EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105648/2016

Held in Glasgow on 2, 3, 4, 5 & 6 October 2017

Employment Judge: Shona MacLean
Members: Mr S F Evans
Mr P Kelman

Mr Cameron Kerr — Claimant
Represented by:
Mr J Mitchell
H & S Representative

Midland Bluebird Limited — Respondent
Represented by:
Ms L Byars - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claim under Section 15 of the Equality Act 2010 is dismissed.

REASONS

Background

95. The claimant sent his claim form to the Tribunal on 22 November 2016. He complained of unfair dismissal and discrimination arising from disability in terms of Section 15 of the Equality Act 2010 (the EqA). After initial consideration, the unfair dismissal claim was dismissed as the claimant had insufficient qualifying service.

96. The respondent resisted the claim of disability discrimination. In the response received by the Tribunal on 11 January 2017 the respondent denied the claimant was a disabled person for the purposes of bringing a

claim under the EqA. If the claimant was found to be disabled the respondent denied having treated him unfavourably because of something arising in consequence of his disability. Alternatively, the respondent said any such unfavourable treatment was a proportionate means of achieving a legitimate aim.

97. A Preliminary Hearing took place on 22 May 2017 at which the Tribunal decided that the claimant was a disabled person within the meaning of Section 6 of EqA. The judgment dated 26 May 2017 sets out in paragraph 17 a statement prepared by the claimant for the Preliminary Hearing explaining his life long condition of Asperger's Syndrome.

98. In preparation for the Hearing the parties discussed the scope of the claimant's claim. It was confirmed that the claim of discrimination arising from disability related solely to the requirements placed on the claimant by Gordon Grant as part of the appeal process: the claimant's reinstatement was conditional on him (a) passing a full PCV driving test and (b) obtaining confirmation from DVLA that there were no limitations on his ability to drive. The respondent accepted that Mr Grant had knowledge of the claimant's disability and therefore knowledge on Mr Grant's part was conceded. No concession was made to the knowledge of the claimant's disability before Mr Grant acted.

99. The issues which the Tribunal had to determine at the Hearing were:

a. Did the request for the claimant to provide written confirmation from the DVLA about his fitness to drive arise in consequence of the claimant's disability?
b. If so, did this request constitute unfavourable treatment?
c. If so, was it a proportionate means of achieving a legitimate aim?
d. If so what remedy should be awarded?

100. Mr Mitchell advised the Tribunal that William Johnstone, Trade Union representative had intended to give evidence for the claimant. Unfortunately, Mr Johnstone had unexpectedly taken ill over the weekend and had been hospitalised. The Tribunal was reassured that Mr Johnstone was recovering but would not be well enough to attend the Hearing. It was unknown when he might be well enough to attend. The Tribunal appreciated that this was unfortunate from the claimant's perspective but did not consider that in relation to the material facts that the claimant would be prejudiced if the case were to proceed without hearing Mr Johnstone's evidence. Mr Mitchell confirmed that he was content to proceed. The claimant gave evidence on his own account. Ms Lindsay McEwan, the claimant's fiancée gave evidence on his behalf. Gordon Grant, formerly Operations Manager, Livingston and Musselburgh gave evidence for the respondent. Since March 2017 the Scottish Borders Council has employed Mr Grant.

101. The Tribunal was referred to a joint set of productions. On the evidence before the Tribunal it made the following material findings in fact.

Findings in Fact

102. The respondent is a subsidiary of First Group Plc. The respondent is a bus operator.

103. The respondent has a duty to ensure the health and safety of its drivers, passengers and other road users and general members of the public. As part of this duty the respondent has a responsibility to take steps to ensure it complies with its obligations including having regard to guidelines set by Government via the Driving and Vehicle Licensing Agency (DVLA).

104. The claimant has Asperger's Syndrome. He is a disabled person in terms of the EqA.

105. The respondent employed the claimant as a bus driver based at Larbert from 14 September 2015 until his employment terminated with effect from 3 July 2016.

106. James Brennan is the Operations Manager at Larbert. Before the claimant applied for the post Mr Mitchell, the claimant's stepfather told Mr Brennan that the claimant has Asperger's Syndrome. Mr Brennan told Mr Mitchell that the claimant would be looked after.

107. The claimant reported to Kenneth Burt, Staff Manager. The claimant received training on 14 and 15 September 2015 at the respondent's Training Academy at Livingston. Michael Wilson is the Training Manager. Peter McCallum, Graham Houllston and William Ferrier are Training Instructors.

108. The claimant signed an agreement on 14 September 2015 which provided that if the claimant's employment was terminated within 12 months of the date of passing the practical PCV driving test he would be liable to pay the respondent £15,000 less any sums which had already been deducted from his wages while he was employed (production 33).

109. On 7 October 2015, the respondent issued the claimant with a written statement of terms and conditions of employment (the Statement) (production 12). The Statement provided if the claimant received training to obtain a PCV driving licence he would sign an agreement regarding repayment of the training costs.

110. Between 28 October 2015 and 22 May 2016, the claimant was involved in four collisions, which were found for insurance purposes to be the claimant's fault. The claimant attended the Training Academy on 8 December 2015 and 7 March 2016 for refresher training. The claimant's driver qualify monitoring scores were acceptable. The claimant's Drive Green scores were mostly amber and red. His Risk Rating was "very high".

111. On 21 June 2016, the claimant was involved in a collision at Falkirk. He reported the incident and continued his shift. When he returned to Larbert the claimant was suspended and asked to return the following day.

112. The claimant spoke to Mr Burt on 22 June 2016. The claimant understood that he was to go out on his shift but was to attend the Training Academy on 24 June 2016 for refresher training. The clamant continued with his shift.

113. On 23 June 2016 Derek Bewick, Larbert Depot Trainer carried out driver monitoring of the claimant which was a good drive (production 19).

114. On 24 June 2016, the claimant attended the Training Academy for refresher training from Mr McCallum. The claimant then met Mr Houllston who carried out a driving assessment lasting one hour 40 minutes. The claimant felt that Mr Houllston was overly critical and partial. Mr Houllston said that the CCTV footage would not be considered but then analysed it. The claimant felt that this affected his performance. Mr Houliston concluded the claimant had not met the required standard for a PCV driver on that day (production 20/100). Mr Wilson told the claimant that he would report back to Larbert; there was a high probability that the claimant would not keep his job.

115. On 27 June 2016 Mr Burt had a meeting with Mr Wilson. The claimant, Mr Mitchell and William Johnston, Trade Union representative were also present. Mr Burt told Mr Wilson that the claimant had Asperger's Syndrome. It was agreed that the claimant should have another driving assessment. After the meeting Mr Brennan intervened and said that the claimant should not have another assessment but instead attend a disciplinary hearing.

116. The claimant attended a disciplinary hearing on 29 June 2016 conducted by Mr Burt. The claimant was given one week's notice of termination of employment because of performance. Mr Burt encouraged the claimant to appeal the decision, which he did.

117. Mr Burt asked Gordon Grant, Operations Manager Livingston and Musselburgh to conduct the appeal. Mr Grant did not know the claimant. Mr Burt told Mr Grant that the claimant had had a few blameworthy incidents and mentioned that the claimant has Asperger's Syndrome.

118. Mr Grant received the incident reports (productions 13, 14, 17 and 18); the driving standard referral dated 4 December 2015 (production 15); the refresher training reports (productions 16 and 20); the driver monitoring on 23 June 2016 (production 19); and driver risk summary (production 21).

119. Mr Grant considered that there were more avoidable incidents than he expected of someone of the claimant's experience. One related to taking a wrong turn and others related to mirror use. Although refresher training had taken place on several occasions this was not reflected in the claimant's Drive Green scores or Risk Rating, which were high. The driver monitoring report was a good drive but the report lacked the detailed feedback, which Mr Grant normally expected.

120. Mr Grant spoke to Mr Burt who clarified that the claimant's condition had not been raised during the investigations into the collisions. Mr Grant knew that at an meeting on 27 June 2016 the claimant had been offered another assessment but that offer had been withdrawn and the claimant was instead dismissed. Mr Grant felt that was unfair.

121. As Operations Manager Mr Grant knew that the DVLA requires licence holders to notify it about certain medical conditions. DVLA relies on a self-notification system. The obligation to notify the DVLA falls on the individual. Mr Grant had no understanding of Asperger's Syndrome as a medical condition or how it affected the claimant.

122. The claimant was invited to an appeal hearing with Mr Grant, which took place on 21 July 2016 for around an hour. Mr Johnstone accompanied the

claimant. Emma Alexander, Recruitment and Training Administrator was present and took notes (the Appeal Notes) (production 25). The claimant was not given a copy of the Appeal Notes.

123. The claimant told Mr Grant about the collision on 21 June 2016; his assessment on 24 June 2016 and why he found it challenging; that he had been offered another assessment but this had been taken away. Mr Grant wanted to know if the claimant thought there was anything Mr Grant needed to consider. Mr Johnstone referred to the claimant's condition. He explained that before the claimant started his employment Mr Mitchell had spoken to Mr Brennan about it. Mr Grant asked about the impact of the claimant's condition and how the respondent could provide support. The claimant did not understand why he was being asked about his condition. The claimant said that after about five or six hours driving his concentration started to deteriorate and he found it difficult learning all the routes at one time. If he did not drive the route for a long time he forgot where to go.

124. Mr Grant considered that had the claimant disclosed his condition on his application form the claimant's learning and training needs could have been accommodated and altered to suit him. Mr Grant wanted the claimant to succeed and felt that he should have been better treated. Mr Grant decided that the claimant should go through another PCV driving test at the Training Academy with an independent examiner rather than a driving assessment with a training instructor. He also felt that before undergoing the PCV driving test the claimant should be given some refresher training. Mr Grant said that he would make the arrangements and be in touch.

125. After the appeal hearing Mr Grant arranged for a PCV driving test to be conducted by David Carson on 26 July 2016 after a refresher drive.

126. Mr Grant sent a letter to the claimant dated 21 July 2016 notifying him of the outcome of the appeal hearing and the arrangements (the Appeal Letter) (production 26). The Appeal Letter stated:

The test will be a full DVSA test conducted by David Carson and will take place at Livingstone on Tuesday 26 July 2016, you should report to the training academy at 13.00 hours where you will be given a 30 minutes refresher driver before the test as agreed at the appeal hearing. If you fail the test, then we may take action up to and including dismissal for failing to meet the standard required for a driver with First as agreed at the meeting.

If you pass the test, we will then arrange for a meeting to take place with Mike Wilson and Kenny Burt so that we can understand your Asperger's Syndrome and how it impacts you, discuss whether or not this is a notifiable condition for DVLA and then look at what support we can offer you to assist you to be able to carry out the full range of your duties."

127. Mr Grant believed that the claimant's condition had not been considered in reaching the decision to terminate his employment. Mr Grant reviewed the incident reports and the claimant's comments as to what he found difficult about his day-to-day role. Asperger's Syndrome is a notifiable condition if it affects your driving. The claimant did not consider that his condition affected his driving. He had not notified the DVLA. Mr Grant considered that given the number and nature of the collisions the claimant's condition might affect his driving. Mr Grant felt that to reinstate the claimant without any conditions would expose the respondent to significant risk regarding its legal obligations. Mr Grant decided was appropriate for the claimant to notify the DVLA and for the DVLA to assess the claimant's fitness to drive.

128. The claimant did not recall receiving the Appeal Letter. On 26 July 2016, the claimant attended the Training Academy. He undertook the refresher training following which he sat and passed the DVLA driving test conducted by Mr Carson.

129. After the DVLA driving test the claimant spoke to Mr Grant and Mr Carson. The claimant thought he was to be reinstated. Mr Grant advised the

claimant that he could not be reinstated until Mr Grant received written confirmation from DVLA that the claimant was fit to drive. Mr Grant told the claimant that he should notify the DVLA of his condition. Although the claimant did not accept that that his condition affected his driving he nonetheless did as he was asked.

130. From his experience of having asked other drivers to notify the DVLA of their conditions, Mr Grant understood that on being told about a notifiable condition the DVLA would take four to six weeks to send its decision. If the DVLA was content for the driver to continue driving while the application was being considered it would send a letter to that effect.

131. The claimant telephoned the DVLA and was told that there was no problem with him driving. The claimant relayed this information to Mr Grant. Mr Grant said that he needed this confirmed in writing. Mr Grant kept in touch with the claimant by telephone.

132. On 15 August 2016, the claimant applied for a job as a driver with Stagecoach Cumbernauld. He attended an interview on 16 August 2016 and was offered a job as a driver. The claimant started training with Stagecoach Cumbernauld on 22 August 2016 (production 8). The claimant did not inform the respondent of his new employment.

133. The claimant did not receive a letter from DVLA by the end of August 2016. Mr Grant was about to go on annual leave. He thought that to expedite the process in his absence the claimant should meet one of his colleagues, Alasdair Ferris and they should have a conference call to the DVLA. The meeting between the claimant and Mr Ferris did not take place.

134. The claimant and Mr Grant spoke on Mr Grant's return from annual leave in mid-September 2016. Mr Grant indicated that once matters had been clarified the claimant might wish to consider working in the Livingstone rather than in Larbert. The claimant said that he was working with

Stagecoach Cumbernauld, which came as a surprise to Mr Grant. The claimant was not interested in working at Livingstone.

135. The claimant's final salary was £22.04. The respondent deducted training fees of £447.61. The claimant's dismissal placed him was in financial difficulty. He was under stress and lost confidence. The claimant is very confused about how he should view his condition and has difficulty expressing his feeling and emotions and empathising with his family. Once the claimant found new employment he had no ongoing loss of earnings.

Observations of Witnesses and Conflict of Evidence

136. The Tribunal found the claimant to be a polite and articulate gentleman who answered questions honestly, candidly and to the best of his recollection. While the Tribunal appreciated that many witnesses find giving evidence stressful it was mindful that the claimant was putting considerable effort into communicating with the Tribunal and Ms Byers.

137. The Tribunal accepted that the claimant did not see his condition impacting on his life or driving. His understanding of his condition and its impact on him is based on what he had been told by others not what he feels or believes. Against this background the Tribunal could understand why the claimant was confused about Mr Grant asking him about his condition and then telling him to notify the DVLA about his condition. The Tribunal also felt that knowing the challenges that the claimant faces in social interaction it would have assisted the claimant if the respondent had taken greater care in the preparation of the Appeal Notes and the Appeal Letter and had ensured that the claimant had received copies. It might also have assisted if Mr Grant had written to the claimant following their telephone conversations setting out his understanding of what was discussed. It might also have assisted Mr Grant in ensuring that the Appeal Notes, Appeal Letter and his own recollection were consistent.

138. In assessing the claimant's evidence the Tribunal took account of his statement provided at the Preliminary Hearing in which he said that "*a large percentage of the conversation can by a large extent be lost to me as I am so busy considering expectations and considering whether my own response is appropriate and adequate*."

139. Ms McEwan was a credible and honest witness. Her evidence was restricted to confirming that she drove the claimant to Livingston where he was to meet with Mr Grant. She was unable to say when that happened but thought that it was late August 2016/early September 2016. The Tribunal did not feel that Ms McEwan was being deliberately vague but rather trying to assist the Tribunal as best as she could.

140. The Tribunal considered that Mr Grant gave his evidence candidly and to the best of his recollection. His evidence was consistent throughout the hearing. The Tribunal's impression was that Mr Grant genuinely wanted the claimant to return to work for the respondent. It was the Tribunal's view unfortunate that at the appeal stage Mr Grant considered how the claimant's condition might affect his driving but did not consider whether the claimant's condition might affect his social communication and interaction at the appeal hearing and afterwards.

141. There were several factual disputes although the Tribunal did not consider that all of them were material in relation to the issues that it had to determine.

142. One key issue was whether Mr Grant had grounds to consider that the claimant's ability to drive may have been affected by his condition. The claimant's position was that it did not. He referred to the driver monitoring and passing driving assessments and driving tests. He questioned the value and reliability of the Drive Green Score and Risk Rating.

143. Mr Grant acknowledged that he did not discuss the claimant's condition with him in detail. However, Mr Grant considered the claimant's Driver Risk

Summary and in his opinion the claimant was a high risk driver, with a high level of collisions in a short period of time. Mr Grant also considered that there was a trend to the type of collision in which the claimant was involved (mirror usage/concentration). Mr Grant was an experienced Operations Manager and understood that the Drive Green Score and Risk Rating was an indicator. He expected that the refresher training would have had an impact on the scores but it had not. Mr Grant understood the claimant to have acknowledged at the appeal hearing that his condition affected his concentration after five/six hours of driving and his ability to learn and remember multiple routes. Mr Grant accepted that the claimant's assessments and driving test were successful but they were under instruction, preceded by refresher training and did not reflect in the claimant's driving afterwards.

144. The Tribunal did not have before it any documentation relating to the disciplinary hearing and outcome or grounds of appeal. From the evidence, the Tribunal understood that at the meeting on 27 June 2016 the claimant's condition was raised in the context of explaining why he did not perform well at the assessment on 24 June 2016. There was no evidence that the claimant's condition was raised at the disciplinary hearing. Mr Grant believed that it had not been taken into account when deciding to dismiss the claimant. There was no evidence to suggest that the claimant's position at the appeal hearing was that his condition affected his ability to driving in general or that it was the reason for the number of collisions. He was not seeking to revisit the collisions. At the appeal hearing Mr Grant did not tell the claimant what he was thinking about the level and nature of the collisions. The Tribunal felt that in the absence of so doing the claimant would not know what Mr Grant was thinking and why he was asking about his condition. Mr Grant acknowledged he had little or no knowledge about the claimant's condition. The Tribunal therefore felt that Mr Grant made assumptions about the affect the claimant's condition had on his ability to drive.

145. Although the Tribunal also discussed the following disputed issues it did not consider that they were material to the issues to be determined.

146. The claimant said that the respondent was aware of his condition. The respondent conceded this point only in relation to Mr Grant's actions. The Tribunal could not form a view on what Mr Brennan was told before the claimant started working for the respondent. However, the Appeal Note recorded that Mr Burt and Mr Wilson knew of the claimant's condition on 27 June 2016. Mr Grant did not challenge this at the appeal hearing and gave evidence of being informed by Mr Burt of the claimant's condition when he was asked to conduct the appeal hearing. The Tribunal considered that the respondent was aware of the claimant's condition.

147. There was a dispute over the number of appeal meetings. The claimant thought that there were two meetings before the PCV driving test. Mr Grant said that there was only one appeal hearing. The Tribunal did not consider that any issue turned on this point. The Appeal Notes suggest that there was only one meeting. It does not record any adjournment. The Appeal Letter also suggest that there was only one meeting as the arrangements for the PCV driving test were communicated in writing. As the claimant did not recall receiving the Appeal Letter but knew of the arrangements for the PCV driving test the Tribunal thought that it was possible that there was some informal follow up discussion.

148. Of more significance was the dispute over what was said at the appeal hearing. The claimant said that he was unsure why Mr Grant was asking about his condition. The claimant tried his best not to acknowledge his condition. He always drove the same way. He was told that Mr Grant needed time to decide if Mr Brennan was correct. At the second meeting, he was told he would be given the driving test promised by Mr Burt and Mr Wilson. Mr Grant's evidence was that it was Mr Johnstone who raised the claimant's condition in response to being asked if there was anything else Mr Grant had to consider. Mr Grant said he then tried to establish how the

claimant's condition affected his role. Mr Grant said that he concluded the appeal hearing by saying that the claimant had to undergo a PCV driving test and the claimant had to notify the DVLA about his condition.

149. The Tribunal thought that it was highly likely that at the appeal hearing Mr Grant was considering the need for the claimant to notify the DVLA of his condition. The Tribunal's reasoning was that before the appeal hearing Mr Grant thought that the claimant had not been given enough support at the assessment and the refresher training had not delivered the expected outcome. Accordingly, the Tribunal thought that at the appeal hearing Mr Grant would be seeking to understand the claimant's condition. The Tribunal was not convinced that at the appeal hearing Mr Grant told the claimant that he had to notify the DVLA and provide confirmation in writing. The Tribunal considered that had he done so it would have been recorded in the Appeal Notes. Also Mr Johnston accompanied the claimant so even if the claimant did not pick up this point in the Tribunal's view Mr Johnston would have mentioned it to the claimant if it had been said in his presence. The Tribunal also felt that it was significant that the Appeal Letter was at odds with Mr Grant's recollection of what was said at the appeal hearing especially as Mr Grant said that he was the author of the Appeal Letter and he wrote it shortly after the appeal hearing.

150. There was disputed evidence about a meeting at which the claimant was offered reinstatement. The claimant said that it took place around September 2016/October 2016. Ms McEwan said that she drove the claimant to a meeting at Livingston around late August 2016/September 2016. Mr Grant said that after the PCV driving test he did not meet the claimant; all discussion was via telephone. The claimant said that Mr Grant offered to reinstate him in Livingston. Mr Grant said that the discussion about reinstatement was subject to the written confirmation from DVLA.

151. The Tribunal did not consider that the claimant or Ms McEwan's evidence was not credible but it felt that Mr Grant's evidence was more reliable on

this issue. The Tribunal's reasoning was that Ms McEwan and the claimant were equivocal about when they travelled to Livingston. There was no reference to this meeting in the claim form or the response for additional information. The Tribunal felt that it was likely that Mr Grant asked the claimant was to meet Mr Ferris around August/September 2016. At that time, the claimant was involved in training with his new employer. He was also under financial and emotional stress. The Tribunal felt that if the request was made over the telephone, it was understandable that the claimant would be confused about who he was meeting and the purpose of that meeting. The Tribunal felt that it was regrettable that the telephone call was not followed up in writing so that the claimant had clear instructions about what he was being asked to do and why Mr Grant thought it was appropriate.

152. On the issue of the offer of reinstatement without written confirmation from the DVLA about the claimant's fitness to drive the Tribunal felt while that was the claimant's understanding it was highly improbable that having taken the approach that he did Mr Grant would have decided to reinstate the claimant without receiving written confirmation from DVLA.

Submissions

153. Ms Byers prepared outline submissions in writing, which she helpfully passed to the Tribunal and Mr Mitchell. The following is a summary.

154. Ms Byers reminded the Tribunal of the legal basis of the claim and the scope of the claim, which had been agreed and is set out in paragraph 5 above. She then provided observations on the evidence. Ms Byers invited the Tribunal to prefer Mr Grant's evidence where a dispute arose. She acknowledged that some of the factual dispute had little impact on the matters to be determined.

155. Ms Byers assisted the Tribunal by setting out the legal analysis. She addressed the Tribunal on each of the questions that it had to consider.

156. The Tribunal was referred to ECHR Code on what amounts to "unfavourable treatment" and the case of *William v Trustees of Swansea University Pension and Assurance Scheme and anor 2017*. The respondent's primary submission was that Mr Grant's offer of conditional reinstatement did not amount to *"unfavourable treatment".* Mr. Grant was complying with his obligations with regards to ensuring health and safety. Also in his view, the claimant's obligation that he was required to notify the DVLA. This was a requirement set by the DVLA not the respondent. If the Tribunal found that there were grounds for Mr Grant to believe that the claimant's condition may have been affecting his ability to drive, requesting that he provide confirmation from the DVLA in writing was not unfavourable treatment.

157. Mr Grant's evidence was that the reason for the condition was the requirement by the DVLA regarding notifiable conditions, which Mr Grant believed might be applicable to the claimant. The cause of the unfavourable treatment was Mr Grant being satisfied that the claimant had a duty to notify the DVLA.

158. The reason for Mr Grant requiring the claimant to provide notification was because he was satisfied that the claimant had a duty to do so. The respondent accepted that there was a connection between the claimant being required to notify the DVLA and his disability. The respondent accepted that if the Tribunal considered the alleged unfavourable treatment to amount to unfavourable treatment then it did arise in consequence of the claimant's disability.

159. If the Tribunal did not accept the claimant's earlier submissions it must move onto consider whether the unfavourable treatment was a proportionate means of achieving a legitimate aim.

160. The respondent contended that the requirement for the claimant to provide written confirmation from the DVLA before being reinstated was a proportionate means of achieving a legitimate aim.

161. The legitimate aim was protection of the health and safety of others. Also to ensure that they are not allowing their drivers to drive if there is concerns over their ability to do so or where the individual has a notifiable condition.

162. The DVLA requirements are to assist in ensuring the health and safety of road users and pedestrians.

163. As a bus service operator, the respondent has significant and important obligations regarding health and safety. The respondent also has legal obligations under section 2 and 3 of the Health and Safety at Work Act 1974.

164. There was evidence before Mr Grant that the claimant posed a risk to others because:

a. The number of blameworthy collisions involving the claimant colliding with a stationary object
b. The claimant's Driver Risk Summary, including his Risk Rating and Drive Green.
c. The referral for refresher training, which did not result in improved scores.
d. The claimant raised issues about how his condition affected him in the context of his role; specifically, concentration and memorising routes.
e. DVLA has a requirement regarding notifiable conditions. The claimant's condition is notifiable if it affects his driving. The DVLA guidance sets out significant consequences of not reporting, including fines and possible prosecution. This support the importance place on this and the general duty to ensure health and safety.

f. Mr. Grant had concerns given the number of incidents the claimant had and that the claimant could if allowed to continued have hit more than a stationary object.

165. The respondent's responsibilities regarding health and safety means it cannot allow an individual who it reasonably consider is unfit to drive the respondent's buses to return to the road. If Mr Grant had reinstated the Claimant to his driving duties, without attaching the conditions he did, it would expose the respondent to significant risk with regards to its legal obligations and also it may only have been a matter of time before the claimant was involved in another collision.

166. The respondent also had an obligation to take very seriously the matters raised by the claimant at the appeal, which called into question his ability to drive safely. It would have been negligible of the respondent to ignore concerns raised by an individual when it asked what they find difficult about their role. Particularly when they could impact of the ability to drive the PCV safely, and in turn the health and safety of others.

167. If the Tribunal is satisfied that there is a legitimate aim, it must move on to consider the questions of proportionality. To show that its actions were proportionate, an employer does not need to show that it had no alternative course of action; rather, it must demonstrate that the measures taken were *"reasonably necessary"* in order to achieve the legitimate aims.

168. This requires the Tribunal to carry out a balancing exercised by taking into consideration all of the relevant facts and circumstances, including an assessment of the working practices, the business considerations involved and the business needs of the employer and weighing these against the unfavourable treatment in this case. See *Hampson v Department of Educations and Science 1989 ICR 179, CA*; *Hensman v Ministry of Defence UKEAT.0067/14/DM* and *Essop v Home Office (UK Border Agency) April 2015*

75. The respondent submitted that justification should not place an "unreasonable burden" on the employer. There may be very good reasons for the alleged unfavourable treatment. The respondent submitted that there was a very good reason for requiring the claimant to contact the DVLA.

76. The respondent acted proportionately. There were legal obligations. It was proportionate because of the potential severity of the consequences had the Claimant been allowed back to work without the confirmation from the DVLA and then gone in to be involved in a further collision which could have had more serious consequences (namely, injury). Mr. Grant stated that the respondent was running a "Be Safe" moto given the heightened fears about ensuring health and safety, because of the Glasgow Bin Lorry incident and the subsequent enquiry. It was not an onerous requirement. Mr. Grant had asked this of other drivers with notifiable conditions. The claimant knew that the respondent would reinstate him so long as he provided the written confirmation from the DVLA. Mr. Grant arranged for the claimant to meet Mr Ferris to sort the matter out. The claimant did not attend. Mr. Grant made various calls to the claimant to see how he was getting on. He reiterated the requirement to the claimant, even if this was not followed up or documented in writing.

77. The respondent submitted that it was proportionate for Mr. Grant to require this confirmation in writing rather than accepting the claimant's word. The Respondent would not have the necessary protection, in the event any further accident had occurred, if it had just taken the claimant's word for it.

78. A factor relevant to the Tribunal's determination of whether the respondent acted proportionately was whether there were less discriminatory means of achieving the legitimate aim. The respondent's submission was that there were not.

79. The claimant was employed as a bus driver. Mr. Grant had serious concerns regarding the claimant's ability to drive safely and, as such, he could not allow the claimant to return pending the written confirmation. The

respondent submitted that it is going too far to say that it should have reinstated the claimant, pending written confirmation. There was no indication as to when this would be forthcoming. It also would have left the respondent in the predicament that if the DVLA response had been negative, it would have had to again consider the termination of the claimant's employment as a driver.

80. Although the guidance states that an individual can ususally keep driving while the application should be considered Mr. Grant said that in his experience a letter is provided to the effect that the individual can continue driving in the meantime (i.e. there are no limitations). This guidance cannot be read to state that every driver is fine to continue driving once the DVLA has been notified. The respondent submitted that it was reasonable and proportionate, given the genuine concerns of Mr. Grant for him to await written confirmation.

81. Ms Byers provided comments about the claimant's schedule of loss. In relation to injury to feeling she referred to the guidelines in *Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102* as updated by *Simmons v Castle 2013.* The respondent denied that there had been any discrimination but if this was not accepted any award would fall in the bottom of the lower band. It was a one-off act of discrimination. It did not relate to dismissal but an offer of reinstatement. Mr Grant was overturning the dismissal. It was not an onerous condition. Mr Grant tried to assist the claimant who found alternative work in the same role within seven weeks.

82. Mr Mitchell also helpfully provided the Tribunal and Ms Byers with a copy of his submissions of which the following is a summary.

83. The Tribunal was referred to sections 13, 19 and section 20 of the EqA. Mr Mitchell accepted that the claimant's claim was not made under theses sections of the EqA.

84. The claimant was asked by Mr Grant to provide proof from the DVLA that he was "fit" to drive with his condition before he could be reinstated as an

employee. This put the claimant at a disadvantage compared to others as it was more complicated to investigate compared to someone needing clarification on fitness to drive with for example high blood pressure. Asperger's Syndrome is a condition not an illness therefore makes it very difficult to explain and understand how it effects someone compared to a standard medical illness or ailment that a doctor can simply look up or examine on the affected person. The lack of clear instructions throughout the process was confusing for the claimant.

85. The respondent will argue that the condition placed on the claimant were a proportionate means of achieving a legitimate aim. The claimant does not accept this. The respondent was unaware of how to handle the claimant's condition and panicked.

86. Mr Grant did not explore other options that could have been available meantime. He took the easy option by not finding the claimant an alternative role to allow him to continue his employment.

87. Mr Mitchell referred to section 15 of the EqA. He said that the claimant's conditions of were changed after he had carried out the original conditions of a passing a PCV driving test. The respondent disputed this and argue that this was not the case. However, the claimant was a victim of unfavourable treatment. His job offer was placed on hold until he could prove his condition did not affect his ability to drive.

88. Through the entire process, the respondent failed to provide vital documents such as minutes of meetings, letters of appeal conditions and letter of dismissal. Also, the disparity between letters and meetings. All of these factors added to the already existing confusion that the claimant was experiencing.

89. It was astonishing that Mr Grant said he wanted the claimant to succeed and that Mr Grant would do what he could for the claimant as he clearly felt that Asperger's Syndrome was something to worry about. However when

asked what he knew of the characteristics of Asperger's syndrome and how it would have affected the claimant, Mr Grant had no idea.

90. How could Mr Grant have concerns about Asperger's Syndrome when he had no knowledge of the condition other than a book from Mr Wilson which Mr Grant did not read.

91. Mr Grant said he wanted the claimant to succeed and said he would do what he could for the claimant. However, when the claimant passed the PCV Driving Test Mr Grant put another barrier by insisting the claimant informed the DVLA of what Mr Grant believed to be a notifiable condition.

92. When asked how he would have treated another employee with a similar record to the claimant, Mr Grant admitted he would consider other background information such as young family, little sleep, separation or bereavement, then one would ask why the same courtesy was not extended to the claimant other than a vague recollection of asking the claimant if anything else should be considered which the claimant denied being asked.

93. Mr Mitchell asked the Tribunal to take into consideration all the evidence. The claimant was seeking the maximum award that the Tribunal feels appropriate due to the level of financial and emotional distress and upset as well as the overall stress of the whole proceedings to the claimant and his family. The claimant was left with a final wage of £22. This was delivered with no consideration of his wellbeing or ability to support himself financially without having to rely on financial help from his family as well as fiancée's family.

Deliberations

94. As the claim was discrimination arising out of disability the Tribunal started by referring to Section 15(1) of the EqA which states: *"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."

95. Section 15(2) goes onto state that Section 15(1) will not apply if the employer can establish that it was unaware that the claimant was disabled. The respondent conceded that Mr Grant was aware of the claimant's disability.

96. To succeed with the claim the claimant had to establish that he suffered unfavourable treatment and that treatment was because of something arising from his disability. If the claimant was successful in so establishing, the respondent was liable unless it showed that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

97. In relation to the steps that the claimant had to establish, the order in which the Tribunal approached them did not matter (see *Basildon and Thurrock NHS Foundation v Weerasinghe 2016 ICR).*

98. The Tribunal considered whether the claimant was treated unfavourably and by whom. The EHRC Employment Code indicates that unfavourable treatment is treated synonymously with disadvantage.

99. The Tribunal accepted that the DVLA requires individuals to notify it if the individual has Asperger's Syndrome and it affects their driving. If the person is unsure they are to ask their doctor. Usually the person can keep driving while the DVLA is considering the application. The DVLA's process potentially involves contacting the individual's doctor or consultant, arranging for the person to be examined or asking the individual to undergo a driving assessment, eyesight or driving test. The claimant did not consider that his condition affected his driving nor was there evidence that the claimant's doctor thought that his driving was so affected.

100. In the Tribunal's view the unfavourable treatment for the claimant was not the DVLA's requirement. It was Mr Grant's condition that until the claimant provided written confirmation from the DVLA about his fitness to drive the claimant would not be reinstated. The reason for this was Mr Grant, who had little knowledge of Asperger's Syndrome, thought that the claimant's driving might be affected by his condition and therefore he believed that the claimant had to notify the DVLA. The Tribunal was satisfied that there was a connection between the unfavourable treatment and the claimant's disability.

101. The Tribunal then turned to consider whether the requirement for the claimant to obtain written confirmation from the DVLA before he was reinstated was a proportionate means of achieving a legitimate aim

102. Mr Grant's evidence, which was not challenged, was that the respondent as a bus operator had significant health and safety obligation not only to its employees, passengers, other road users and the public.

103. The Tribunal considered that Mr Grant's evidence established the importance that the respondent placed on ensuring that its drivers are safe to drive. The drivers are monitored and where appropriate refresher training is provided. The claimant had been involved in several blameworthy incidents stationary objects and one referred to the wrong route being take. The claimant had been rated as Very High Risk. He had numerous Red Scores in his Drive Green. Despite refresher training his Drive Green Score and Risk Rating had not improved. At the appeal hearing the claimant's condition was raised as something that Mr Grant should take into consideration. Mr Grant's view was that the claimant's dismissal was unfair. Mr Grant understood that the claimant's condition impacted on his ability to drive after five or six hours and his ability to memorise several routes at one time. Knowing of the claimant's condition and that it might affect the claimant's ability to drive Mr Grant had concerns about reinstating the claimant without obtaining reassurance of his ability to drive.

104. The Tribunal's view was that there was a legitimate aim of protection of the health and safety of others so it moved onto the question of proportionality. This involved the Tribunal carrying out a balancing exercise.

105. The Tribunal had no doubt that Mr Grant wanted the claimant to succeed in his role as a driver as he said that he would reinstate the claimant. The conditions that Mr Grant attached to the reinstatement arose out of genuine concerns about the claimant's Driver Risk Summary. While the claimant passed driver monitoring, assessments and PCV driving tests these were under instruction. The claimant's Drive Green scores and Risk Rating did not provide reassurance about the claimant's driving ability. There was uncertainty so far as Mr Grant was concerned about the affect the claimant's condition had when he was working his shift, which was usually unsupervised and often lasted in excess of six hours. If the claimant returned to work and was involved in a more serious collision involving injury there would be serious consequence for the respondent given its knowledge of the claimant's condition and its concerns. The claimant had not already notified the DVLA. The respondent had no locus to do so. Mr Grant felt that it was appropriate for the claimant to do so. Mr Grant had asked other drivers with notifiable conditions to do so in the past and this was provided usually with four to six weeks. Mr Grant kept in touch with the claimant. When the DVLA response had not been received within the anticipated timescale Mr Grant was willing for Mr Ferris to assist the claimant.

106. The claimant had been dismissed. Until the written confirmation from the DVLA was received he could not return to work and was not paid. The claimant did not consider that his driving was affected by his condition and therefore it was unnecessary to notify the DVLA. Nonetheless he did so immediately. The claimant was told verbally by the DVLA that it had no problem with the claimant driving.

107. The claimant could notify the DVLA. He said he did so by telephone. The claimant's evidence was vague as to what he discussed on the telephone and if he provided the information for the application verbally. The claimant did not say that he made a separate application online or in writing. The claimant did say that on the telephone the DVLA had no problem with him driving. What was not clear was if this was while his application was being considered or its decision having considered the information that he provided. From the information contained in the DVLA website the Tribunal thought it was more likely to be pending the application being considered.

108. The Tribunal considered whether it would have been more proportionate for Mr Grant to have reinstated the claimant based on what the claimant was told by the DVLA on the telephone.

109. The Tribunal was mindful that Mr Grant's experience was that if the DVLA was content for the driver to continue driving while the application was being considered it would send a letter to that effect. Also, Mr Grant expected the DVLA's decision on the application within four to six weeks.

110. If the claimant had been reinstated based on the telephone discussion or pending written confirmation the respondent would have had little protection if a further accident occurred. It would also have complicated the situation if a further accident occurred and the DVLA then advised that the claimant was not fit to drive.

111. The Tribunal concluded that making the claimant's reinstatement conditional on him providing written notification from the DVLA was a proportionate means of achieving legitimate aim.

112. Having reached this conclusion, it was not necessary for the Tribunal to consider this issue of remedy.

Employment Judge: Shona MacLean
Date of Judgment: 19 October 2017
Entered in register: 31 October 2017
and copied to parties