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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000165/2023**

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**Final Hearing  
Held in Edinburgh  
on 2, 3, 4, 9 and 10 April 2024**

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**Employment Judge A Jones  
Tribunal Member A Matheson  
Tribunal Member L Brown**

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**Mr W Hynds**

**Claimant  
In person**

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**Mitsubishi Electric Air Conditioning**

**Respondent  
Represented by  
Mr Duffy, solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

It is the unanimous judgment of the Tribunal that:

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1. The claimant was subjected to harassment related to a disability in terms of section 26 Equality Act 2010 by the respondent in March 2021, but the Tribunal does not have jurisdiction to determine that claim;

2. The claimant was not subjected to any other treatment which amounted to harassment related to a disability;

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3. The respondent did not fail in its duty to make reasonable adjustments;

4. The claimant was not discriminated against for a reason relating to his disability;
5. The respondent did not make any unlawful deductions from the claimant's wages; and
- 5 6. The claimant was not constructively dismissed.

The claimant's claims therefore fail in their entirety and are dismissed.

## REASONS

### Introduction

- 10 1. The claimant presented a claim on 10 April 2023, alleging that he had been subjected to discrimination because of a disability and that he had suffered an unlawful deduction from wages. The claimant has represented himself throughout these proceedings and the respondent has been represented by Mr Duffy, who is a solicitor.
- 15 2. There have been four preliminary hearings for the purposes of case management of this case at which efforts have been made to clarify the nature of the claimant's claims. A list of issues to be determined at the final hearing was set out by Employment Judge King following a hearing on 27 October which was continued to 9 November 2023.
- 20 3. The claimant resigned from his employment with the respondent on 8 January 2024 without notice. Following a hearing on 12 February, the claimant's claim was amended to include a claim of constructive dismissal and a further claim of unlawful deduction from wages which related to sums deducted from the claimant's final pay. The respondent's position was that the deduction was made as a result of an overpayment. The claimant explicitly said that he was not seeking to add any new claim of disability discrimination in this amendment arising out of the termination of his employment.
- 25 4. At the commencement of the hearing, I clarified with the claimant that the list of issues which had been set out was accurate subject to the amendments which had been accepted.
- 30 5. An Order had been made for a joint bundle of documents to be produced and notwithstanding that Order and the claimant having been reminded that he should provide the respondent with any documents on which he

intended to rely to allow the production of a joint bundle in the week before the hearing, the claimant sought to lodge his own bundle of documents at the commencement of the hearing. His failure to comply with the Order required an adjournment to allow parties to collate the bundles to ensure that any additional documents could be incorporated into the bundle of documents.

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6. The claimant then commenced giving evidence. It was apparent that he was reading from handwritten notes and on enquiry, it transpired that he intended to read out those notes as his evidence in chief. There was a further adjournment to allow the respondent to consider the notes and its position on the claimant giving evidence in this manner. It transpired that the claimant's notes were extensive and effectively a detailed written witness statement, and the respondent objected to the claimant giving evidence in chief in this manner. I sought to explore why the claimant had not made any application to give evidence by way of written statement and he indicated that he had not been aware that he would have to do that. After discussion, the claimant was directed to have regard to the list of issues in the bundle and to produce a note related to that list which would allow him to refer to relevant documents in the bundle and have a note of headings as to the evidence he intended to give. The Tribunal proposed that it adjourn until 2pm to allow the claimant to prepare in this regard. The claimant however said that would not be enough time and that he required an adjournment until the following morning, which with some hesitation was granted.

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7. During the course of his evidence the claimant indicated that he was not relying on COPD as a disability in respect of which he had suffered any discrimination. On that basis the issue of whether he was a disabled person due to that condition fell away.

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**Issues to be determined**

Disability discrimination

5 Toileting

8. Direct discrimination – section 13 the Equality Act 2010

- i. Did the respondent treat the claimant less favourably because of disability in relation to toileting issues?
- ii. What was the disability?
- 10 iii. What was the less favourable treatment?
- iv. Who is the comparator?

9. Harassment – section 26 the Equality Act 2010

- i. Did the respondent engage in unwanted conduct?
- ii. If so, what was that conduct?
- 15 iii. Did it relate to the protected characteristic of that disability?
- iv. What was that disability?
- v. Did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

20 10. Time limits - section 123 the Equality Act 2010

- i. Was the complaint brought after the end of three months starting with the date of the act to which the complaint relates?
- ii. If so, would it be just and equitable to extend time?

25 Provision of toileting

11. Was there a failure on the part of the respondent to make reasonable adjustments for the claimant in relation to his access to toilet facilities in terms of section 20 the Equality Act 2010

- 30 i. What was the disability?
- ii. What was the provision criterion or practice that was in place?

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- iii. What substantial disadvantage in relation to a relevant matter was the claimant put to in comparison with persons who were not disabled?
  - iv. What reasonable adjustments should the respondent have put in place for the claimant to avoid the disadvantage?

Parking space

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12. Was there a failure on the part of the respondent to make reasonable adjustments in relation to the claimant's access to parking in terms of section 20 the Equality Act 2010
- i. What was the disability?
  - ii. What was the provision criterion or practice that was/is in place?
  - 15 iii. What substantial disadvantage in relation to a relevant matter was the claimant put to in comparison with persons who were not disabled?
  - iv. What reasonable adjustments should the respondent have put in place for the claimant to avoid the disadvantage?

Changes to job role

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13. Was there a failure of the respondent to make reasonable adjustments to the claimant's job role within section 20 the Equality Act 2010
- i. What was the disability?
  - ii. What was the provision criterion or practice that was/is in place?
  - 25 iii. What substantial disadvantage in relation to a relevant matter was the claimant put to in comparison with persons who were not disabled?
  - iv. What reasonable adjustments should the respondent have put in place for the claimant to avoid the disadvantage?

Sick leave

14. Did the failure of the respondent to pay the claimant full pay between his April and July 2023 amount to discrimination arising from disability within the terms of section 15 the Equality Act 2010
- 5                   i. What was the disability?
- ii. Was the claimant treated unfavourably because of something arising in consequence of his disability?
- iii. What was the unfavourable treatment?
- iv. What was the 'something'?
- 10                   v. Was the treatment a proportionate means of achieving a legitimate aim?
15. Was the failure to pay the claimant full pay during this period an unauthorised deduction from wages within the terms of section 13 of the Employment Rights Act 1996?
- 15                   i. What was the pay due to the claimant for the relevant period?
- ii. Was any deduction made from that pay?
- iii. If so, was the deduction required or authorised to be made by virtue of a statutory provision or a relevant provision of the 10 claimant's contract?
- 20                   iv. Or, had the claimant previously signified in writing his agreement or consent to the making of the deduction?

Arrangements at work from August 2023 onwards

- 25           16. Did the respondent make an unauthorised deduction from the claimant's wages within the terms of section 13 the Employment Rights Act 1996 after his return from long term sick leave.
- i. was the pay due to the claimant for the relevant period?
- ii. Was any deduction made from that pay?
- 30                   iii. If so, was the deduction required or authorised to be made by virtue of a statutory provision or a relevant provision of the claimant's contract?

- iv. Or, had the claimant previously signified in writing his agreement or consent to the making of the deduction?

Constructive dismissal

17. Was the claimant constructively dismissed?
- 5 i. What was the breach of contract or breaches relied upon by the claimant?
- ii. Did they individually or collectively amount to a fundamental breach of contract?
- iii. Did the claimant resign in response to that breach?
- 10 iv. Did he delay in so doing?

Remedy

18. What award, if any, should be made to the claimant?

Observations on the evidence

- 15 19. The Tribunal did not find the claimant to be a wholly credible or reliable witness. He was vague and emotive in examination in chief and argumentative in cross examination. He indicated that he had not read the bundle of the productions prior to the hearing despite having been provided with the bundle prior to Christmas last year. He used this astonishing omission as a justification for documents not having been included in the bundle. For instance, he suggested that he had raised more grievances than were included in the bundle. He suggested he would provide these documents to the Tribunal but never did. He also indicated it was not for him to provide such documentation but for the respondent to do so.
- 20 20. The respondent's witnesses were all straightforward and both credible and reliable. The respondent led evidence from Mr Aludjo, who was General Affairs Department Manager and had overall charge of HR matters, Mr MacDonald who dealt with some of the claimant's grievances;
- 25 30 Mr Rooney who deal with other aspects of the claimant's grievances; Mr Felvus who dealt with the claimant's last grievance and Ms Gordon, who was the respondent's payroll manager.

21. The claimant cross examined the respondent's first witness Mr Aludjo, albeit fairly briefly. He did not cross examine any of the other witnesses called by the respondent. The Tribunal sought to explain the consequences of not challenging the respondent's evidence on a number of occasions.

5 The claimant's position was that he did not want to participate in what he said were the 'respondent's lies'. He suggested that this was on the basis of his Christian beliefs. He said he would deal with this in his submissions. The Tribunal explained that submissions had to be based on evidence heard by the Tribunal. The claimant's response was "there's other avenues

10 I'm going to do down after this." The Tribunal found the claimant to be somewhat disrespectful of the Tribunal and the process and unwilling to comply with Orders or directions given by the Tribunal. It appeared to the Tribunal that the claimant viewed the Tribunal as a stepping stone to other proceedings he intended to raise.

15 Findings in fact

22. Having listened to the evidence, and in particular noting that the respondent's evidence was largely unchallenged by the claimant, having regard to the documents and submissions made, the Tribunal found the
- 20 following material facts to have been established.
23. The claimant commenced employment with the respondent on 29 October 2018 as a production operator. The claimant worked in the respondent's premises in Livingston, which is a factory setting producing air conditioning units.
- 25 24. The claimant was employed under terms and conditions signed by him around the time of his employment which set out matters such as sick pay and grievances and disciplinary procedures.
25. The respondent paid employees company sick pay depending on their length of service and whether they had been absent in any individual year.
- 30 26. The claimant had short absences from work in 2019, 2020, 2021 and 2022. The claimant was absent from work from 17 August 2022 until 14 July 2023 because of a shoulder injury.



27. The claimant has diabetes, and neuropathy which is related to that condition. These conditions have impacted on the claimant's mobility and dexterity. The claimant is disabled for the purposes of the Equality Act 2010 as a result of these conditions.
- 5 28. In March 2021, the claimant was working in aircon1, which is one of the factory buildings in the respondent's operations. Another employee who was undertaking some temporary supervisory duties, started timing the claimant's visits to the toilet. The claimant visited the toilet more frequently than other employees.
- 10 29. The claimant raised a grievance regarding this matter against the employee concerned. The grievance was set out in a handwritten letter dated 15 March 2021. In that grievance the claimant indicated that he had taken advice from "Disability UK, Diabetes UK, the Veteran's agency and a government department."
- 15 30. The claimant's line manager discussed the grievance with him. The member of staff concerned was instructed to stop timing the claimant's toilet visits immediately and the member of staff apologised to the claimant for his actions. The claimant was content that the matter had been dealt with to his satisfaction.
- 20 31. The claimant was referred by the respondent for an occupational health assessment on 23 March 2022. The assessment related to difficulties the claimant was experiencing in lifting items above shoulder height. The claimant's duties required him to lift items up to 10kg onto trays which could be above shoulder height.
- 25 32. The claimant was absent from work due to a shoulder injury from 17 August 2022. He provided sick lines for a month, then two months and then three months, all of which stated that his absence was because of shoulder pain and that he was not fit for work.
- 30 33. The claimant was referred again to occupational health and had a consultation by phone with the respondent's occupational health nurse on 11 April 2023. The claimant informed the nurse that his GP supported a return to work and had recommended 'light duties'. No evidence of any GP recommendations was provided to the respondent. The nurse's

recommendation was that the claimant could return to work with recommendations, which included a phased return and an assessment on manual handling.

- 5 34. The claimant attended work on 26 April 2023 without discussing his return with anyone. When he returned, his line manager tried to find something for him to do, but there was nothing suitable given the restrictions the claimant had. Mr MacDonald who was a manager, indicated that the claimant should be sent home but told that he would be paid full pay until the respondent could meet with him.
- 10 35. The respondent then invited the claimant to a meeting on 4 May by letter dated 27 April to discuss a possible return to work. The claimant was asked to bring any recommendations from his GP with him.
- 15 36. When the claimant attended the meeting Mr MacDonald who was the section manager responsible for him, was shocked at the claimant's condition. The claimant attended the meeting with 2 walking sticks which Mr MacDonald had never seen him use before and the claimant had to hold on to furniture to move about. The claimant informed the respondent that his GP had told him that he would be in a wheelchair within 2-3 years and that he had fallen twice in the last 3 months, his grip was poor and he couldn't lift more than a cup of coffee.
- 20 37. The respondent informed the claimant it would be very difficult to find a job for him in his current area in which he was able to sit all the time. The claimant was asked what areas he thought he could work in. The claimant said he could work in quality assurance. The claimant said he did not want to work night shifts anymore and only wanted to work day shifts. The claimant did not suggest that his request to work day shifts related to the claimant's disability.
- 25 38. The respondent indicated that they would look for a job to which the claimant could return and that he was not currently fit for his existing role. The claimant was told that in the circumstances, he would revert to normal company sick pay rules. The claimant responded by saying "No I will not, its your duty under the Equality Act to find me a job or else pay me if you can't. My disabilities are covered under the Equality Act. What will the
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company do when I'm in a wheelchair, you will still have to find me a job!". The claimant then started shouting and pointing his finger saying he knew his rights and he would not go back on the sick. Mr MacDonald brought the meeting to an end. The claimant's conduct at that meeting was unreasonable.

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39. The respondent then wrote to the claimant by letter of 4 May confirming that the claimant would return to company sick pay rules and that a follow up meeting would be arranged after the respondent explored whether there were any suitable roles for the claimant with the restrictions he had highlighted.

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40. The claimant wrote a letter on 5 May to the respondent complaining about the conduct of the welfare manager who had been at the meeting the previous day in particular in relation to her stating that the claimant was not fit to return to work and company sick pay rules would apply to him. The claimant had not been fit to return to his substantive role.

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41. Further meetings took place with the claimant and the respondent on 15 and 29 June to discuss his return to work. The claimant agreed to return to work in a day shift role which had been identified for him in a different factory building. The contractual change resulted in the claimant no longer being entitled to a shift allowance.

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42. The claimant took annual leave from 18 July until the 7 August when he returned to work on the day shift pattern in aircon2 in a role which allowed him to sit down and did not require lifting.

43. In October 2023, the claimant complained that the requirement to use an electric screwdriver in his new role was causing him pain. As a result, the claimant's supervisor identified an alternative role for him which involved filling accessory bags. This was the lightest role available in the factory and allowed the claimant to sit down during his work.

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44. The claimant did not ever inform the respondent that he required the use of a disabled toilet. Adequate toilet facilities within a short distance from the claimant's workstation were available for him to use.

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45. Adequate parking facilities were available for the claimant to use to allow him to go into work without having to walk more than a short distance. The

claimant did not ever tell the respondent that he required to park at any particular distance from the factory entrances of which there were two.

5 46. The claimant wrote to the respondent's solicitor on 27 November and copied the email to the Employment Tribunal. By this time the claimant had lodged a Tribunal claim, complaining of disability discrimination. His email stated "So, I am going to evaluate my choices after the Christmas holidays. However, just to let you know, that I definitely don't want to work for Mitsubishi Electric Europe Ltd, in their Toxic working environment. With this in mind. I will probably claim Constructive Dismal, and apply to put an addition onto my Employment Tribunal case." The respondent's solicitor passed the email to the respondent who treated it as a grievance.

10 47. The respondent wrote to the claimant by letter dated 4 December inviting him to a meeting to discuss the matter on 6 December. The claimant attended that meeting and complained that a supervisor had been present when staff had made inappropriate comments to him. Notes were taken at that meeting and the claimant was recorded as saying "When my supervisor found out about it he went and sorted it and said it won't happen again then Scott was quick to act on it and said it wont happen again so that's why I was happy to leave it. I actually said to Scott that I was going to put a letter into withdraw my grievance but he said I should still carry on with it." The claimant went on to confirm that he was happy to 'close out' the grievance. The respondent issued a letter to the claimant dated 7 December confirming the outcome of the meeting.

15 48. The claimant then sent a further email to the respondent's solicitor on 13 December raising issues in relation to previous events and making further allegations.

20 49. The claimant was invited to a meeting to discuss his email on 19 December. At that meeting the claimant indicated that the main issue (which had not been raised in his previous emails) was that his work area was too cold and that he wanted to "move somewhere warm or I will be claiming constructive dismissal and take the money." The respondent sought to understand what the claimant was looking for. The claimant said he wanted to work in an office environment. The claimant was unwilling to

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discuss the other matters he had raised in his email of 13 December and said “that is all being sorted by the tribunal, so I am not going to discuss that, don’t worry I will sort him right out then.” The claimant went on to say that if he was not moved he would be claiming constructive dismissal. The claimant was asked what jobs he thought he could do and how he was with computers. He refused to discuss the matter and stated “I am not caring that is for you to sort out and if not, you haven’t made reasonable adjustments.” The respondent explained to the claimant that the factory was closing that week for a two-week shut down over the holiday period. It was explained to the claimant that the respondent was unlikely to be able to get back to him before the shutdown. The claimant replied “timescales are not my problem; I have waited long enough.” The claimant’s conduct at this meeting was obstructive and unhelpful.

50. The respondent wrote to the claimant by letter dated 21 December confirming what had been discussed at the meeting and stating that once risk assessments had been completed, the respondent could advise further on a potential move.

51. The respondent’s operations shut down on 22 December and reopened on 8 January 2024.

52. The claimant attended for work on 8 January and immediately went into the office of Mr Felvus, who was the manager who had dealt with his most recent grievance. The claimant asked if Mr Felvus had any news for him in relation to a move. Mr Felvus explained that they were just back, and that the management team would get together and get back to him as soon as a decision was made. The claimant said “so I don’t have a new job off of the shop floor as of the now?” to which Mr Felvus said not today. The claimant then put a letter of resignation on Mr Felvus’ desk and stated “in that case here is my constructive dismissal letter, see you later.”

53. The claimant resigned with immediate effect in a letter dated 8 January 2024 which he had brought with him to work on that date. He stated in that letter that he had resigned “as your factories are extremely cold in the winter and with the extreme cold that severely affects my disabilities. Also with a job that injures my hands and gives me great pain.”

54. The sum of £1029.60 was deducted from the claimant's final pay because he had taken more annual leave than had accrued to him at the date of termination of his employment. The respondent's annual leave year runs from 1 April. The respondent subsequently became aware that the sum of £939 ought to have been deducted instead. However, as the claimant's final pay would still have been in a negative balance, no further adjustment was made.

55. The claimant has not worked since his resignation from the respondent's employment and is currently signed off as unfit to work.

## Relevant law

### Disability discrimination

56. Disability is a protected characteristic for the purposes of the Equality Act 2010 ('EqA') (section 4).

57. Section 13 EqA provides that direct discrimination will arise when a claimant is treated less favourably because of a protected characteristic. Section 13(3) provides that discrimination will not arise where a disabled person is treated more favourably than a non-disabled person.

58. Section 15 EqA prohibits unfavourable treatment because of something arising in consequence of a claimant's disability.

59. Section 20 and 21 EqA set out an employer's duty to make reasonable adjustments and what amounts to a failure to comply with that duty.

60. Section 26 EqA sets out what amounts to harassment related to a protected characteristic.

61. Section 136 EqA sets out the burden of proof in a claim of discrimination.

62. Section 123 EqA sets out the time limits in which a claim under the EqA should be raised and makes provision for an extension of time where a Tribunal finds it just and equitable.

63. Section 13 Employment Rights Act 1996 ('ERA') deals with unlawful deductions from wages. Section 14 sets out excepted deductions which

include at section 14(1)(a) where there has been an overpayment of wages.

64. Section 95 ERA sets out the circumstances in which an employee is dismissed. This includes at section 95(1)(c) where an employee terminates the contract in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

## Discussion and decision

### Disability discrimination

65. The Tribunal and the respondent made considerable efforts to determine the exact nature of the claimant's claims. The claimant had been given many opportunities to clarify his claims and during the final hearing raised the possibility of further amendments when he sought to put forward evidence in relation to claims which were not currently before the Tribunal.

66. The respondent had accepted that the claimant was a disabled person by virtue of his diabetes and neuropathy. The claimant indicated during the course of the hearing that he was no longer relying on COPD as a disability. The claimant said that medication he took because of his diabetes caused him to have to use the toilet more often than others. When it was pointed out to him that there was no evidence about this matter, the claimant said he would bring in the leaflet for the relevant medication, but did not do so.

### Harassment

67. The respondent accepted that the claimant had been subjected to an act of harassment in terms of section 26 EqA or direct discrimination in terms of section 13 by one of its employees in March 2021 when the claimant was timed going to the toilet. However, the respondent's position was that this claim was time barred. The respondent highlighted that the claimant had taken advice from various agencies around the time of the incident and that he had not lodged a claim at that time. The respondent's position was

also that the claimant was satisfied with the way in which the respondent had dealt with the issue at the time and had decided not to take matters further.

- 5 68. The claimant made vague claims of further acts of harassment although he did not give any specification as to who exactly was alleged to have said what to him or when. The claimant had been on sick leave from August 2022 until July 2023 and had not raised any claims relating to any harassment which he said had occurred after his return to work.
- 10 69. The Tribunal was satisfied that the claimant had been subjected to harassment because of disability in March 2021 when he was timed going to the toilet. However, his Tribunal claim was not lodged until more than 2 years after the event. The claimant's position on time bar was variously that he was not aware of any time limits and while he had looked at the Equality Act, he had not looked at the issue of time limits; that he thought there was  
15 no time limit and that he thought the time limit was 3 years 'like in some criminal matters'. He also suggested in submissions that the Tribunal did not sufficiently advertise the applicable time limits to the general public, and he would be writing to the President to bring this to her attention.
- 20 70. The Tribunal was mindful that the exercise of its discretion to extend time limits should be the exception and not the rule. It was for the claimant to persuade the Tribunal that it should exercise its discretion in this regard.
- 25 71. The Tribunal determined that there was no basis for the exercise of its discretion to extend the time limit at all and certainly not for a period of two years after the event. The Tribunal took into account that the claimant had taken advice at that time from a number of bodies, and that he had looked at the relevant legislation. The claimant appeared to be of the view that it was not his responsibility to establish time limits in relation to claims he might bring. His submissions appeared to blame the Tribunal service for not advertising time limits more widely. The claimant is able to use the  
30 internet and could have searched for time limits applicable to claims of discrimination or harassment. It was his responsibility to do so and he did not take any action at all to establish when he should lodge a claim. In any event, he had informed the respondent that he was happy with how the



respondent had dealt with the issue in that the colleague apologised and the conduct was not repeated. While that does not render unlawful treatment lawful, it is a relevant factor to take into account when determining whether or not to exercise discretion to extend time limits.

- 5 72. In addition, the Tribunal was satisfied that there was no evidence before it to demonstrate that the claimant had been subjected to any further harassment. Although he made vague allegations in this regard, any such treatment must have occurred prior to his long-term absence which commenced in August 2022. Any claim is therefore time barred and there
- 10 was no basis on which the Tribunal was persuaded it should exercise its discretion to extend the time limit, not least because any claim was wholly unspecified.

#### Reasonable adjustments

- 15 73. The claimant alleged that the respondent should have made the following reasonable adjustments for him:
- a. The provision of a disabled toilet for his use at some unspecified date
  - b. The provision of a disabled parking space for his use at some unspecified date
  - 20 c. The provision of a different job role at some point in time
74. In order for a duty to make reasonable adjustments to arise the employer must have applied a provision criterion or practice ('PCP') that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.
- 25 75. It is therefore necessary first to identify the PCP and then to consider the nature and extent of the substantial disadvantage relied on by the claimant, the extent to which the respondent was aware of any such disadvantage and the reasonableness of the proposed adjustment.
- 30 76. In terms of the toileting issue, the claimant did not identify a PCP. The respondent sought to identify a PCP from what the claimant said and suggested that it was that non-disabled persons were able to use the disabled toilet.

77. In the first instance, the claimant did not specify a time frame in which he said he ought to have use of a disabled toilet. There was nothing in the claimant's claim form regarding this matter. The claimant first raised the issue of a disabled toilet in an email of 6 July 2023 where he sought to particularise his claim. However, all he said in that email was that he had reminded the respondent that there was only one disabled toilet in aircon 1. Following an Order for the claimant to further specify his claim in this regard he stated that "this toilet was adequate for my need however, the whole factory could use them, which meant a very long wait to get to use it." The particulars went on to say, "they should have limited the number of people who could use the toilet." The claimant did not work at aircon 1 from August 2022. Therefore, the last possible date at which the reasonable adjustment ought to have been if such were required was that date.
78. The Tribunal was not satisfied that the claimant had suffered a substantial disadvantage in relation to the provision of toilet facilities. He did not say how often he had to go to the toilet or produce evidence that this was related to his disability or indeed any medical evidence on the matter. The claimant's evidence was that he often had to wait long periods to access the disabled toilet. The Tribunal did not accept that evidence. He did not ever bring to his employer's attention during his employment that this was an issue. The claimant's position appeared to be that because he was registered disabled, he was entitled to have use of a disabled toilet. The respondent's evidence, which was not challenged by the claimant was that there was a disabled toilet which was not busy other than potentially at lunchtime, that there was another accessible toilet immediately above the disabled toilet and that there were ample other toilet facilities in aircon 1. The Tribunal accepted this evidence.
79. Even if it could be said that the claimant had suffered a substantial disadvantage, he did not bring this to the respondent's attention at any time. It was not clear what the claimant was suggesting should have been done. For instance, it was not clear whether he was suggesting that there should be an announcement to other staff not to use the disabled toilet. The toilet was located at reception and available for use by visitors to the

factory, and it was not clear whether the claimant was suggesting that this toilet should be kept vacant while he was on duty for his sole use.

80. The Tribunal concluded that this was not a reasonable adjustment which should have been made in relation to the toilet facilities.

5 81. However, even if the Tribunal is wrong in that, the claimant's claim was not lodged until April 2023 almost 8 months after he had ceased working in that area. The claimant did not raise the issue of toilets after he returned to work in August 2023 and did not seek to amend his claim in that regard.

10 82. Therefore, the claimant's claim is time barred and for the reasons set out above in relation to the issue of harassment, the Tribunal is not satisfied that it would be just and equitable to extend the time limit.

#### Parking space

15 83. The claimant led no evidence that he was subjected to a substantial disadvantage because of the lack of a disabled parking space. His evidence appeared to be that because he had a blue badge (and the Tribunal notes that he did not produce any evidence that he had a blue badge or when he got a blue badge) he was entitled to a disabled parking space. He did not give any evidence of any specific difficulties he had ever had in parking at work and walking to work. The Tribunal noted that the claimant did not start using walking sticks at work until his return to work in August 2023 and there was no claim before the Tribunal in relation to any failure to make reasonable adjustments after that period. The Tribunal therefore found it difficult to understand what the substantial disadvantage was said to be.

20 84. The Tribunal accepted the respondent's largely unchallenged evidence that while there were no disabled parking spaces, there was a large car park and that shift times were staggered since the pandemic to reduce any bottlenecks in staff arriving and leaving at the same time. There was simply no evidence that the claimant could not find a parking space which allowed him to walk to the factory without difficulty.

30 85. The Tribunal also notes that the claimant's further particulars on this matter state "There was no mention of this on my ET1 claim form as I did not know

that they were breaking the Equality Act until someone was kind enough to advise on this.”

- 5 86. In addition, the claimant did not at any time explain to the respondent why he would need a disabled parking space or that he had any difficulty in parking and walking to the factory. In all of these circumstances, this did not amount to a reasonable adjustment.
- 10 87. Even if it could be said that this was a reasonable adjustment, the claimant’s claim was time barred. There was nothing in the claimant’s evidence, to suggest any basis on which the Tribunal should exercise its discretion to extend that time limit.
- 15 88. The third reasonable adjustment related to a suggestion that the claimant ought to have been transferred to light duties prior to having been absent from work on long term sickness. The claimant did not lead any evidence on this matter or suggest what should have happened or when.
- 20 89. The Tribunal notes that the claimant’s long-term absence did not appear to be related to his disability as it was for a shoulder injury caused by what he said was an accident at work. During the course of the hearing the claimant made reference to letters of complaint he said he had given to the respondent over his employment regarding various matters. He suggested it was for the respondent to produce these documents rather than him. There was simply no evidence that there was anything in the claimant’s role prior to his sick leave which caused him a substantial disadvantage.
- 25 90. In any event, any duty would have arisen prior to the claimant’s sick leave and therefore his claim is time barred. There is no basis on which it is just and equitable to extend the time limit.

#### Discrimination arising from a disability

- 30 91. The claimant sought to argue that the failure to pay him full pay during his absence from work after he said he was fit to return amounted to discrimination arising from his disability. He also argued that the failure to maintain his shift allowance when he moved to day shift was either

discrimination arising from his disability or an unlawful deduction from his wages.

- 5 92. The claimant had returned to work from sick leave unannounced in April 2023 and was instructed to go home and that he would receive full pay pending further investigations. No arrangements had been made for him to return to work as he could not return to his prior role and another role had not as yet been identified for him. The claimant appeared to be particularly aggrieved that non-medical staff had said that he could not return to work, when it was perfectly apparent from what the claimant said to the respondent that he could not return to his previous role and the claimant did not seek to dispute this. The claimant was not paid full pay during the period between April and July 2023 because he was not fit to return to his contractual role and another role had not as yet been identified. It was only when the claimant met with respondent on 4 May 2023 that the respondent had information which would allow it to try to identify a suitable alternative role. There were further meetings with the claimant on 15 June and 29 June and a role was identified for him to return to work on day shift hours and be able to remain seated. The claimant's contract was then amended to take account of the new arrangements.
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- 20 93. The claimant was not paid full pay during this period as he was not fit to work his contractual duties. He was subject to the respondent's company sick pay arrangements.
94. That does not amount to discrimination arising from his disability and therefore his claim fails.
- 25 95. The claimant's contractual arrangements were varied to allow him to return to work. The claimant said he wanted to work a day shift and did not want to work night shift. There is no shift allowance for those working a day shift and the claimant was aware of this. The claimant did not give any evidence as to why he could not work a night shift and the Tribunal accepted the respondent's evidence that the claimant was happy to work a day shift and that he had said something to the effect of no longer having to work shifts would "give him his life back". This did not amount to discrimination arising from his disability but as a result of the new contractual arrangements and
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reasonable adjustments made by the respondent. Where a reasonable adjustment involves an employee being transferred to a new job, an employer is not necessarily obligated to maintain the terms and conditions of the role the employee can no longer perform. Whether that would amount to a reasonable adjustment would depend upon the circumstances of the particular case. The claimant did not seek to argue that this amounted to a reasonable adjustment but even if he had, the Tribunal did not accept that continuing to pay the claimant a shift allowance for an indefinite period which was not payable to other staff on that shift pattern amounted to a reasonable adjustment in the particular circumstances of the claimant.

#### Unlawful deduction from wages

96. The claimant alleged that the deduction from his final wages relating to overpaid holiday pay was an unlawful deduction. He appeared to rely on an email from the respondent regarding his pay prior to him resigning where it stated that “going forward as long as you have no further absence all deductions have been met”. However, this email was sent on 17 August 2023.

97. The respondent’s Payroll Manager gave evidence which was not challenged by the claimant. The Tribunal accepted her evidence that as a result of the changes to the claimant’s hours and role and taking into account the annual leave he had already taken, at the point of his resignation he had taken more annual leave than that to which he was entitled. The respondent was therefore entitled to make a deduction to his wages in terms of section 14 ERA to recover the overpayment.

#### Constructive dismissal

98. The claimant’s position was that he resigned because the respondent did not transfer him to an office-based job on his return from the Christmas

shut down on 8 January and that this amounted to a fundamental breach of contract.

99. The Tribunal had no hesitation in concluding that this did not amount to a breach of contract, never mind a fundamental breach of contract such that the claimant could treat himself as constructively dismissed.

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100. It was clear that the claimant had been considering resigning from his employment in November before he raised the issue of the cold affecting him with the respondent at the meeting in December. The Tribunal therefore formed the view that the reason for his resignation was not because the respondent had not found an alternative role for him, but because he had already decided he was going to resign. The Tribunal concluded that he was looking for an excuse to resign so that he could present a claim of unfair dismissal.

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101. The claimant's conduct at the meeting on 20 December was not suggestive of a person genuinely engaging in trying to find a solution to a problem. His conduct was obstructive and unreasonable. He would only say that he wanted an office job and would not give any information regarding what sort of office job he could do. His position was that it was for the respondent to guess what he might be able to do. That was entirely unreasonable. It was clear the claimant was seeking to manufacture a situation where he would resign and go on to claim that he had been constructively dismissed. The claimant was aware that he was giving the respondent a single working day to find a job for him when he had given them no information regarding what skills or abilities he might have which would assist. The claimant knew that the factory was shutting down that week and that the shutting down of all the machinery for a two-week period was not a straightforward matter. The respondent had no time at all to search for another job for the claimant.

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102. The claimant turned up for work on 8 January in the knowledge that the respondent would not have been able to identify a role for him. He came prepared with his resignation letter.

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103. The respondent did not breach the claimant's contract and the claimant was not entitled to treat himself as having been dismissed. The claimant's conduct was entirely unreasonable. His claim therefore fails.

5      **Employment Judge:      A Jones**  
**Date of Judgment:      15 April 2024**  
**Entered in register:      16 April 2024**  
**and copied to parties**

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