether any detriment was on the ground that he had made a protected disclosure.

Disability

14. The Respondent accepted that the Claimant was a disabled person within the meaning of section 6 Equality Act 2010.

Discrimination Arising from Disability

15. The Tribunal was required to determine:

(a) whether the Respondent treated the Claimant unfavourably by subjecting him to a capability process and reaching a decision to dismiss him;

(b) whether the Claimant's alleged inability to undertake picking duties arose in consequence of his disability;

(c) whether any unfavourable treatment was because of that matter;

(d) whether the treatment was a proportionate means of achieving a legitimate aim.

Reasonable Adjustments

16. The Tribunal was required to determine:

(a) whether the Respondent applied the provision, criterion or practice (PCP) identified in the List of Issues, namely a performance requirement applicable to operatives undertaking picking duties;

(b) whether that PCP placed the Claimant at a substantial disadvantage in comparison with persons who were not disabled;

(c) whether the Respondent knew, or could reasonably have been expected to know, that the Claimant was likely to be placed at that disadvantage;

(d) what steps could have been taken to avoid the disadvantage;

(e) whether those steps would have been reasonable; and

(f) whether the respondent failed to take such steps.

Flexible Working Detriment

17. The Tribunal was required to determine:

(a) whether the Claimant exercised rights relating to a statutory flexible working request;

(b) whether the Respondent subjected him to a detriment; and

(c) whether any detriment was because he had made, or proposed to make, a flexible working request.

18. Remedy in relation to the successful section 15 claim will be determined at a remedy hearing on 10th September 2026.

The Hearing

19. The Tribunal was provided with an agreed bundle of evidence comprising 386 pages.

20. The Claimant gave evidence on behalf of himself.

21. Dominika Sedlak (first line manager/claimant's line manager), Abdullah Jundi (HR advisor), Mark Prince (duty section manager and decision maker in the dismissal), Russel Hunter (Transport manager and appeal chair) gave evidence on behalf of the Respondent.

Findings of Fact

The Respondent

22. The Respondent operates as a third-party logistics provider, supplying warehouse and distribution services to its client, including the processing and dispatch of online retail orders. The purpose of the operation is to receive customer orders generated through the client's platform, process those orders through a series of warehouse functions, and ensure their timely dispatch to meet required delivery deadlines and cost targets. The Respondent's performance is driven by contractual obligations to its client, including requirements as to efficiency, cost per unit and delivery times, with financial consequences for failure to meet those targets.

23. In terms of scale, this is a large-scale operation. At the relevant site, there were approximately 2,300 employees, of whom around 1,800 were Distribution Centre Operatives working across inbound and outbound functions, with the remainder comprising managerial, administrative and support roles. Within the broader organisation, the Respondent employs approximately 44,000 staff across 290 sites nationwide.

24. Within the outbound operation at the relevant site, a substantial proportion of the workforce is allocated to picking duties, reflecting the operational requirement that items must first be picked before they can progress through subsequent stages of packing and dispatch.

25. The Tribunal therefore finds that the Respondent's operation is both large in scale and highly structured, with workforce deployment driven by operational demand and efficiency considerations.

Terms of Employment

26. The Claimant commenced employment with the Respondent in 2016 as a Distribution Centre Operative. In that role, he was required to carry out a range of warehouse duties including picking, packing, inducting, sortation, feeding and marshalling.

27. The role was structured on the basis of operational flexibility, such that employees might be allocated to a particular task for a shift but could be redeployed depending on operational need. The Claimant accepted that he did not carry out all duties every day and that retraining was required where a task had not been performed for a period, namely refresher training after six months and full retraining after twelve months. It is further not in dispute that some employees worked under restrictions for health or capability reasons, which could include limitations on picking duties.

How the Respondent Runs the Warehouse

28. The Respondent operates a large, highly automated outbound warehouse in which customer orders are processed through a series of interdependent stages including picking, induction, automated sorting and packing. Workforce planning is undertaken centrally using forecast sales data, and staff are allocated to tasks through daily operational registers based on their core skills, with managers retaining the ability to redeploy employees during a shift to respond to operational demands.

29. The Tribunal accepts the evidence of Mr Prince, Duty Section Manager, that the operation relies on flexibility within the workforce and that employees are routinely moved between tasks to maintain efficiency and meet service targets and that picking constitutes the initial and essential stage of the outbound process, such that downstream functions including packing and dispatch depend on sufficient picking activity being completed. In that context, staffing is structured to be “picker-heavy”, particularly on the morning shift, in order to ensure that work is available for subsequent stages of the operation.

30. In addition, the Tribunal accepts the evidence of Mr Hunter as to the relative proportions of staff engaged in each stage of the process, including that there are significantly higher numbers of employees allocated to picking than to packing, with typical operational ratios of approximately two pickers to each packer, and further staffing allocated to induction, feeding and associated support functions. That distribution reflects the operational requirement that individual items must first be picked before any packing or dispatch can occur.

Performance Management System

31. During or around 2023, the Respondent introduced a performance management system known as the Distribution Centre Performance Management ("DCPM") system. The purpose of the system was to monitor productivity and operational performance across the warehouse operation.

32. The Tribunal accepts the evidence of Mr Prince that DCPM was not designed simply to measure the number of items picked per hour. Rather, it was intended to assess performance across a range of warehouse functions by reference to expected task completion times and levels of activity. The Tribunal finds that the system generated performance data using a percentage-based methodology and that employees were generally assessed against a target performance score rather than by reference to a fixed numerical requirement.

33. The Tribunal accepts that planning assumptions used by the Respondent included an average figure of approximately 140 picks per hour. However, we are satisfied from the evidence of both Mr Prince and the Claimant that this figure represented an operational planning assumption rather than a strict performance requirement imposed on employees in every hour worked. The Claimant himself accepted in cross-examination that factors such as the location of items, travel distances, use of lifts and elevators, differing picking routes, and the need to deposit totes could affect the number of items picked in any given period.

34. The Tribunal accepts Mr Prince's evidence that two employees could perform their duties equally effectively whilst achieving significantly different numbers of picks per hour. An employee picking multiple items from a single location may achieve a much higher item count than an employee required to travel between numerous locations. For that reason, the Respondent did not assess productivity solely by reference to the number of items picked.

35. The Tribunal further accepts the Respondent's evidence that performance was measured by reference to expected task times generated within the DCPM system. Those expected task times took account of operational variables and produced a performance percentage. An employee who completed a task within the expected time would achieve a performance score of approximately 100%, whilst completion above or below the expected time would produce correspondingly higher or lower scores.

36. The DCPM system also measured an "active index". We accept the evidence that this was distinct from the performance score and was designed to measure the extent to which an employee remained actively engaged in productive work during a shift. The active index was assessed over an individual shift, whereas performance was assessed over a longer period and commonly reviewed over a four-week cycle.

37. The Tribunal notes that the Claimant relied upon references within the documentation to targets of 140 picks per hour, 85% performance and a 90% active index. However, the Tribunal is not satisfied that the evidence demonstrates the existence of a rigid requirement that every picker must achieve 140 picks per hour irrespective of operational circumstances. We accept the Respondent's evidence that employees were managed using performance percentages and activity measures rather than a fixed hourly picking count.

38. The Tribunal also accepts the evidence of Mr Prince that, where an employee failed to achieve expected performance levels, the Respondent's process ordinarily involved coaching and performance discussions rather than immediate formal action. Initial concerns would be addressed through coaching and review periods designed to identify obstacles to performance and support improvement. If performance did not improve, further coaching and objective-setting could occur before any formal performance-management process was considered.

39. Importantly, the Tribunal finds that the Claimant was never subjected to any formal performance-management procedure for failure to achieve DCPM targets. Whilst concerns were raised during performance review discussions in early 2023 regarding his ability to achieve expected performance levels when undertaking picking duties, the evidence does not demonstrate that he was formally managed for underperformance within the DCPM system. Rather, by 2024 the Respondent's concerns had shifted to the Claimant's ability to undertake and sustain picking duties at all in light of his medical condition, associated absences and stated limitations.

40. Accordingly, the Tribunal finds that the DCPM system formed part of the background to the dispute between the parties and was discussed by the Claimant on a number of occasions. However, the capability process commencing in 2024 was not triggered by any failure to achieve DCPM performance targets. It arose instead from concerns regarding the Claimant's capacity to carry out picking duties to the extent required by the Respondent and the resulting periods of absence.

Restrictions Policy

41. The Tribunal accepts the evidence of the Respondent’s witnesses, in particular Mr Prince and Mr Jundi, that the Respondent operated a restrictions process under which a limited proportion of the workforce could be subject to restrictions preventing them from undertaking certain tasks, including picking. The evidence was that this was set at approximately 10% of the workforce, with that proportion distributed across different areas and shifts of the operation, and that the availability of restrictions was influenced by operational capacity and business need.

42. The Tribunal finds, however, that in the evidence there was a tendency on the part of some of the Respondent's witnesses to conflate, or at least closely associate, the concept of "restrictions" with that of reasonable adjustments. In particular, adjustments which would involve limiting or removing picking duties were discussed in terms of whether a restriction could be accommodated within the available quota, rather than as a distinct exercise of the Respondent's duty to make reasonable adjustments under the Equality Act 2010. The Tribunal further finds that, in practice, the operation of the restrictions policy played a significant role in determining whether any adjustment involving removal from picking duties was considered feasible, with the availability of "restriction capacity" acting as a limiting factor on what adjustments were explored or offered to the Claimant.

The Claimant's Condition

43. It is common ground that the Claimant suffers from an orthopaedic condition affecting his right foot, described as a bunion, which by the relevant period caused pain and limitations in prolonged walking and physically demanding tasks. The Tribunal finds that this condition was longstanding and, by 2023 and 2024, had a material impact on his ability to undertake picking duties. Medical evidence during 2024 included occupational health and physiotherapy reports, which indicated that the Claimant may be limited to approximately one to two hours of picking activity. The parties agree, and the Tribunal finds, that this condition amounted to a disability within the meaning of the Equality Act 2010.

44. However, the Tribunal considers that the occupational health and physiotherapy evidence provides only limited independent assessment of functional capacity because it largely reflects the Claimant's own reporting of symptoms and limitations. Nevertheless, the Tribunal finds that they do establish that, at the material time, the Claimant was consistent in reporting pain and discomfort associated with picking duties, and in maintaining that he was unable to sustain such activity for prolonged periods.

Working conditions pre-2021

45. We accept the written evidence in the bundle as consistent with the Claimant's oral evidence that pre-April 2021, he had a restriction in place for walking duties due to bunion pain where the Respondent accepted he had pain after 1-2 hours of walking. From 2018 to 2021, he had an agreed restriction of less than one hour on picking.

Flexible Working Request 2020

46. On 18 October 2020, the Claimant submitted a formal flexible working request seeking a change to his working pattern. That request was acknowledged by the Respondent, and the Claimant was invited to a meeting, which took place on 30 October 2020, at which the request was refused on the basis that the working pattern sought was not one operated by the Respondent. The Claimant accepted in his evidence that the Respondent could not accommodate the specific pattern requested.

47. The Tribunal finds that, following the refusal, there was a series of email exchanges between the Claimant and the Respondent's HR function in January 2021. On 6 January 2021, the Claimant emailed HR (Stephanie Darling) seeking an update, stating that he had not received any further information. On 7 January 2021, HR responded confirming that the Claimant had been placed on a waiting list for a shift transfer. The Claimant acknowledged that response in an email dated 13 January 2021.

48. Further correspondence took place in April 2021. On 18 April 2021, the Claimant emailed senior management, including Mr Perritt, stating that he had not received a formal outcome to his request and seeking to appeal the decision. On 19 April 2021, Mr Perritt responded indicating that an appeal could be arranged. However, on 20 April 2021, HR Manager Ms Green wrote to the Claimant confirming that he was out of time to lodge an appeal but indicating that the original outcome would be resent and proposing that the matter could be addressed through a welfare meeting and consideration of alternative arrangements.

49. The Tribunal therefore finds that, whilst the flexible working request was formally refused in October 2020, there was continuing correspondence into early 2021 in which the Claimant sought clarification of the outcome and attempted to pursue an appeal, and that the matter was ultimately addressed outside the formal appeal process.

Moving of Shifts and restrictions review– April 2021

50. Following the refusal of the flexible working request, the Claimant was moved to a morning shift, working Friday to Monday, with effect from 21 April 2021. A Record of Conversation was completed at that time, which the Claimant accepts he signed, and which records him as being fully fit for all duties within the warehouse including picking. The Tribunal finds that the shift change was implemented at that time and that the Claimant thereafter worked on the morning shift.

51. On balance we do not accept the Claimant's evidence that there was an additional promise by James Norsworthy (the Claimant's manager at the time) that he would not have to do picking because it is inconsistent with

the signed paperwork that he was fit to do picking and the restriction being removed.

5th February 2023 meeting

52. The Claimant had a meeting described in the paperwork as a "review meeting" with Johanna Stadnik. During that meeting he stated that he could not comply with the performance targets because of his orthopaedic condition. He also raised concerns regarding his age, considered that he should not have the same targets as younger employees and expressed concerns regarding the new performance management system. The discussion focused on performance-related matters.

53. We have not been provided with sufficient evidence regarding the outcome of that review meeting and therefore make no findings regarding any action taken following it.

54. The Claimant did raise clearly the performance management targets within this meeting.

March 2023 grievance

55. In or about 13 March 2023, the Claimant raised concerns by email regarding the safety of the picking task. The Tribunal finds that, on that occasion, the Claimant's complaint was framed in general terms as a health and safety concern, rather than by reference to his underlying medical condition. In substance, he asserted that it was not possible to meet the Respondent's performance expectations whilst complying with safe working practices and that the manner in which picking duties were undertaken posed safety risks. He further indicated that he wished to carry out alternative duties but was informed that he would be required either to continue picking or to go home sick. The Claimant accepted in his evidence that, at that stage, his concerns related to general safety issues associated with the picking process and were not expressly linked to his foot condition.

16th September 2023 training

56. The Claimant did some picking training and we are satisfied this involved an element of picking because the documents note the trainer's operations about how he performed the duty. At the end of the training, he said "I am not feeling safe using the batch pick trolley while moving at fast pace."

Disclosures

57. On 17th September Claimant completed a workplace safety inspection identifying a number of not insignificant risks in the warehouse. This was signed by Gemma Christou and Alexandra Toth and Johanna Stadnik.

58. An email was sent to various Barnsley teams the following day which refers to a score of 91% but does not list all of the risks identified by Claimant. This document is not complete in the bundle we have received.

59. The Claimant's evidence is that the score he recorded was 64% but was altered to raise it to 91% and that he complained about this to Johanna Stadnik.

60. On balance we are not satisfied that he said this to Johanna Stadnik because the documentary evidence does not support this claim. We also take account of the fact that no contemporaneous complaint recording an allegation of score manipulation was produced, despite the Claimant being an active user of e-mail and grievance procedures and having raised other concerns in writing during the same period.

61. Similarly, we cannot be satisfied that he made complaints that safe and legal compliance checks at the start of each shift were not being fully completed, in particular that the yellow pack section had not been checked. We found the evidence on this issue insufficiently cogent to discharge the burden of proof. While the Claimant genuinely believed the concerns existed, we were not satisfied that the verbal disclosures relied upon were in fact made to the individuals identified.

The October 2023 Grievance

62. On 3 October 2023, the Claimant raised a formal grievance concerning his treatment in relation to picking duties. The Tribunal finds that the substance of the grievance was that the Claimant had been required to undertake picking work in circumstances which he considered unsafe and inappropriate, and that he had been told he must either continue picking or go home sick. The grievance therefore concerned both the requirement to perform picking duties and the manner in which that requirement had been imposed.

63. The Respondent treated the matter as a formal grievance and arranged a grievance hearing, which took place on or about 13 October 2023, chaired by Mr Hunter. The matter was investigated, including consideration of the circumstances in which the Claimant had been directed to undertake picking duties and the managerial response at that time.

64. An outcome letter was issued in or about 9 November 2023, although the Claimant's evidence was that he did not receive it at that time and that it was subsequently reissued to him. The Tribunal finds that the grievance was not upheld.

65. The Claimant appealed that outcome, and an appeal hearing took place on 14 December 2023. The Tribunal finds that the grievance appeal did not result in any substantive change to the outcome, and that the Respondent maintained its position following the appeal. Following the grievance process, the Claimant commenced a period of sickness absence beginning in late October 2023, which continued into early 2024.

66. We accept that the Claimant was told to "pick or go home sick" as consistent with his contemporaneous and immediate complaint and we have no evidence to the contrary

The June 2024 Grievance

67. On 26 June 2024, during the course of the capability process, the Claimant raised a further complaint concerning his treatment by the Respondent and, in particular, the alleged failure to make reasonable adjustments. The Tribunal finds that the substance of that complaint included concerns that he was being required to undertake picking duties notwithstanding his condition, that appropriate adjustments had not been implemented, and that information about him had been shared between managers in a manner he considered inappropriate.

68. The evidence indicates that the matters raised in that complaint were discussed within the ongoing capability process, including at the meeting of 12 July 2024, at which the Claimant reiterated his concern that the proposed phased return required him to undertake picking duties only and did not reflect his medical limitations or need for adjustments. The Claimant's position was that occupational health, and physiotherapy recommendations had not been properly taken into account and that he expected support in the form of reduced duties or alternative work.

69. The Respondent's position, as reflected in the evidence of Mr Jundi and Mr Prince, was that the Claimant had been provided with support through occupational health referral, physiotherapy and the proposal of a phased return, and that the requirement to undertake picking duties, albeit on a reduced basis, was consistent with operational needs and with the Claimant's own indication that he could undertake such work for a limited period. The Tribunal finds that no separate or freestanding grievance outcome was issued in relation to the complaint of 26 June 2024, and that the Respondent instead addressed those issues as part of the continuing capability process leading to the dismissal in August 2024.

Sickness Absences

70. The Claimant experienced several periods of sickness absence in the period following the 2023 grievance. In particular, he was absent from 31 October 2023 until 29 January 2024, returning briefly to work on 2 February 2024. He thereafter undertook a further period of absence between 28 February 2024 and 28 April 2024, before returning again in June 2024. Following a return to work on 21 June 2024, the Claimant went off sick again on 22 June 2024, and remained absent until 30 July 2024, shortly prior to his dismissal in August 2024.

71. During these periods, the Claimant provided fit notes in support of his absence. The Tribunal finds that these notes referred not only to his underlying orthopaedic foot condition but also to symptoms of stress and anxiety, and that at times they recorded that he was not fit for work. The Claimant accepted in evidence that, at least by June 2024, the fit notes indicated that he was not fit for any work rather than only restricted duties. The Tribunal therefore finds that the Respondent was on notice throughout these periods both of the Claimant's physical limitations and of an associated psychological impact arising from his working situation.

Capability Process

72. A formal capability process was initiated by the Respondent in June 2024, following a period of prolonged sickness absence and concerns regarding the Claimant's ability to undertake his duties. The Claimant was invited to a capability meeting by correspondence sent prior to 6 June 2024, and he attended a capability meeting on that date chaired by Mr Prince, with HR support from Mr Jundi.

73. At the meeting on 6 June 2024, the Respondent discussed the Claimant's absence record, the medical evidence available at that time, including occupational health and physiotherapy input, and his ability to return to work. The Tribunal finds that the Claimant indicated during that meeting that he could undertake approximately two hours of picking duties, and a phased return to work was proposed on that basis. The Respondent's position was that this arrangement would allow the Claimant's capability to be assessed in practice. Although the Claimant initially disputed that a phased return had been discussed, he ultimately accepted in evidence that such a discussion did take place, albeit maintaining that it was confined to picking duties only.

74. Following that meeting, the Claimant returned to work on 21 June 2024, but went off sick again on 22 June 2024, without completing any sustained

period of work under the proposed phased return. A fit note at that time recorded that he was not fit for work.

75. The Claimant was subsequently invited to a further capability meeting by letter dated 4 July 2024, which was rearranged and took place on 12 July 2024, again chaired by Mr Prince. At that meeting, the Respondent reviewed the position following the attempted return to work. The Tribunal finds that the Claimant expressed the view that the proposed phased return was inappropriate, maintaining that it required him to undertake picking duties beyond his capability and that the recommendations of occupational health and physiotherapy had not been properly implemented. He indicated that he felt unsupported and raised concerns about the lack of alternative duties or adjustments. The Respondent reiterated its position that the Claimant had been offered support, including referrals to occupational health and physiotherapy and a phased return based on his own indication of capability, and that picking duties remained a core requirement of the role. It was agreed at that stage that a further referral to occupational health would be made.

76. A final capability meeting took place in August 2024, following further absence. The Claimant attended that meeting, at least in part by telephone from Romania. At that meeting, the Claimant accepted that he was able to undertake only limited picking duties, stating in substance that he could not carry out a full shift of picking but could manage approximately two hours. The Tribunal finds that the Respondent considered that position, together with the absence record and the operational requirements of the role.

77. The decision to dismiss was taken by Mr Prince. The Tribunal accepts his evidence that the principal reason for dismissal was that the Claimant was unable to perform the essential duties of the role, in particular the requirement to undertake picking work to the extent required by the business. Mr Prince's reasoning included that:

- the Claimant had not successfully undertaken the proposed phased return;
- no further progress had been made in establishing his ability to carry out picking duties beyond a very limited period;
- operational requirements required employees to be flexible and able to perform picking duties; and
- no viable adjustments had been identified within the constraints of the operation which would enable the Claimant to fulfil the role.

78. The outcome of that meeting was confirmed in writing in a dismissal letter dated 21 August 2024. The Tribunal finds that, in that letter, the Respondent set out that the Claimant was being dismissed on capability grounds due to his inability to perform the role as required, having regard to his absence record, the limitations described by him, and the lack of a

sustainable return to full duties. The letter also advised the Claimant of his right of appeal.

Appeal and Reinstatement

79. The Claimant lodged an appeal against his dismissal following receipt of the outcome letter dated 21 August 2024, and an appeal hearing took place on 5 September 2024, conducted by Mr Hunter. The Tribunal finds that, in his appeal, the Claimant challenged the dismissal on the basis that he was not incapable of work but rather capable of undertaking duties with appropriate adjustments, in particular that he could perform picking duties for a limited period and should not have been assessed by reference to a requirement to perform such duties for a full shift. He also maintained that the capability process had not properly taken account of the medical evidence or his stated limitations.

80. The Tribunal accepts the evidence of Mr Hunter that, on appeal, he undertook a review of the Claimant's capacity in light of the available medical material and the Claimant's own account of his abilities. The Tribunal finds that a central feature of the appeal outcome was the acceptance that the Claimant was capable of undertaking limited picking duties of approximately two to three hours per shift, and that the role could be adjusted to accommodate that level of activity. In that respect, the appeal decision departed from the earlier conclusion reached at the capability stage that the Claimant was unable to fulfil the requirements of the role.

81. He also said that due to increased work there was more scope for work away from picking than there had been at the time of dismissal.

82. The Tribunal finds that, on that basis, the appeal was upheld and the dismissal overturned, with the Claimant being reinstated and an adjusted working arrangement implemented reflecting his limited picking capacity. The Claimant returned to work on or about 27 September 2024 under those arrangements.

<u>The Relevant Law</u>

<u>Failure to Make Reasonable Adjustments</u>

The Legislation

83. Section 20(3) Equality Act 2010 provides:

"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."

84. Section 21 Equality Act 2010 provides:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person

85. By section 212(1) Equality Act 2010, a substantial disadvantage is one which is "more than minor or trivial

Relevant Principles

86. A Tribunal considering a complaint of failure to make reasonable adjustments must adopt a structured approach. It must identify the relevant provision, criterion or practice ("PCP"), physical feature or absence of an auxiliary aid relied upon; the substantial disadvantage said to arise from it; whether that disadvantage is connected to the Claimant's disability; whether the Respondent had the requisite actual or constructive knowledge; and whether there were reasonable steps which ought to have been taken to avoid the disadvantage. The importance of this approach was emphasised in *Environment Agency v Rowan* [2008] ICR 218 and approved by the Court of Appeal in *Newham Sixth Form College v Sanders* [2014] EWCA Civ 734

87. The identification of the PCP is a critical part of the analysis, as both the alleged disadvantage and any proposed adjustment must be considered by reference to it. A PCP is construed broadly and may include formal or informal arrangements, policies, practices or requirements. However, it must identify a state of affairs or way of operating capable of application to others and not merely a one-off act or decision.

88. In *Ishola v Transport for London* [2020] EWCA Civ 112, the Court of Appeal explained that the function of the PCP is to identify the aspect of the employer's management or operation said to give rise to the disadvantage relied upon.

89. The need for careful identification of the PCP was also emphasised in *Carreras v United First Partners Research* UKEAT/0266/15/RN

90. The Claimant must establish that the PCP places him at a substantial disadvantage in comparison with persons who are not disabled. The Tribunal should identify clearly the nature and extent of that disadvantage before considering whether any adjustment would have been reasonable.

There must be a sufficient connection between the disability relied upon and the disadvantage alleged. In *Thompson v Vale of Glamorgan Council* EAT/0065/20, the EAT emphasised the need first to identify the substantial disadvantage caused by the PCP before considering the reasonableness of any proposed adjustment.

91. The comparison required by section 20 is directed to whether the PCP places the disabled person at a greater disadvantage because of the effects of the disability than those who are not disabled. It is not necessary to identify an actual comparator whose circumstances are otherwise the same as those of the Claimant. The question is whether the PCP has the effect of placing the Claimant at a substantial disadvantage when compared with persons who are not disabled.

92. The duty to make reasonable adjustments does not arise unless the Respondent knew, or could reasonably have been expected to know, both that the Claimant was disabled and that he was likely to be placed at the relevant substantial disadvantage. Knowledge of disability alone is not necessarily sufficient. In *Secretary of State for the Department of Work and Pensions v Alam* [2010] ICR 665, the EAT emphasised the need separately to consider the Respondent's knowledge of the disadvantage said to arise from the PCP.

93. Whilst the precise nature of any adjustment need not originate with the Claimant, there must be evidence from which it can properly be inferred that a particular step could have avoided or alleviated the disadvantage relied upon. In *Project Management Institute v Latif* [2007] IRLR 579, the EAT observed that, without such evidence, a Respondent would be placed in the impossible position of having to prove that no reasonable adjustment could have been made.

94. Whether a proposed adjustment is reasonable is an objective question for the Tribunal. Relevant considerations may include the extent to which the proposed step would remove or reduce the disadvantage, its practicability, its impact on the Respondent's operations and the resources available to the Respondent. The focus remains on whether the proposed step would avoid, prevent or materially reduce the disadvantage identified.

<u>Discrimination Arising from Disability</u>

The Legislation

95. Section 15 Equality Act 2010 provides:

"(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

Relevant Principles

96. In determining a complaint under section 15, the Tribunal must consider whether the Claimant was disabled at the material time, whether the Respondent subjected the Claimant to unfavourable treatment, what caused that treatment, whether the cause was something arising in consequence of the Claimant's disability, whether the Respondent had actual or constructive knowledge of the disability, and, if those elements are established, whether the treatment was a proportionate means of achieving a legitimate aim.

97. There is no requirement for a comparator in a claim under section 15. The focus is on the statutory language and, in particular, whether the unfavourable treatment occurred because of something arising in consequence of disability. This was emphasised by the Supreme Court in *Williams v Trustees of Swansea University Pension and Assurance Scheme* [2018] UKSC 65.

98. The Tribunal must first identify the unfavourable treatment relied upon. Unfavourably is not defined in the Equality Act 2010.

99. The Code states that it means the disabled person "must have been put at a disadvantage"

100. In T-Systems Ltd v Lewis EAT 0042/15, HHJ Richardson said, "unfavourable treatment is that which the punitive discriminator does or says or omits to do or say which places the disabled person at a disadvantage…..Unfavourable treatment is not the mental process which led the punitive discriminator to behave in that way."

101. The proper approach to causation was summarised by Simler J in *Pnaiser v NHS England and another* [2016] IRLR 170 EAT. The Tribunal must identify the reason operating on the mind of the decision-maker and determine whether that reason was something arising in consequence of the Claimant's disability. The "something" need not be the sole or principal reason for the treatment, but it must have had a significant influence upon it such that it was an effective cause of the treatment complained of.

102. Whether the relevant "something" arose in consequence of disability is an objective question. The chain of causation may involve more than one link, and it is a question of fact in each case whether the connection is sufficiently established. In *Basildon and Thurrock NHS Foundation Trust v*

Weerasinghe [2016] ICR 305 and *Pnaiser v NHS England and another* [2016] IRLR 170, it was recognised that the Tribunal may approach the issue either by identifying the reason for the treatment and then considering whether it arose from disability, or by identifying the consequence of the disability and considering whether it caused the treatment.

103. The fact that there may be more than one step between the disability and the treatment does not necessarily prevent a claim succeeding. In *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090, the EAT confirmed that the phrase “arising in consequence of” is capable of encompassing a chain of consequences and requires a practical assessment of the facts of the particular case.

104. The Respondent's knowledge is directed to knowledge of the disability itself. It is not necessary for the Respondent to know that the particular matter which led to the unfavourable treatment arose in consequence of that disability. The Court of Appeal confirmed in *City of York Council v Grosset* [2018] ICR 1492 that the question whether the relevant “something” arose from disability is an objective one.

105. Once the elements of section 15(1)(a) are established, the burden falls upon the Respondent to show that the treatment was a proportionate means of achieving a legitimate aim. The Tribunal must reach its own conclusion on justification and undertake an objective balancing exercise between the discriminatory effect of the treatment on the Claimant and the importance of the aim relied upon by the Respondent. There is no range of reasonable responses test.

106. In considering proportionality, the Tribunal may take into account whether less discriminatory measures were available to achieve the Respondent's legitimate aims. The existence of a less discriminatory alternative may be relevant to whether the treatment complained of was reasonably necessary.

<u>Whistleblowing Detriment</u>

The Legislation

107. Section 47B (1) Employment Rights Act 1996 provides:

> “A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.”

108. Section 43B (1) Employment Rights Act 1996 provides that a qualifying disclosure is:

“any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show” one or more of the categories of wrongdoing identified in the section.

109. The categories of wrongdoing identified by section 43B include the commission of a criminal offence, a failure to comply with a legal obligation, a miscarriage of justice, danger to health and safety, damage to the environment and the deliberate concealment of information tending to show any such matter.

Relevant Principles

110. The burden rests upon the Claimant to establish that he made a qualifying disclosure and that he was subjected to a detriment because of that disclosure. Only once the Claimant has discharged this burden does it shift to the Respondent to prove that the Claimant was not subjected to the detriment as a result of the disclosure.

111. Before considering any issue of causation, the Tribunal must first determine whether there was a qualifying disclosure capable of attracting statutory protection.

112. In *Williams v Michelle Brown AM* UKEAT/0044/19/00, HHJ Auerbach observed that a qualifying disclosure contains five elements: there must be a disclosure of information; the worker must believe that it was made in the public interest; that belief must be reasonable; the worker must believe that the information tends to show one of the statutory categories of wrongdoing; and that belief must also be reasonable.

113. The Tribunal must firstly be satisfied that there has been a disclosure of information. Whether a communication amounts to a disclosure of information is ultimately a question of substance. In *Kilraine v London Borough of Wandsworth [2018] ICR 1850*, the Court of Appeal held that the question is whether the communication contains sufficient factual content and specificity to be capable of tending to show the relevant wrongdoing.

<u>Flexible Working Detriment</u>

The Legislation

114. Section 47E Employment Rights Act 1996 provides, so far as material, that an employee has the right not to be subjected to a detriment by any act, or any deliberate failure to act, by the employer done for a prescribed reason. One of the prescribed reasons is that:

“the employee made, or proposed to make, an application under section 80F ERA 1996.”

Relevant Principles

115. To succeed in a complaint under section 47E, the Claimant must establish that he made, or proposed to make, a statutory request for flexible working, that he was subjected to a detriment, and that the making, or proposed making, of the request materially influenced the treatment complained of.

116. In considering whether there has been a detriment, the Tribunal applies the same approach as in other employment protection claims. The question is whether a reasonable worker would or might regard the treatment complained of as disadvantageous and whether the Claimant genuinely regarded it as such.

117. The Tribunal must identify the actual reason for the treatment complained of and determine whether the exercise of the statutory right to request flexible working materially influenced that treatment. The fact that a flexible working request had been made is not, of itself, sufficient. The Claimant must establish a causal connection between the request and the alleged detriment.

118. Where the Tribunal is satisfied that the treatment occurred wholly for reasons unconnected with the making, or proposed making, of the flexible working request, the complaint cannot succeed. The focus is therefore upon the reasons operating on the mind of the relevant decision-maker at the time of the treatment complained of.

<u>Conclusions</u>

Protected Disclosure

119. The Claimant alleges that he made a number of disclosures on or around 17 September 2023, including reports to Ms Stadnick, Mr Prince and Ms Christou concerning alleged alterations to audit records and failures to carry out safe and legal compliance checks. However, the Tribunal is not satisfied, on the balance of probabilities, that the Claimant made the disclosures as alleged. Having considered the evidence as a whole, including the absence of contemporaneous support for the alleged disclosures together with the Tribunal's assessment of the oral evidence, the Tribunal does not find that the Claimant has established that he communicated the information relied upon in the terms asserted.

120. In those circumstances, the Tribunal finds that the Claimant has not established that he made any qualifying disclosure within the meaning of section 43B of the Employment Rights Act 1996. It follows that the claim does not progress beyond that stage, and it is therefore unnecessary to consider the further elements of whether any such disclosure was made in

the public interest, whether any belief held by the Claimant was reasonable, or whether any detriment or dismissal arose by reason of such disclosure.

121. Accordingly, The Tribunal's conclusion does not turn upon issues of public interest, reasonable belief or causation but upon a prior finding that the alleged disclosures themselves have not been established on the balance of probabilities. The claim in respect of protected disclosures is not well-founded.

Detriment – Flexible Working Request

122. The Tribunal has considered whether the Claimant was subjected to any detriment as a result of his flexible working request made in October 2020. The Claimant contends that the subsequent capability process and his dismissal formed part of that detriment. However, the Tribunal does not accept that submission. On the findings of fact, the capability process initiated in June 2024 arose from the Claimant’s absence record and his inability to carry out the duties of the role, in particular picking, rather than any earlier flexible working request or the manner in which it was handled. The Tribunal finds that there is no causal link between the flexible working request and the treatment complained of.

123. The Tribunal further notes a substantial period of time, exceeding three years, between the flexible working requests and the capability process. We found no evidence from which it could reasonably be inferred that the request continued materially to influence the decision making in 2024.

124. In those circumstances, the claim that the Claimant was subjected to a detriment because of his flexible working request is not well-founded.

Discrimination Arising from Disability (Section 15 Equality Act 2010)

125. The Tribunal is satisfied that the Respondent subjected the Claimant to unfavourable treatment, namely the initiation of a capability process culminating in his dismissal in August 2024, notwithstanding that dismissal was subsequently overturned on appeal. The Tribunal accepts that dismissal and the process leading to it plainly constitute unfavourable treatment.

126. The Tribunal further finds that the relevant “something arising” was the Claimant’s inability to undertake picking duties to the extent required by the Respondent, and that this arose in consequence of his disability. The Claimant consistently maintained that his orthopaedic condition caused pain and limitation when undertaking picking work, and the Tribunal accepts that this limitation was causally connected to his disability.

127. The Tribunal is satisfied that the unfavourable treatment was because of that matter, namely the Claimant’s limited ability to perform picking duties. The Respondent’s own evidence was that the capability process and ultimate dismissal were driven by concerns about his ability to carry out picking functions and his absence record linked to that issue.

128. In reaching that conclusion we accept Mr Prince's evidence that the capability concerns centred upon the claimant's inability to undertake picking duties to the extent required by the business and not merely upon his sickness absence viewed in isolation.

129. The central question is whether that treatment was a proportionate means of achieving a legitimate aim. The Tribunal accepts that the Respondent had legitimate aims, including the efficient running of a large-scale warehouse operation, meeting client demands, maintaining productivity, and ensuring workforce flexibility. However, the Tribunal is not satisfied that the Respondent’s actions were proportionate in pursuit of those aims.

130. In particular, the Tribunal finds that the Respondent did not undertake sufficient enquiry into less discriminatory alternatives. Despite being a large organisation with substantial resources, employing approximately 44,000 staff across 290 sites and operating multiple functions within the business, the Respondent’s approach was constrained by its internal restrictions policy and an assumption that the Claimant must perform picking duties to a defined level. The Tribunal finds that insufficient consideration was given to whether the Claimant could remain in employment through a combination of limited picking and alternative duties, notwithstanding medical evidence indicating limited picking capacity and the fact that such an arrangement was subsequently implemented on appeal.

131. We reached that conclusion not because the respondent was obliged to create a new role or permanently remove a core function of the job, but because the evidence demonstrated that alternative duties existed within the operation and were in fact utilised following the successful appeal.

132. The Tribunal further finds that the Respondent did not adequately balance the needs of the Claimant, as a disabled employee, against its operational requirements. While operational efficiency and cost considerations are legitimate factors, they do not displace the need to make proper enquiry into reasonable alternatives. The evidence demonstrates that the Respondent’s consideration of adjustments was materially influenced by the availability of “restriction capacity”, rather than a full assessment of what adjustments were reasonable in the Claimant’s case. In particular, we found that consideration became focused upon availability within the restrictions quota rather than a discrete assessment of whether continued employment with adjusted duties remained reasonably achievable.

133. In those circumstances, the Tribunal finds that the Respondent did not carry out a sufficiently thorough or structured consideration of less discriminatory measures prior to dismissal and that its reliance on operational constraints was not sufficiently substantiated to render dismissal reasonably necessary. The subsequent appeal outcome, in which the Claimant was reinstated with a limitation to 2–3 hours of picking duties, further supports the conclusion that a less discriminatory alternative was in fact available.

134. We recognise Mr Hunter's evidence that operational pressures had increased by the time of the appeal, and this gave greater scope for deployment to non-picking tasks. However, having considered the evidence as a whole, we are satisfied that the appeal outcome demonstrated more than a mere change in operational demand. The appeal manager reached a materially different assessment of the claimant's capability and accepted a combination of limited picking and alternative duties could be accommodated. We therefore regard the appeal outcome as evidence that a less discriminatory alternative was available.

135. This conclusion is reinforced by an earlier finding that the Respondent’s witnesses frequently approach the issue through the lens of restrictions capacity rather than through a structured consideration of possible adjustments.

136. Accordingly, the Tribunal concludes that the Respondent has failed to establish that the unfavourable treatment was a proportionate means of achieving a legitimate aim, and the claim under section 15 of the Equality Act 2010 is therefore well-founded.

Reasonable Adjustments (Sections 20 and 21 Equality Act 2010)

137. The Tribunal is satisfied that, by early 2024 and in any event by the commencement of the capability process in June 2024, the Respondent knew, or could reasonably have been expected to know, that the Claimant was a disabled person and that his disability affected his ability to undertake picking duties.

138. The identified PCP was the requirement that operatives achieve the DCPM/KPI performance target when undertaking picking duties. We emphasise that this was the PCP identified in the agreed list of issues for the purposes of the reasonable adjustments claim. We recognise that the claimant also relied elsewhere upon wider requirement to undertake picking duties. However, that was not the PCP identified for determination under sections 20 and 21 of the Equality Act 2010.

139. Although that PCP existed, The capability process was not initiated because the claimant failed to achieve the KPI target relied upon.

140. The Claimant was never subjected to performance management, disciplinary action or capability proceedings because he failed to achieve the KPI target. The capability process arose because of concerns regarding his ability to undertake and sustain picking duties to the extent required by the Respondent, together with the resulting sickness absences, rather than any failure to meet a KPI or productivity target.

141. Accordingly, the Claimant did not suffer the substantial disadvantage alleged, namely being unable to achieve the target and being subjected to capability proceedings as a result because the capability process was not triggered by the PCP relied upon. The duty to make reasonable adjustments therefore did not arise in relation to the PCP identified by the Claimant.

Approved by:
Employment Judge Bridge

7th August 2026

SENT TO THE PARTIES ON:

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FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/