EMPLOYMENT TRIBUNALS

Claimant: Mr J Andrews

Respondents: 1. Greater Manchester Buses (South) Limited
2. Mr S Roughley

HELD AT: Manchester **ON:** 4, 5, 6, 7 and 8 September 2017
2 and 3 October and
20 December 2017
(in Chambers)

BEFORE: Employment Judge Horne
Ms L Atkinson
Ms B Hillon

REPRESENTATION:

Claimant: Ms R Levene, Counsel
Respondents: Ms R Wedderspoon, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. Neither respondent directly discriminated against the claimant.
2. The first respondent is liable for Mrs Ellis' harassment of the claimant on 10 December 2015.
3. In all other respects the complaint of harassment is not well-founded.
4. The first respondent did not breach the duty to make adjustments by declining to appoint an independent investigator or mediator to deal with the claimant's grievance.
5. In all other alleged respects the respondents breached the duty to make adjustments.
6. The first respondent discriminated against the claimant arising from disability in the following respects:

6.1. Giving the claimant a formal warning for sickness absence on 21 September 2015;

6.2. On 10 December 2015 telling the claimant to speak to his doctor about changing his medication and warning him that his future employment was at risk is his attendance did not improve; and

6.3. Giving the claimant a final written warning for sickness absence on 13 January 2016.

7. In the other alleged respects the first respondent did not discriminate the claimant arising from disability.

8. The first respondent indirectly discriminated against the claimant in relation to his disability.

9. The complaint of victimisation is dismissed following withdrawal by the claimant.

10. The claimant was unfairly constructively dismissed.

11. The first respondent wrongfully constructively dismissed the claimant in breach of contract.

CASE MANAGEMENT ORDER

.

1. There will be a further hearing on **12 and 13 March 2018** to determine the claimant's remedy.

2. The remedy hearing provisionally listed for 9 January 2018 is postponed.

3. Amongst the issues to be determined at the remedy hearing, the Tribunal will consider whether, had the first respondent not fundamentally breached the claimant's contract and discriminated against the claimant, the claimant would or might in any event have resigned.

4. The time allocation for the remedy hearing will be two days.

5. A party may apply to have the remedy hearing postponed on the ground that it is inconvenient to counsel or to a witness. Any such application must be made by 4pm on 10 January 2018.

6. If a party considers that any further case management order is required for the purpose of the remedy hearing, that party must notify the Tribunal in writing by 4pm on 10 January 2018.

7. If a party is interested in engaging in judicial mediation prior to the remedy hearing, that party must inform the tribunal in writing by 4pm on 10 January 2018.

REASONS

Delay in sending judgment to the parties

1. There has been a regrettable delay between the conclusion of the parties' submissions on 8 September 2017 and the sending of this reserved judgment to the parties. The parties deserve an explanation.

2. The tribunal met on 2 and 3 October to deliberate. By 5pm on 3 October, the three members of the tribunal had not yet reached a unanimous decision on all aspects of the claim. The case was therefore re-listed for a further day's hearing in the absence of the parties. Unfortunately, before that hearing took place, one of the lay members had an accident and suffered a traumatic injury requiring surgery. The deliberation day therefore had to be cancelled. The members were not able to reconvene until 20 December 2017. As a result, the written decision could not be sent to the parties until January 2018, for which the tribunal apologises.

Complaints and issues

3. By a claim form presented on 21 July 2016 the claimant raised the following complaints:

   3.1. Unfair constructive dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA").

   3.2. A claim for damages for breach of contract (wrongful dismissal).

   3.3. Direct disability discrimination, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA").

   3.4. Discrimination arising from disability, contrary to sections 15 and 39 of EqA.

   3.5. Indirect disability discrimination, contrary to sections 19 and 39 EqA.

   3.6. Harassment related to disability, contrary to sections 26 and 40 EqA.

   3.7. Failure to make adjustments, contrary to sections 20 and 21 EqA.

   3.8. Victimisation, contrary to sections 27, 39 and 108 EqA.

4. At the outset of the final hearing, counsel for the claimant indicated that the complaint of victimisation was withdrawn.

<u>Unfair Constructive Dismissal</u>

5. The claimant relied on one term of the contract, commonly known as the implied term of trust and confidence. Here is a complete list of the first respondent's alleged conduct which was said to have undermined the trust and confidence relationship:

   "

   (1) Ceasing the claimant's contractual sick pay, the handling of this matter, and failing to reinstate the same until after appeal.

   (2) The handling of the claimant's rota and hours in the light of his disability, Occupational Health advice and his needs to attend medical appointments. In particular the requirement for the

claimant to work long hours, 9.00am to 7.00pm, and working more than five days out of seven before rest days.

(3) The issuing of disciplinary sanctions under the attendance policy.

(4) Not giving the claimant alternative non driving duties.

(5) On 10 December 2015 Joanne Ellis telling the claimant that his "job is on the line" and instructing the claimant to have his medication changed.

(6) Not using an independent party for the grievance and appeal against final written warning.

(7) Refusing to change the claimant's rota in a manner that had been agreed at the grievance and appeal against the final written warning hearing."

6. The issues that the Tribunal had to determine were as follows:

6.1. Did the first respondent conduct itself as alleged?

6.2. Was the alleged conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence?

6.3. Did the first respondent have reasonable and proper cause?

6.4. Did the claimant resign in response to the alleged breach?

6.5. Did the claimant delay too long and thereby affirm the contract?

6.6. If the claimant was constructively dismissed, what was the reason for his dismissal?

6.7. If the claimant was constructively dismissed, did the first respondent act reasonably or unreasonably in treating that reason as sufficient for constructively dismissing him?

Breach of Contract (Wrongful Dismissal)

7. The claim for damages for breach of contract turned on whether the claimant had been constructively dismissed as above.

Direct Discrimination

8. It was common ground that the claimant was disabled at all relevant times because of his infection with the Human Immunodeficiency Virus ("HIV").

9. Here is a complete list of all the less favourable treatment that was alleged to have been done by the first respondent because of the claimant's disability:

"

(1) Ceasing his contractual sick pay/threatening to do the same.

(2) Applying conditions to the claimant's entitlement to contractual sick pay.

(3) Failing/refusing to address the claimant concerns and complaints.

(4) Failing/refusing to implement the respondent's own recommendations.

(5) Imposing disciplinary sanctions against the claimant."

10. Some of these allegations appeared at first sight to be too vague to enable the Tribunal to determine them effectively. For example, it did not initially seem clear which "concerns and complaints" the first respondent had omitted to address. On reading the claimant's very helpful closing written submissions, however, and cross checking them against the original claim form, the allegation became much clearer. It concerned the claimant's complaint about the second respondent's (Mr Roughley's) conduct of a meeting which took place on 4 July 2015. The claim form advanced this allegation on the basis that the claimant had raised his complaint at a meeting with Mrs Joanne Ellis.

11. It was also clear that the "respondent's own recommendations" referred to in the fourth allegation of direct discrimination related to the first respondent's Occupational Health report. Only one such report was referred to in the claim form, namely the report dated 22 July 2015. The final allegation ("Imposing disciplinary sanctions") was focused on the formal warning given to the claimant on 21 September 2015 and the final written warning on 13 January 2016. The claimant's written closing submissions made reference to earlier warnings for poor attendance, but there was no complaint about these in the claim form. At the outset of the final hearing, the claimant's counsel confirmed that there was no distinct complaint of discrimination in respect of those earlier warnings.

12. We had to determine, in the case of each allegation:

9.1 Whether the first respondent had treated the claimant less favourably as alleged; and

9.2 Whether the reason for the less favourable treatment was because the claimant was disabled with HIV.

Duty to make adjustments

13. The duty to make adjustments was said to have arisen in five different ways. Each requirement stemmed from the existence of an alleged provision, criterion or practice ("PCP").

14. The first of these (PCP1), was described in the claimant's List of Issues as "working long hours, 9.00am to 7.00pm". During the course of the evidence it became increasingly clear that this formulation of PCP1 did not properly capture the essence of the claimant's complaint. He was not complaining about the length of his shifts; nor did the claimant ever have to work from 9.00am to 7.00pm. What the claimant was really complaining about was the irregular start and finish times and, in particular, the lack of a guaranteed finish time earlier than 7.00pm. During the course of closing submissions, the Employment Judge postulated a possible reformulation of PCP1 as follows:

> "A requirement to work a variety of duties within the shift window 9.00am to 7.00pm with irregular finish times, including finish times at 7.00pm."

15. Counsel for the respondent observed that this would be a change to the claimant's pleaded case but, very fairly in our view, she did not suggest that there was any procedural bar to us proceeding on the basis of PCP1 as reformulated.

16. A similar conversation took place in relation to the alleged disadvantage and claimed adjustment. Contrary to what appeared in the List of Issues, the claimant did not want to work shorter hours. It was his case advanced in final submissions that he should have been given fixed start and finish times, 9.00am to 5.00pm. Again, we did not understand the respondent to be raising any procedural objection.

17. So far as PCP1 was concerned, therefore, the issues for determination were:

    17.1. Whether PCP1 put the claimant at a substantial disadvantage in comparison with persons who were not disabled; and

    17.2. Whether it would be reasonable for the respondent to have to make the adjustment of giving the claimant fixed start and finish times, 9.00am to 5.00pm.

18. During the course of final submissions there was a further discussion about whether the respondent could rely on what is commonly called the "knowledge defence". The claimant's position in relation to this issue was that it had not been identified in the agreed List of Issues and an amendment was therefore required. On the merits, it was the claimant's case that the respondent could reasonably have been expected to know about the disadvantage caused by PCP1 had it made basic enquiries of the claimant.

19. PCP2 was alleged to be "working a shift pattern without two consecutive rest days each week". By a "week", the claimant meant a rolling period of seven days, as opposed to a working week from Sunday to Saturday. The Tribunal had to decide:

    19.1. Whether PCP2 put the claimant at a substantial disadvantage in comparison with persons who were not disabled; and

    19.2. Whether it was reasonable for the respondent to have to make the adjustment of a shift pattern (such as Monday to Friday) with two rest days in any rolling period of seven.

20. PCP3 was initially defined as "the application of the absence/capability procedure". At the outset of the final hearing it was agreed that this formulation should be altered to "a capability procedure providing for escalating warnings on reaching defined patterns of sickness absence". The Tribunal had to determine whether:

    20.1. PCP3 put the claimant at a substantial disadvantage in comparison with persons who were not disabled (in particular on 21 September 2015, 10 December 2015 and 13 January 2016); and

    20.2. Whether it would be reasonable for the first respondent to have to make the adjustment of revoking or avoiding sanctions under that procedure.

21. PCP4 was a requirement to do driving duties. There seems to be no dispute that, in December 2015, the claimant was put to a disadvantage by this requirement because a change of medication for his disability meant that he could not drive. What the Tribunal had to decide was whether or not it was reasonable for the respondent to have to make the adjustment of giving alternative duties to the claimant during that period.

22. Finally, PCP5 was alleged to be "internal management of the grievance process without reference to an independent and impartial third party". The issues for the Tribunal were:

    22.1. Whether PCP5 put the claimant at a substantial disadvantage in comparison with persons who were not disabled; and

    22.2. Whether it was reasonable for the first respondent to have to make the adjustment of providing an independent third party mediator for his hearing on 18 April 2016.

Indirect disability discrimination

23. There were three strands to the indirect discrimination complaint. In truth they were virtually indistinguishable from the complaint of failure to make adjustments. The three strands were PCP1, PCP2 and PCP3 as reformulated under the heading of failure to make adjustments.

24. The questions for the Tribunal, in relation to each PCP, were:

    24.1. Did the PCP put people with HIV at a particular disadvantage compared with persons who did not have HIV?

    24.2. Could the respondent show the PCP to be a proportionate means of achieving a legitimate aim?

Harassment

25. Two individuals were alleged to have harassed the claimant. These were Mrs Ellis and the second respondent (Mr Roughley).

26. The ET3 response raised what is known in the jargon as the "statutory defence" under section 109 of the Equality Act 2010. This defence was not pursued; nor was it suggested that the first respondent might escape vicarious liability on the ground that either alleged harasser had acted outside the course of their employment.

27. Here is a complete list of the unwanted conduct that was said to be related to the claimant's disability:

    27.1. In July 2015 Mrs Ellis refused to engage with the claimant over his concerns about Mr Roughley stopping his contractual sick pay, and refused to investigate the claimant's complaint in this regard.

    27.2. On 10 December 2015 Mrs Ellis told the claimant that his "job was on the line" and instructed him to approach his medical advisers and have his medication changed.

    27.3. On 4 July 2015, Mr Roughley stopped the claimant's contractual sick pay and required the claimant to meet him despite being unwell.

    27.4. At the meeting on 4 July 2015, Mr Roughley unreasonably interrogated the claimant as to the reason for his absence and refused to reinstate his contractual sick pay.

    27.5. On 19 April 2016, Mr Roughley directed that he would not implement the agreed changes to the claimant's working hours that had been agreed in the meeting on 18 April 2016.

28. During the course of cross examination of Mrs Ellis, the Employment Judge indicated that, if the claimant wished to allege that any individual had acted for the purpose of violating the claimant's dignity or creating the proscribed environment, that allegation must be put to that individual so that they could have a fair opportunity to respond to it. At no point did the claimant's counsel put to either Mrs Ellis or Mr Roughley that they acted for that purpose. We therefore confined our focus to the question of the relevant adverse effect.

29. The first allegation of unwanted conduct ("Mrs Ellis refused to engage" etc) was clarified in the claimant's written closing submissions. It is the claimant's case that Mrs Ellis ignored the claimant's e-mail of 7 July 2017 and refused to undertake any further investigation following the meeting of 31 July 2017.

30. In relation to the harassment claim, therefore, the issues were:

    30.1. Did Mrs Ellis and/or Mr Roughley subject the claimant to the alleged unwanted conduct?

    30.2. Was that conduct related to the claimant's HIV?

    30.3. Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Discrimination arising from disability

31. By the time the hearing had reached closing submissions, there were three allegations of discrimination arising from disability. The unfavourable treatment was said to have been as follows:

    31.1. Giving the claimant disciplinary sanctions under the attendance management procedure due to his disability related absences. The sanctions in question were given on 21 September 2015 and 13 January 2016.

    31.2. Failing to give the claimant non driving duties and requiring him to take sick leave when the side effects of his disability related medication meant that he was unfit to drive in December 2015.

    31.3. Mrs Ellis telling the claimant to change his medication on 10 December 2015.

32. The issues for the Tribunal were:

    32.1. Did the respondent treat the claimant unfavourably as alleged?

    32.2. What was the reason (or "something" in the language of EqA) why the claimant was treated in that way?

    32.3. Did that reason arise in consequence of the claimant's disability?

    32.4. Could the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Time limits

33. It was common ground that, taking account of the effects of early conciliation, the claim had been presented within the time limit for any act of discrimination occurring on or after 22 March 2016. For each act of discrimination, therefore, we had to determine whether or not the act was "done" on or after that date. If it was done before that date, the question arose as to whether the act was part of an act

extending over a period ending on or after that date. If it is was not part of such a continuing act, the Tribunal had to consider whether it would be just and equitable to extend the time limit.

Evidence

34. We considered documents in an agreed bundle which we marked CR1. As the evidence progressed, various documents were introduced, which we marked R2 through to R12. We did not read every page of these documents. Rather, we concentrated on those documents to which the parties had drawn out attention, either in witness statements or orally, during the course of the hearing.

35. The claimant gave evidence on his own behalf. The respondents called Mrs Ellis, Mr Barton, Mr Braithwaite, Mr Roughley, Mr Wilson and Mr Stafford as witnesses. Each confirmed the truth of their written witness statement and answered questions.

Facts

36. The first respondent is the legal entity that operates Stagecoach buses in Greater Manchester. For the year ending 30 April 2015, the first respondent reported 2,047 employees and a profit of £18million.

37. The claimant was employed by the respondent from 13 October 2008 until he resigned on 20 April 2016. During that time he was a PCV driver, in other words a bus driver, based at the first respondent's Stockport depot.

38. Mr Roughley has been the Depot Operations Manager at Stockport since September 2013. He is responsible for some 420 staff. From December 2014, Mr Roughley reported to Mr Ross Stafford, Head of Service Delivery in Manchester.

39. The first respondent operates bus routes under contract to Transport for Greater Manchester. From time to time routes and timetables are notified to the first respondent which must then set about allocating drivers to cover the routes. Because timetables vary, for example during school holidays, allocation of drivers' duties would have to change over the course of a year. The process is the responsibility of the Allocation Manager who, since 1 May 2013, was Mr Andrew Braithwaite.

40. Drivers typically spend 38 or 45 hours per week actually driving. They are expected to arrive at the depot approximately 15 minutes prior to the start of their driving duty. Generally it takes about five minutes between finishing driving and leaving work.

41. The first respondent is required to provide a service around the clock, every day of the week. Duties are therefore organised into a number of shift patterns. Relevant for the purposes of this claim are "middle shifts" between about 9.00am until about 7.00pm, and "split shifts", which provide for two duties each day with an approximate three hour break in the middle of the day. The start and finish time of each shift does not actually represent time at which the driver will start or finish work. Rather, it is a window during which particular driving duties are allocated. For example, a driver with a middle shift pattern could expect to be driving from 8.44am until 4.27pm one day and from 9.29am until 6.04pm the next day.

42. Drivers typically work according to a rotating shift pattern. Over the course of, say, 12 weeks, a driver might be expected to work a variety of early, middle and late shifts separated by rest days. Each week in the roster is referred to as a "line". Other drivers always work the same type of shift. Their duties would appear on a different roster.

43. A new roster would typically be devised about four weeks prior to it actually taking effect. The process by which this happened was as follows.

44. On receipt of the timetable requirements from Transport for Greater Manchester ("TFGM"), the schedulers under Mr Braithwaite's direction would produce a set of duties to cover all the required services. Typically there were about 400 duties that would need to be covered. The list of duties was then sent to the recognised trade union, Unite. The union's scheduling representatives would then fit the duties into template rosters such that no driver would have to drive more than their contractual hours. The populated rosters were then sent back to Mr Braithwaite. A team of allocators would then place individual drivers onto different starting lines within the roster.

45. The most popular rest days were Saturdays and Sundays. Rosters were generally devised so that each driver would receive their fair share of weekend rest days. This mean, of course, that many drivers' rest days would have to be on other days of the week. Generally speaking, drivers were usually allocated a mixture of single rest days and multiple consecutive rest days. A consistent pattern of consecutive pairs of rest days (such as a weekend) was unusual.

46. No driver worked the precise hours 9.00am to 5.00pm. The claimant believed that these were the hours worked by one or more officials of Unite. This was not in fact the case.

47. Over the years a custom developed whereby drivers with more than 40 years' service would receive preferential treatment in the allocation of duties as a reward for their loyalty. Such employees were entitled to pick a particular duty and have it allocated to them for every working day. That duty would then be unavailable to be entered into the template schedule by the union schedulers. The one example we were given by Mr Wilson was of a long-serving employee who had chosen duties starting early in the morning, but there was no reason in principle why he could not have chosen duties akin to a 9 to 5 working day.

48. The claimant's salary was £21,736 per annum. His working hours were 40 hours per week. His pay therefore equated to an hourly rate of £10.45.

49. On 13 October 2008 the claimant was given a written statement of terms of employment. The statement provided that the claimant was included in the first respondent's sickness scheme as contained in a collective agreement. We have no evidence as to the provisions of that scheme, but it is common ground that drivers who were absent on sick leave were entitled to occupational sick pay at a higher rate than statutory sick pay.

50. On 26 May 2004 the first respondent issued a document headed "Attendance Policy and Procedure". The first section of the document was devoted to sickness reporting. Its rubric laid down a procedure for notifying management of sickness absence, self certification and the providing of what are now called fit notes. Paragraph 1.6 under that heading read:

> "Failure to consistently comply with the above may result in the withholding of sick pay and/or disciplinary action."

51. Section 2 was headed "Sickness/absence monitoring". It provided that:

> "All employees will be seen by their manager after any period of sickness…preferably on the day of resumption, but in any event no later than the end of the third day back at work."

52. Such a meeting was called a "return to work counselling meeting". The procedure provided that the most recent absence should be discussed to ascertain the reason for the absence.

53. The procedure also contained measures for dealing with persistent short-term absence. Broadly speaking, the policy established a scheme of sanctions escalating in severity from an oral warning to dismissal. Four stages were envisaged, each with its own defined trigger point. Two absences in a rolling six month period or ten days' total absence in that period were sufficient to trigger escalation to the next stage of the procedure. Three absences in a rolling 12 month period or a total of 13 days' absence would have the same effect.

54. The claimant is HIV positive. The condition attacks his immune system. Throughout the claimant's employment, and for the rest of his life, the claimant has been dependent on medication to prevent his condition becoming fatal.

55. The claimant did not immediately inform the respondent that he was HIV positive. In about July 2009, however, the claimant informed Mrs Joanne Ellis, personnel officer, of his condition. Mrs Ellis made a referral to the Occupational Health service, resulting in a report dated 25 August 2009. The reported stated, amongst other things:

> "[The claimant] has been struggling with his health recently and these appear to be the side effects of commencing new medication which fortunately has now settled. However, [the claimant] is struggling to take his medication as directed by his specialist due to the nature of his shift patterns at present. His specialist has indicated that it is imperative that there is regularity to his medication taking in order to help him maintain his health…The adjustments I consider would held [the claimant] greatly is that of provision of fixed split shift patterns, whereby he can confidently take his medication as directed at all times which will in turn maintain his health and maintain attendance at work. As treatment options for this condition are fairly limited it is important that his medication does not alter due to problems in compliance. No other specific adjustments or restrictions are required at the present time."

56. On receipt of the report, Mrs Ellis did not arrange a meeting to discuss it with the claimant. At some point following the report being obtained, the claimant asked to be taken off a rotating shift pattern and placed onto fixed split shifts. This request was granted.

57. The claimant and Mr Braithwaite had a good working relationship. Mr Braithwaite would try to be accommodating of the claimant's needs where he could. There was, however, no structured arrangement to ensure that the claimant had a regular evening finish time.

58. Throughout his employment the claimant struggled to maintain regular attendance at work. On 16 September 2009 the claimant was given a formal warning about his sick leave from work. The claimant said that his absences had been caused by the side effects of the medication that he was taking. Nevertheless, the warning was given and upheld on appeal. During the course of the appeal meeting, the claimant stated that his condition and his working hours were putting additional pressure on him. There was no review of the claimant's working hours following this meeting.

59. On 13 September 2010, the claimant was invited to a further disciplinary meeting to discuss his attendance. His absences had been such as to reach a trigger point for a final written warning. His absences had been for a variety of reasons. Some of them, we find, had been caused by his HIV. For example, he had needed dental treatment from a specialist because his condition meant that he did not have access to ordinary dental services. His condition made him more vulnerable to infection. Part of his absence was due to his tooth being infected. Other absences had nothing to do with his condition. For example, he overslept on one occasion and on another occasion he fractured his ankle due to an accident at work. At the disciplinary meeting he was given a further written warning, but the Depot Operations Manager decided not to issue a final written warning.

60. Between April 2012 and January 2013, the claimant was absent on five occasions, four of which were due to infection. Disciplinary action was not taken until after the fifth occasion of absence. Rigid application of the sickness absence procedure would have led to a warning being issued at an earlier stage. As it was, a formal written warning was given to the claimant on 8 January 2013.

61. On 11 July 2013, a further disciplinary meeting took place to discuss the claimant's attendance. Since his previous warning there had been two occasions when he had not reported for work. The first had been due to jetlag which was entirely unrelated to his HIV. The second was due to his being at a clinic following medication being changed. At the meeting, the claimant said that he normally had his meal in the evening and he would take his anti HIV tablets at that time, but that this was not always possible and he did not want to tell all his colleagues about his medical condition. The Assistant Depot Operations Manager agreed that the claimant needed to take certain steps to ensure he took his medication at a regular time. He said that the allocators did try to help him by swapping his later shifts in order for him to have a regular evening meal and take his medication. It was, however, not always possible to get a swap. The Assistant Depot Operations Manager agreed to speak to Mr Braithwaite in private to discuss the issue. Rather than imposing a final written warning as the written procedure suggested, the claimant was reissued with an ordinary written warning.

62. In April 2014 the claimant’s father died. The loss of his father and its effect on his mother led to the claimant being too unwell to work for just over two weeks.

63. On 20 May 2014 the claimant notified the first respondent of a change of address. His new address was in Edgeley, Stockport.

64. On 26 September 2014, the claimant took a day’s sickness absence. We do not know the cause of his absence or whether it was related to his HIV condition.

65. In October 2014 the claimant was absent for two days because of a death in the family. This had nothing to do with his condition.

66. On 15, 16 and 17 December 2014, the claimant was ill with influenza. The nature of his HIV was such that he was more vulnerable to infection such as this and they tended to have a more severe effect on him than on others. Despite there being no expert medical evidence on the point, we are satisfied that his HIV contributed to the duration and severity of his symptoms on this occasion.

67. On 1, 2 and 3 April 2015 the claimant was ill with sickness and migraine and did not attend work.

68. On 13 April 2015 to 19 April 2015, the claimant did not attend work. His absence was self certified as being due to neck pain. In fact, the true position was more complicated and more distressing. Before starting employment with the respondent, the claimant had been diagnosed with a cancer known as Kaposi Sarcoma. From our general knowledge we are aware that people with HIV are much more susceptible to this particular cancer than the general population. Whilst the cancer was successfully treated, the claimant was very anxious about the risk of reoccurrence of this or another form of cancer. When he began to suffer from neck pain, he was advised by his doctor to go to hospital for investigation into the possibility of cancer of the lymph nodes. He was admitted onto a ward for tests. Even without expert medical opinion, we are satisfied that it was the claimant's underlying HIV that had led the claimant's otherwise unremarkable symptoms to be investigated in this way.

69. On 12 June 2015, the claimant began a period of absence from which he did not return until 22 July 2015. His GP fit note stated that he was suffering from "low mood". We do not have the benefit of expert medical opinion as to what caused the claimant to be depressed during this period. We are, nevertheless, able to make findings about the causes based on what the claimant subsequently told Dr Neeta Garg, an Occupational Health professional. We find that the main reason for the claimant's depression was the death of his father the previous year and having to support his widowed mother. His low mood was made worse by worries about his HIV infection. Workplace problems also contributed to his depression. These were inseparable from his HIV infection, because they related to the difficulty in taking his medication reliably due to his shift pattern.

70. On 18 June 2015, Mrs Ellis caused a letter to be sent by post to the claimant's address in Edgeley. The letter invited him to an informal meeting to discuss his sickness absence. The meeting was scheduled to take place on 24 June 2015 with Mr Roughley. It stated that attendance at the meeting was a requirement under the first respondent's sickness reporting procedure, but did not spell out the consequences of non attendance. Though not expressly stated in the letter, this meeting was intended to be a return to work counselling meeting within the meaning of section 2 of the Attendance Policy and Procedure.

71. The claimant did not attend the meeting at the appointed time. This was not the first time that an employee had failed to attend a counselling meeting. It was Mr Roughley's usual practice in these circumstances to stop the employee's occupational sick pay. No doubt Mr Roughley believed that the withholding of pay would be a powerful lever to compel absent employees to engage with the absence monitoring process. It was a step that he had no right to take. The Attendance Policy and Procedure was prescriptive as to the circumstances in

which sick pay could be withheld. Non-attendance at a counselling meeting was not one of them.

72. This brings us to another important question of fact. Was Mr Roughley's decision to withhold the claimant's sick pay motivated, consciously or subconsciously, by the fact that the claimant had HIV? We cannot find any facts from which we could draw this conclusion. The claimant was treated no differently to others who had failed to attend counselling meetings.

73. Having taken the decision to stop the claimant's pay, Mr Roughley instructed Mr Ellis to communicate that decision to the claimant. This time, Mrs Ellis addressed the letter to the claimant's partner's address in Offerton, Stockport. The letter urged the claimant to make contact. It is the claimant's case that he did not receive this letter or the preceding letter inviting him to the counselling meeting. We did not find it necessary to make a finding as to whether either letter actually arrived. We are satisfied that they were sent.

74. At the beginning of July 2015, the claimant noticed that the amount of pay he was receiving was much lower than what he was expecting. Occupational sick pay should have been about 70% of his full wage. In fact, he was only paid statutory sick pay. He made contact with Mr Roughley and his line manager and was informed that he needed to attend a meeting. Accordingly, on 4 July 2015, the claimant attended the Stockport depot and spoke to Mr Roughley. There is a dispute about what was said during this meeting. Before turning to that particular clash of evidence, we can set out some of the common ground.

75. The claimant told Mr Roughley he was having difficulty with his medication for HIV. He was due to return to his consultant on 27 July. His next fit note would probably be for a further four weeks away from work. There was a discussion about the claimant's depression. The claimant mentioned that his father had died the previous year. Mr Roughley asked the claimant how old his father had been. The claimant replied. Whatever else was said in that part of the conversation, the claimant was left with the impression that Mr Roughley was unsympathetic. There was a further discussion about the claimant's sick pay. The claimant told Mr Roughley that he had not received either of the two letters written to his different addresses. Mr Roughley replied that he found that very hard to believe. Although he agreed to reinstate sick pay going forward, he refused to make any back payments to cover the period between 22 June and 4 July 2015.

76. We have asked ourselves why Mr Roughley turned down the claimant's request for back pay. In our view it is because he disbelieved the claimant's explanation as to why he had not attended the counselling meeting. It was not motivated in any way by the fact that the claimant had HIV.

77. We return to the precise point of dispute. It relates to what Mr Roughley said when the claimant told him the age of his father. The claimant's evidence is that Mr Roughley told him that his (the claimant's) father had not been a young man and that the claimant would need to "pull his socks up". We did not find it necessary to make a finding about what precisely Mr Roughley said about the claimant's father's age. This is because, insensitive as it may have been, it would not have had any connection to the claimant's disability. The phrase, "pull your socks up" may not have been Mr Roughley's precise words: the claimant did not complain about this phrase until a long time later. We do accept, however, that Mr Roughley is likely to have told the claimant that, despite his father's

death, he would still be expected to maintain reliable attendance. At the time, this did not strike the claimant as the offensive part of the conversation. The claimant was more concerned about being disbelieved over receiving the letters.

78. The claimant's occupational sick pay was restored with effect from 4 July 2015.

79. On 7 July 2015, the claimant emailed Mrs Ellis. His email made essentially two points. The first was that he believed his occupational sick pay should be backdated to 24 June 2015. The second was a complaint about what Mr Roughley had said to him during the 4 July 2015 meeting. This part of the email read:

> "I was very annoyed at the fact [Mr Roughley] basically called me a liar for basically saying he found it very hard to believe I didn't receive the letters."

80. The claimant's email did not suggest that Mr Roughley had said anything else inappropriate during the course of the meeting.

81. Some time between 4 and 21 July 2015, Mrs Ellis made a referral to Occupational Health. This was the first Occupational Health referral since the report in 2009.

82. Mrs Ellis did not reply to the claimant's email of 4 July 2015. Though the claimant was disappointed not to receive a reply, and subsequently referred to that fact at his grievance meeting, the absence of a reply did not make the claimant think that a hostile, offensive, intimidating, humiliating or degrading environment environment had been created for him.

83. Dr Neeta Garg, Occupational Health professional, reported on 22 July 2015. The report set out the claimant's explanation for why he had been suffering from depression. The claimant had returned to work the previous day because of financial pressure. He was still low in mood but fit to work. The report referred to the claimant's HIV. It made the following recommendations:

> "[The claimant] takes medication for this condition twice daily, and it is recommended that these tablets are taken with food. He says [he] has not been taking these tablets reliably due to his shift pattern. A potential adaptation to explore with him is whether he could be offered more regular hours e.g. 9.00am to 5.00pm and have regular two day breaks each week (to help fatigue). Such a pattern may assist with his compliance with medication, which would then improve his general health."

84. On 22 July 2015 the claimant raised a formal grievance about the withholding of his occupational sick pay. The basis of his grievance was that he had not been contacted in advance of the counselling meeting. It referred to the "immense financial trouble and distress" that had been caused by withholding his sick pay. According to the grievance, the claimant had not been well enough to attend the counselling meeting on 4 July 2015, but the grievance did not make any mention of any inappropriate remarks that Mr Roughley was alleged to have made. There was nothing in grievance about the effect of Mrs Ellis' failure to reply.

85. It is the claimant's evidence that, at the time when the Occupational Health report was received, Mrs Ellis told the claimant that, if he wanted any adjustments to be

made, he would have to put his request in writing. Mrs Ellis denied making that comment. We did not find it necessary to resolve that particular dispute. It is clear to us that, following receipt of the Occupational Health report, nobody met with the claimant to discuss its contents. Nobody discussed the content of the report with Mr Braithwaite, or asked Mr Braithwaite to make a pro-active assessment of what changes to the claimant's shift pattern were necessary to implement the Occupational Health recommendation. This meant that when, approximately 2 months after the date of the report, the claimant and his trade union representative approached Mr Braithwaite to request a rota change, Mr Braithwaite was reliant on the claimant's own description of his needs rather than the recommendations of the report itself.

86. The grievance meeting on 31 July 2015 was chaired by the Head of Service Delivery, Mr Ross Stafford, with support from Mrs Ellis. The claimant attended unaccompanied. He told Mr Stafford that he had not received the two letters, that he had spoken to Mr Roughley on 4 July 2015. He did not directly complain of Mr Roughley having said anything untoward. Neither the claimant nor Mrs Ellis initiated any discussion of the claimant's earlier e-mail. The claimant did say that he did not tell lies, implying that Mr Roughley had been wrong to disbelieve him. Mr Stafford asked the claimant what would be a satisfactory outcome to his grievance, to which the claimant replied that he wanted his sick pay restored.

87. Either during the grievance meeting or in a separate conversation near that time (the evidence was unclear as to which), the claimant mentioned to Mrs Ellis that, during the course of the 4 July 2015 meeting, Mr Roughley had asked the claimant about his father's age. By mentioning this question, the claimant was implying that Mr Roughley had acted dismissively in asking it. The claimant did not ask Mrs Ellis to investigate the matter. Mrs Ellis took it no further.

88. The grievance meeting or the separate conversation, if there was one, would have been a convenient opportunity for Mrs Ellis to raise the subject of the Occupational Health report and what adjustments needed to be made. It is unfortunate that this opportunity was not taken.

89. We have asked ourselves why Mrs Ellis took no action in response to the claimant's concerns (either in his 7 July 2015 e-mail or as expressed at the 31 July 2015 meeting) and why she did not discuss the Occupational Health report with the claimant. In our view, there are no facts from which we could conclude Mrs Ellis' inactivity was motivated in any way (consciously or subconsciously) by the fact that the claimant was HIV positive. There is nothing to suggest that anybody else complaining about Mr Roughley would have been treated any differently. Nor are there any facts tending to show that there would have been any more proactive an approach towards a person who, for example, had depression or a back condition. There was no evidence that Mrs Ellis viewed HIV with distaste. It is widely known that, for a long time, people with HIV found others reluctant to come into close proximity with them because of a wrongly-held belief that they posed a risk of infection. We found no evidence of such prejudice here. Mrs Ellis demonstrated that she was happy to meet with the claimant, as she did on 31 July 2015. In addition, we are able to make a positive finding that, following the meeting on 31 July 2015, the reason why Mrs Ellis carried out no further investigation was because the claimant's written grievance was about his pay and the claimant did not ask for the other matters to be investigated.

90. By letter dated 6 August 2015, Mr Stafford informed the claimant that his grievance was upheld. His sick pay was backdated to the start of his absence. The claimant did not take the matter any further. He did not complain about Mrs Ellis' failure to investigate any other aspect of his grievance. Nor did the claimant think that Mrs Ellis' inactivity following the meeting on 31 July 2015 had created an intimidating, hostile, degrading, offensive or humiliating environment for him.

91. On 12 and 13 August 2015, the claimant was absent from work, describing the reason as "sickness/runs".

92. On 28 August 2015, the claimant and his union representative, Mr O'Brien, attended a meeting with Mr Braithwaite to discuss his sickness absences. Following the meeting, on 21 September 2015, the claimant was given a written warning for his attendance. It is unclear from the written warning itself which absences Mr Braithwaite took into account. There are no notes of the meeting. Our finding is that Mr Braithwaite was influenced by the absences occurring during the 6 months prior to 28 August 2015. These were: 1 to 3 March 2015 (sick and migraine), 13 to 19 April 2015 (suspected lymph node cancer investigation caused by his previous HIV-induced Kaposi sarcoma), 12 June to 21 July 2015 (depression partly caused by anxiety about his HIV) and 12 and 13 August 2015 (sickness and diarrhoea). Of these, at least the two longest absences arose as a consequence of the claimant's HIV infection.

93. We are required to examine whether, in giving the claimant the warning, Mr Braithwaite was motivated, consciously or subconsciously, by the fact that the claimant was HIV positive. In our view there are no facts from which we could reach that conclusion. Mr Braithwaite was generally supportive of the claimant and showed no aversion to him or anybody else with HIV. In our view, the warning was the result of mechanistic application of the Attendance Policy and Procedure. An employee who was not HIV-positive, but who had the same pattern of absence, would have been treated just the same.

94. From 3 to 15 September 2015, the claimant was absent from work. His initial symptoms were sickness and diarrhoea. A stool sample revealed that the claimant had contracted a highly-contagious infection. He was instructed by Stockport Environmental Health to remain at home pending further investigations. On his return, the claimant did not have a return-to-work interview. Nobody met with him to discuss the implications of the 22 July 2015 Occupational Health report.

95. In late September 2015, Mr O'Brien approached Mr Braithwaite on the claimant's behalf to ask for a change in his rota. He had two requests. First, he sought a pattern of two consecutive rest days. At that stage he did not ask for the rest days to be on the same days each week (such as Saturday and Sunday). The second element to the claimant's request was to have more regular and earlier finish times.

96. A four-line (4-week) rota was devised with Mr O'Brien's agreement. It took effect from about 25 October 2015. Each line began on a Sunday and ended on a Saturday. The claimant was taken off split shifts and, instead placed on a "middle shift" with varied duties falling between 9am and 7pm. On each line was a pair of two consecutive rest days. The two-day breaks were irregularly spaced. For example, in week two, the claimant had rest days on Wednesday and Thursday and was required to work on Friday and Saturday. Week three began

with two more rest days on the Sunday and the Monday. These were followed by ten back-to-back working days until the next rest break in week four.

97. In response to the claimant's request for earlier finish times, Mr Braithwaite asked if the claimant could "show some flexibility". Mr O'Brien agreed. As a result, whilst the rota mainly provided for duties ending before 5.30pm, it also contained one duty per week that would end at 6.04pm. On those days the claimant would actually leave work at about 6.10pm, provided that his bus was not delayed in traffic.

98. On 19 and 20 October 2015, before the new rota had been implemented, the claimant was absent from work for two days. In a later meeting the claimant said that the reason was "general sickness" due to his medical condition. Beside that bald assertion we have no evidence as to what caused the claimant's absence. We were unable to find a causal link between the absence and the claimant's HIV.

99. In November 2015 the claimant's supply of medication was starting to run low. He made an evening appointment at the clinic appointment to renew his medication. Unfortunately, due to traffic congestion on his bus route, the claimant was unable to leave on time and had to reschedule his appointment. On his next appointment, the same thing happened. The claimant sought help from Mr Neil Wilson, the Unite branch chairman. At about the same time, the claimant informed Mr Wilson that his pattern of long consecutive working days between rest breaks was too tiring for him. Mr Wilson approached Mr Braithwaite, who agreed to rearrange the claimant's duties "wherever possible" to suit clinic appointments, but that he did not have a driver to cover the next appointment. In the end, Mr Wilson drove part of the claimant's duty himself, so that the claimant could leave early enough to attend the clinic.

100. Following his November 2015 appointment, the claimant changed his medication regime. One temporary side-effect of starting the new medication was depression. Another was impaired vision, such that it was not safe for the claimant to drive. On 29 November 2015 the claimant did not feel well enough to drive. The following day, he went to see his GP. His fit note dated 30 November 2015 stated that the claimant should avoid driving duties, but was otherwise fit for work. When he got his fit note, the claimant attended the depot and spoke to Mr Roughley. He told Mr Roughley that he wanted to work and was willing to do any job that they could give him. He asked Mr Roughley whether there were any alternative duties available, for example in the garage or the stores or the office. Mr Roughley told the claimant that there was nothing that he could offer and that he would have to be signed off sick. Having no other choice, the claimant remained on sick leave until 26 December 2015.

101. On 10 December 2015, the claimant attended a counselling meeting, accompanied by Mr Wilson. The meeting was chaired by Mrs Ellis. The claimant explained about the effects of his new medication and mentioned that he had a follow-up doctor's appointment in five days' time. There was a discussion of the possibility of non-driving duties. Like Mr Roughley, Mrs Ellis' standpoint was that there was no such work available. She told him, truthfully from her own knowledge, that there was no office work available at the Stockport depot. She did not check whether there were any tasks to be in done in any other depots. Nor did she check what work was available in the stores or the garage. Mrs Ellis

told the claimant that he needed to take a more pro-active approach to improving his attendance. "If your medication is making your poorly," she suggested, "why don't you go to your doctor and see if you can get it changed?" It appeared to have escaped her attention that the claimant had already recently changed his medication and also that, in 2009, Occupational Health had stressed the importance of avoiding forced changes in medication because of the limited treatment options. Mrs Ellis added that the claimant's future employment could be at risk if his attendance did not improve. Mr Wilson sought to put the claimant's mind at rest by pointing out that termination of employment would be the last resort. Neither the claimant nor Mr Wilson complained at the time about Mrs Ellis' comment.

102. There is a dispute about the precise terms in which Mrs Ellis conveyed this message. Did, as the claimant tells us, Mrs Ellis use the words, "Your job is on the line?" We were not able to reach a finding about whether those exact words were used. What is clear to us, however, is that the gist of what Mrs Ellis said was that if the claimant's attendance did not improve, his future employment was at risk.

103. Following the meeting, the claimant had a difficult conversation with his treating consultant. Against his consultant's strong advice, he asked for a further change in his medication to enable him to return to work. He made this request because he felt under pressure to do so from the respondent. The pressure came from the ongoing attendance management process and from Mrs Ellis' direct suggestion made at the meeting.

104. In our view, it is likely that, for at least some of the period 1 to 26 December 2015, there was some work that the claimant could have been usefully employed to do at one of the first respondent's depots. We have reached this conclusion essentially for two reasons. First, the sheer scale of the first respondent's operation would have necessitated a large amount of support work at each depot. Tasks that spring to mind are allocating and storing equipment and uniform, keeping the depots clean and tidy, assisting mechanics in the garages, and general clerical and administrative work. Our second reason is based on what we know to have happened on other occasions when drivers were unable to carry out driving duties. Two female employees, for example, were found office-based work whilst pregnant. A male driver dismissed for ill-health absence had his dismissal overturned when a vacancy in the stores arose at short notice. Mrs Ellis' evidence did not persuade us that there was no alternative work for the claimant. She did not know, because her search was so limited.

105. Following a period of annual leave, the claimant returned to work at the beginning of January 2016. No return to work interview took place. Instead, the claimant was invited to a disciplinary meeting to discuss his attendance.

106. The disciplinary meeting took place on 13 January 2016. Mr Ross Barton, Assistant Depot Operations Manager, chaired the meeting with support from Mrs Ellis. The claimant was accompanied by Mr O'Brien. At the meeting:

106.1. There was a discussion of the two periods of sickness absence that had followed the 21 September 2015 warning. Most of the conversation concerned the claimant's December absence. The claimant made clear that he had been prepared to carry out non-driving duties but had been told that no such work was available. Mr Barton asked the claimant whether his future

attendance would improve. The claimant said that it would probably not improve because his sickness "came with the territory" because "he needed to take his daily medication".

106.2. Mr Barton asked about the four-line rota introduced in October 2015. The claimant said that it was "much better for him". By this, the claimant meant that the four-line rota was much better than the previous split shift arrangement that had gone before. He did not mention that he found the long periods of shifts between rest breaks too tiring for him. We nevertheless accept the claimant's evidence that, before his December 2015 absence, he had started to struggle with his rest breaks being spaced so far apart.

106.3. It was agreed that, if the claimant gave advance notice of a medical appointment, his duties would be accommodated so that he could attend.

106.4. Neither the claimant nor Mr O'Brien sought to argue that the 21 September 2015 warning had been wrongly issued.

107. Mr Barton then adjourned to reach his decision. In his view there had been no improvement in the claimant's attendance since the claimant's formal warning on 21 September 2015. He did not enquire into whether that earlier warning had been properly issued. In particular, he did not consider whether the absences leading to that warning could have been avoided had the first respondent acted upon the Occupational Health report. He took into account that the company had shown leniency to the claimant in the past. His decision was to issue the claimant with a final written warning to improve his attendance. In coming to this conclusion he was influenced by the claimant's absence in December 2015.

108. We have considered whether Mr Barton's decision was influenced, either consciously or subconsciously, by the fact that the claimant was suffering from HIV. In our deliberations on this question, we have reminded ourselves of a comment made by Mr Barton during his oral evidence on which the claimant has placed much significance. Mr Barton said that the claimant had given him "no confidence that he wanted to improve his attendance". He immediately corrected himself by adding, "… that he *could* improve his attendance". It is the claimant's case that this remark betrayed Mr Barton's real thoughts: that the claimant did not want to improve. Our finding is that Mr Barton did think that the claimant was not trying hard enough to attend work We also think that it was unreasonable for him to come to this conclusion. Nevertheless there are no facts from which we could conclude that Mr Barton formed this opinion because the claimant was suffering from HIV, as opposed to some other condition causing a similar pattern of absences. Had the claimant had a similar attendance record as a result of, say, depression, or back pain, we have no reason to think that Mr Barton would have reasoned any differently. His decision was essentially process-driven. Without an improvement in attendance since the previous warning, Mr Barton thought that there should be an escalation in the level of sanction.

109. When the meeting reconvened, Mr Barton announced his decision. The claimant immediately notified the first respondent of his wish to appeal. Following the meeting, the claimant consulted solicitors. On 25 January 2016, the claimant's solicitors e-mailed Mrs Ellis, indicating a potential claim of disability discrimination, harassment and constructive dismissal. The e-mail was followed by a more detailed letter dated 28 January 2016. The letter set out the claimant's grievance about what had occurred since July 2015, in similar vein to the way in

which the claim is now formulated. It asserted that the respondent had conducted itself in a manner which was calculated to destroy the relationship of trust and confidence and that the claimant was entitled to resign and bring a complaint of unfair constructive dismissal. On the claimant's behalf, the letter insisted (amongst other things) that the warnings on 21 September 2015 and 13 January 2016 were cancelled and that the grievance be investigated by an impartial third party CEDR-accredited mediator.

110. The first respondent instructed solicitors, who replied substantively to the claimant's solicitors on 8 February 2016. The first respondent proposed to appoint a different manager and different personnel officer to investigate the claimant's grievance. They were not prepared to agree to appoint an independent mediator for that purpose. As explained in a later letter, the first respondent considered that the claimant was not actually seeking mediation at all, but had requested an investigation with findings in his favour. Independence could be maintained by ensuring that the investigator was done by a manager previously unconnected with the dispute. After much correspondence, the first respondent proposed Mr Stafford, assisted by Ms Julie Keppie. The claimant eventually agreed.

111. On 15 February 2016, the claimant's solicitors informed the first respondent that the claimant had been certified by his doctor as unfit to work, suffering from work-related stress and depression.

112. Despite the fact that the claimant was legally represented, Mr Wilson continued to work on his behalf to resolve the situation. During the week commencing 11 April 2016, he had a number of discussions with Mr Roughley in an attempt to agree a different rota for the claimant. Mr Wilson's opening gambit was to ask for Monday to Friday, 9am to 5pm. Mr Roughley's reply was that such a rota would be problematic. Weekend rest days were at a premium and other drivers would be aggrieved if the claimant had more than his fair share. Mr Roughley sketched out a revised rota which would reduce the number of consecutive working days between rest breaks. According to Mr Roughley's draft, there would be a maximum of 7 back-to-back shifts. Mr Wilson and the claimant both thought that the gap between rest breaks was still too long. They discussed an alternative proposal. So far as the rest days were concerned, the claimant said he would be happy with a regular pattern of Tuesday to Saturday working, 9am to 5pm, with his rest breaks on Sunday and Monday every week. When that proposal was put to Mr Roughley, he was non-committal about the rest days and maintained his position that he would prefer the claimant to work duties between 9am and 7pm.

113. The claimant's appeal meeting took place on 18 April 2016. As promised, Mr Stafford chaired the meeting with support from Ms Keppie. The claimant was accompanied by both Mr O'Brien and Mr Wilson.

114. The claimant was asked to explain his aggrieved feelings about Mr Roughley. The claimant replied that Mr Roughley was unsympathetic and did not give him the "time of day". Ms Keppie said that, in her experience of working alongside Mr Roughley for 10 years, he had an "efficient" approach which might have appeared unsupportive, but it would not have been his intention to come across that way. Mr Stafford asked the claimant what he would like him to do to resolve this aspect of his complaint. Mr Wilson suggested that, in the future, Mr

Roughley and Mrs Ellis could be "a little more understanding and sympathetic" when speaking with the claimant. In response to a question from Ms Keppie, the claimant confirmed that he would be happy with that outcome.

115. The conversation moved on to the rota. Mr Wilson told Mr Stafford that he had asked Mr Roughley for Monday to Friday, 9am to 5pm, but that his request had been refused. He confirmed that Tuesday to Saturday would be acceptable.

116. Mr Stafford said that he could not agree precise rota arrangements at that meeting. He agreed, however, that there should be a meeting at local level (that is, with management at the Stockport Depot) in order to get the best possible fit to the working pattern the claimant needed. Mr Stafford went on to say that he would be speaking to local managers personally about the claimant's hours. He and Mr Wilson understood that the meeting was to take place within the following two days. There was some talk about the remit of the proposed meeting and, in particular, the working pattern that depot management should be aiming to accommodate. Unfortunately, this part of the discussion was not recorded in the minutes or the outcome letter, and the parties left the meeting with different impressions of what had been agreed. Mr Wilson and Mr Stafford were of the same mind that the local meeting should be aiming for Tuesday to Saturday and "the best fit possible akin to 9 to 5". The claimant believed, incorrectly, that there had been an agreement that he would be working 9am to 5pm, Monday to Friday. In contrast to Mr Wilson and Mr Stafford, Mr O'Brien did not understand there to have been any agreement about start and finish times and assumed that the claimant would still be expected to be flexible between the hours of 9am and 7pm.

117. Mr Stafford decided to downgrade the claimant's final written warning to a (lesser) formal warning. Had he wished to do so, Mr Stafford could have simply allowed the appeal, neutralising the effect of Mr Barton's warning altogether. It is part of the claimant's case that, in choosing not to take this more lenient course, Mr Stafford was motivated by the fact that the claimant had HIV. We disagree. In our view, Mr Stafford was supportive of the claimant. He had known of the claimant's HIV condition at the time of his previous appeal in July-August 2015 and allowed that appeal in full. There are no facts from which we could conclude that the claimant's HIV influenced Mr Stafford's decision at all. Our positive finding is that Mr Stafford was concerned about the claimant's history of sickness absence and thought that some form of warning was appropriate.

118. The claimant left the meeting feeling elated. He exchanged jovial text messages with Mr Wilson that evening. The following day at 8.49am the claimant e-mailed Ms Keppie to thank her and Mr Stafford. Ms Keppie replied warmly, informing him that Mr Stafford would speak to Mr Roughley, Mr Braithwaite and Mrs Ellis that afternoon.

119. In the meantime, at about 6.40am, Mr O'Brien relayed the outcome of the previous day's meeting, first to Mr Braithwaite and then to Mr Roughley. Accurately, Mr O'Brien informed both managers of the proposal for Tuesday to Saturday shifts. He went on, however, to tell both managers that it had been agreed that the claimant would work "middle shifts". He did not mention the important qualification to that concept that Mr Stafford and Mr Wilson had understood, namely that the duties would be the best possible fit akin to 9 to 5. Nor did Mr O'Brien tell Mr Roughley or Mr Braithwaite that the local-level meeting

to discuss the claimant's working hours would be chaired by Mr Stafford. Without further elaboration, Mr Braithwaite and Mr Roughley understood "middle shifts" to include duties between 9am and 7pm. There was some discussion of the possibility of Monday to Friday working. Mr Roughley told Mr O'Brien that he could cope with Tuesday to Saturday, but not Monday to Friday. He may or may not have added that Monday to Friday would require him to introduce extra days on other rotas. To our minds it does not particularly matter: Mr Roughley made clear that he was not prepared to accommodate Monday to Friday working. Though we have no direct evidence of it, it is likely that, at this time, Mr Roughley confirmed his agreement to something along the lines of "shifts on Tuesdays to Saturdays, from 9am and 7pm". Such a comment, so far as it concerned start and finish times, would be consistent with Mr Roughley's stance in his talks with Mr Wilson the preceding week. It would also have fitted with what Mr O'Brien appeared to be telling him. When Mr O'Brien reported the conversation back to his union colleagues, Mr Wilson formed the impression, not just that Mr Roughley had agreed Tuesdays to Saturdays, but also that the claimant was still going to be required to work duties between 9am and 7pm.

120. Later that day, probably shortly before his driving duty which began at 1.53pm, the claimant went into the Unite office and spoke to Mr Wilson. Although Mr Wilson does not remember the conversation, we accept the claimant's evidence that it occurred. Mr Wilson relayed to the claimant what was, by now, a third-hand version of what Mr Roughley had said. The claimant took it to mean that his request for Mondays to Fridays, 9am to 5pm had been refused. The claimant became visibly anxious, at which point Mr Wilson told the claimant to leave it with him, and he would "sort it out".

121. We do not know what, if anything, Mr Wilson did that afternoon.

122. At about 9am on 20 April 2017, the claimant had a further conversation with Mr Wilson, this time in the cash office. The claimant was still in a high state of anxiety. Mr Wilson told the claimant that Mr Roughley would not agree to the claimant working Monday to Friday, 9 to 5. Mr Wilson did not specifically say that Mr Roughley had refused outright to guarantee finish times near to 5pm. There would have been no need for Mr Roughley to indicate such a refusal, because he had been told by Mr O'Brien without qualification that the agreement was for middle shifts. We think it more likely that the claimant incorrectly thought of Monday to Friday, 9 to 5, as an indivisible package, based on his mistaken understanding of the hours worked by one or more of the union officials. The way the claimant saw it, if Monday to Friday was being refused, so was 9 to 5.

123. The claimant then began his driving duty. Whilst on duty, he e-mailed Ms Keppie to resign with immediate effect. He gave his reasons as follows (as exactly worded):

> "The last few months have today taken its toll on me and I feel like my only option is to resign as I feel the Workin relationship between myself and depot managers has failed beyond repair. the appeal was 2 days ago and i have seen both the depot manager and personnel and things are still the same. i have also found out the the depot manager in his words, "I can cope with him. mesking me Workin tues to Saturday but he's not goin Monday to Friday. i have a life threatening medical condition and yet there are unite branch staff that work Monday to

> Friday with no medical conditions. what is this mans problem I am being victimized and my health has to come First this is making me ill"

124. On finishing his shift, the claimant saw Mr Wilson in the depot yard and broke down in tears. Mr Wilson put his arm round the claimant to comfort him. He told the claimant that he would do everything he could to support the claimant and that he would "nail the bastards". The claimant told Mr Wilson that he had been advised by his solicitor that he was entitled to Monday to Friday, 9 to 5. He also said that he believed Mr Roughley was on a "witch hunt" to "get him". Shortly after that conversation, the claimant's solicitors e-mailed the first respondent to inform the company of the claimant's resignation.

125. By the time of the claimant's resignation, Mr Stafford had not yet met with depot management. The two days understood by Mr Wilson to be the timescale for the meeting had not yet fully elapsed, although by this time it was the day after the 1pm meeting foretold by Ms Keppie. At no stage prior to resigning did the claimant check whether Mr Stafford had met with Mr Roughley to put in place what had been agreed at the appeal meeting.

126. On 25 April 2016, Ms Keppie sent the claimant the minutes of the appeal meeting. The following day, which also happened to be the day on which the claimant began early conciliation with ACAS, Ms Keppie sent the claimant a letter asking him to reconsider his decision to resign. With regard to the rota, her letter stated that "arrangements were taking place to introduce the adjusted pattern." It did not state what the adjusted pattern would be. In her letter, Ms Keppie set a deadline of 3 May 2016 for the claimant to make contact, failing which she would assume the claimant to be remaining steadfast in his decision to resign. At 4.31pm, the claimant sent an instant message to Mr Wilson asking for his help, adding, "I know I don't want to work there now". Mr Wilson spoke to Mr Crenighan of Human Resources. They discussed the possibility of redeploying the claimant to the Wythenshawe depot if he were to retract his resignation.

127. On 28 April 2016, Mr Wilson gave the claimant an update by instant message. He proposed to convene a meeting with Mr Stafford, Ms Keppie, Mr Roughley and Mrs Ellis, with the aim of reaching a solution that would work to the claimant's satisfaction. He enquired as to what advice the claimant had received. The claimant replied that he had been advised that, if he wanted to resume his employment, the first respondent would have to comply with the Occupational Health recommendations and make a payment of £5,000 for injury to feelings. Having taken further legal advice that evening, the claimant messaged Mr Wilson on 29 April 2016 to add that he would be willing to return to work immediately if Human Resources would confirm in writing that the claimant could work Monday to Friday, 9am to 5pm. Later that day he informed Mr Wilson that he was in a dilemma, because he had been "offered a new job to start Tuesday". We find that this new job was with Selwyn's Coaches, which actually did start on Tuesday 3 May 2016. The claimant did not formally apply for the role until 1 May 2016, but, given the fact that he was interviewed the very next day and started work the day after that, it is likely that by 29 April 2016 the claimant was already confident of getting the job.

128. There is a dispute about whether the claimant also informed Mr Wilson at around this time that he had the chance of a job with Morrison's Supermarkets where his sister worked. We did not find it necessary to resolve this dispute.

Whether or not the claimant had the opportunity to work for Morrison's, it is clear that he did not in fact take that opportunity.

129. When the claimant attended his interview with Selwyn's Coaches, he asked if he could drive on their school bus contract, which would mean that he would work regular school-time hours, Monday to Friday. He was informed that he would be given such a routine when it became available. In the meantime, he was required to work flexibly on a rotating shift pattern.

130. The claimant's rate of pay with Selwyn's was between £8.75 and £9.15 per hour depending on performance. Even at the top end of that range, it was considerably less than what he had been earning whilst employed by the first respondent.

131. This brings us to the reasons why the claimant resigned. They were not straightforward. At the time of the claimant's resignation he was highly emotional and was not thinking particularly clearly. Doing our best to untangle the claimant's thoughts:

131.1. The claimant did not resign so that he could work for Selwyn's Coaches. It is unlikely that he would have chosen a pay cut unless something had driven him away from the first respondent.

131.2. The claimant's decision to resign was motivated significantly by his belief that he would continue to have to do driving duties regularly past 6pm and occasionally as late as 7pm. He wanted to work Monday to Friday, 9am to 5pm. Despite the wording of his resignation e-mail, we are satisfied that, for the claimant, getting Saturdays and Sundays off was only part of the issue. Of equal or greater importance to him was a finish time near to 5pm, so he could take his medication with an evening meal early enough that he would not have difficulty sleeping. His thinking was muddled by the erroneous belief that Monday to Friday, 9am to 5pm was an indivisible package, a misplaced sense of unfairness based on his incorrect belief that trade union officials worked those hours, and the advice that he had been given that that working pattern had been recommended by Occupational Health. This confusion accounts for why the claimant resigned without giving Mr Stafford the opportunity to put matters right. Clouded as the claimant's judgment was, it did not stop him from being significantly influenced by fear of having to continue working long past 5pm.

131.3. Another reason for the claimant resigning was his belief that Mr Roughley was engaged on a "witch hunt". In one sense, the claimant's belief was not strictly correct. We do not think that Mr Roughley was actively trying to make the claimant's working life awkward. That is, however, what the claimant genuinely perceived. Events leading to the claimant forming that belief included Mr Roughley telling the claimant on 4 July 2015 that he disbelieved him. Over time, the claimant came to believe that Mr Roughley's remarks on 4 July 2015 were more offensive than he had actually thought them to be at the time of the meeting. The claimant's perception of "victimisation" was reinforced by Mr Roughley refusing alternative duties in December 2015 that would have enabled the claimant to return to work, holding out for a pattern of variable rest days until just before the appeal meeting, and, at the time of the claimant's resignation, still not committing himself to finish times before 7pm.

Relevant law

Direct discrimination

132. Section 13(1) of EqA provides:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats, or would treat, others.

133. Section 23(1) of EqA provides:

> (1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.

134. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

135. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572.

136. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons ("the decision-makers") who decided upon the less favourable treatment. If another person influenced the decision by supplying information to the decision-makers with improper motivation, the decision itself will not be held to be discriminatory if the decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

Harassment

137. Section 26 of EqA relevantly provides:

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the … effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (*a*) the perception of B;
>
> (*b*) the other circumstances of the case;
>
> (*c*) whether it is reasonable for the conduct to have that effect.

138. By subsection (5), disability is one of the relevant protected characteristics.

139. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.

Duty to make adjustments

140. By section 20 of EqA, the duty to make adjustments comprises three requirements.

141. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice (PCP) of the employer's puts a disabled person at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

142. A disadvantage is substantial if it is more than minor or trivial: section 212(1) of EqA.

143. Where an attendance management procedure contains a requirement for an employee to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions, a disabled employee whose disability increases the likelihood of absence from work is disadvantaged when compared to non-disabled employees as they are obviously at greater risk of being absent on grounds of ill health. It may then be a reasonable adjustment to alter trigger points at which disciplinary action will be considered : *Griffiths v. Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2016] IRLR 216.

144. Paragraph 6.28 of the Equality and Human Rights Commission's *Code of Practice on Employment* lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

144.1. Whether taking any particular steps would be effective in preventing the substantial disadvantage;

144.2. The practicability of the step;

144.3. The financial and other costs of making the adjustment and the extent of any disruption caused;

144.4. The extent of the employer's financial and other resources;

144.5. The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

144.6. The type and size of employer.

145. Before a respondent is required to disprove a failure to make adjustments, there must be sufficient facts from which the tribunal could conclude not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made: *Project Management Institute v. Latif* UKEAT 0028/07.

Discrimination arising from disability

146. Section 15(1) of EqA provides:

(1) A person (A) discriminates against a disabled person (B) if-

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

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

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

147. Langstaff P in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14 (19 May 2015, unreported) explained (with emphasis added):

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

148. As with direct discrimination, the focus must be on the conscious or subconscious motivation of the person or persons who decided on the unfavourable treatment: *IPC Media Ltd v Millar [2013] IRLR 707.*

149. These principles have been affirmed in *Pnaiser v. NHS England* [2016] IRLR 174.

150. An employer can be reasonably expected to know of an employee's disability if he could have discovered it on making reasonable enquiries. Paragraph 5.15 of the *Code* illustrates the point:

5.15

An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

> **Example:** A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.
>
> The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.

151. When considering the justification defence (now found in subsection (1)(b)), the tribunal must weigh the discriminatory effect of the treatment against the reasonable needs of the business: *Hardy and Hansons Plc v Lax* [2005] ICR 1565*,* applying *Allonby v. Accrington & Rossendale College* [2001] ICR 1189.

152. In *Hensman v Ministry of Defence* UKEAT/0067/14, Singh J held that, when assessing proportionality, while a tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

153. The *Code* offers guidance on the interrelationship between the making of adjustments and the proportionate means defence. The following extract appears to us to be relevant:

> "5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments…
> 5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.
> …"

154. Paragraph 5.21 of the *Code* is consistent with the following statement made by Simler J in *Dominique v. Toll Global Forwarding Ltd* UKEAT/0308/13 (concerning the Disability Discrimination Act 1995) at paragraph 51:

> "….where there is a link between the reasonable adjustments said to be required and the disadvantages …being considered in the context of ….disability-related discrimination, it is important to ensure that any failure to comply with a reasonable adjustment duty is considered as part of the balancing exercise in considering questions of justification. This is because it is difficult to see as a matter of practice how a disadvantage that could have been addressed or prevented by a

> reasonable adjustment that has not been made can, as a matter of practical reality, be justified."

Burden of proof

155. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

156. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
>
> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

157. The initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA 1913

158. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

159. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Constructive dismissal

160. Section 95 of the Employment Rights Act 1996 (“ERA”) relevantly provides:

> 95 Circumstances in which an employee is dismissed
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and… only if)—
>
> … (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is

> entitled to terminate it without notice by reason of the employer's conduct. …

161. An employee seeking to establish that he has been constructively dismissed must prove:

161.1. that the employer fundamentally breached the contract of employment; and

161.2. that he resigned in response to the breach.

(*Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27).

162. An employee may lose the right to treat himself as constructively dismissed if he affirms the contract before resigning.

163. It is an implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v. BCCI plc* [1997] IRLR 462, as clarified in *Baldwin v Brighton & Hove CC* [2007] IRLR 232.

164. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in *Pearce-v-Receptek* [2013] ALL ER (D) 364.

> 12. ...It has always to be borne in mind that such a breach [of the implied term] is necessarily repudiatory, and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal, not in an employment context, in the case of *Eminence Property Developments Limited v Heaney* [2010] EWCA Civ 1168:
>
> > "So far as concerns of repudiatory conduct, the legal test is simply stated ... It is whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
>
> 13. That has been followed since in Cooper v Oates [2010] EWCA Civ 1346, but is not just a test of commercial application. In the employment case of *Tullet Prebon Plc v BGC Brokers LP* [2011] EWCA Civ 131, Aikens LJ took the same approach and adopted the expression, "Abandon and altogether refuse to perform the contract". In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that, since it is repudiatory, it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract.

165. A fundamental breach of contract cannot be "cured", but if an employer takes corrective action the employer may prevent conduct from developing into a breach of the implied term of trust and confidence: *Assamoi-v-Spirit Pub Co Ltd* [2012] ALL ER (D) 17.

166. Where a fundamental breach of contract has played a part in the decision to resign, the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning: *Wright-v-North Ayrshire Council* [2014] IRLR 4 at paragraph 16. See also *Abbey Cars (West Horndon) Ltd v Ford* UKEAT 0472/07 at paragraph 34 and 35.

167. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract. All depends on the circumstances of the particular case: *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443,

168. In *Mari (Colmar) v Reuters Ltd* UKEAT/0539/13*,* HHJ Richardson reviewed the authorities relating to affirmation by employees who are on sick leave. The following principles were derived:

168.1. It is open to the tribunal to find that an employee has affirmed the contract simply by remaining in employment for a period of time, even if the employee was absent on sick leave for the whole of that period.

168.2. It is relevant to consider whether, during the period of sick leave, there was any affirmatory behaviour beside the receipt of sick pay.

168.3. It is also relevant to consider whether, during the period of sick leave, the employee continued to protest about the breach.

168.4. Each case depends on its own facts.

169. It is not uncommon for an employee to resign in response to a "final straw". In *Omilaju v. Waltham Forest London Borough Council* [2005] EWCA Civ 1493*,* [2005] IRLR 35*,* CA the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relatively insignificant. As a result, if the final act was totally innocuous, in the sense that it did not contribute or add anything to the earlier series of acts, it was not necessary to examine the earlier history.

170. *Vairea v Reed Business Information UK Ltd* UKEAT/0177/15 is authority for three further points in relation to the "final straw" and affirmation:

170.1. There cannot be a series of "last straws".

170.2. Once the contract is affirmed, earlier repudiatory breaches cannot be revived by a subsequent "last straw".

170.3. Following affirmation it takes a subsequent repudiatory breach to entitle the employee to resign.

<u>Fairness</u>

171. Section 98 of ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal and

> (b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it…(a) relates to the capability… of the employee for performing work of the kind which he was employed by the employer to do….
>
> (3) In subsection (2)(*a*)— (*a*) 'capability', in relation to an employee, means his capability assessed by reference to … health or any other physical or mental quality…
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

172. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

173. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

174. An employer will find it difficult to claim that it has acted reasonably if it takes no steps to try and fit the employee into some other suitable available job. This is likely to be more so in an ill-health case than in an incompetence case (see *Bevan Harris Ltd v Gair* [1981] IRLR 520).

> "… when one comes to consider the circumstances of the case, as to whether they make it reasonable or unreasonable to act upon his incapacity and to dismiss him, it cannot be right that, in such circumstances, an employer can be called upon by the law to create a special job for an employee however long-serving he may have been. On the other hand, each case must depend upon its own facts. The circumstances may well be such that the employer may have available light work of the kind which it is within the capacity of the employee to do, and the circumstances may make it fair to at least encourage him or to offer him the chance of doing that work, even if it be at a reduced rate of pay'." See *Merseyside and North Wales Electricity Board v Taylor* [1975] IRLR 60, [1975] ICR 185

175. An example of where a dismissal was held unfair because an available job was not offered is provided by the early tribunal decision in *Todd v North Eastern Electricity Board* [1975] IRLR 130. Again in *Garricks (Caterers) Ltd v Nolan* [1980] IRLR 259 the employer was held to have acted unreasonably in not giving sufficient consideration to finding the employee a job in circumstances where although he was not fit enough to do shift work, he could have done a day job.

176. An employer will not normally act reasonably unless it makes reasonable enquiries into the causes of absence and investigates whether they have an impact on the prospect of returning to work. The relevance of such enquiries is that it can only be reasonable to have to investigate the causes of absence if addressing the cause might have some effect on the prospects of returning to work. For example, if somebody is off work with asthma and claims that the asthma was due to exposure to chemicals in the workplace, it would clearly be relevant to look to see whether the asthma was caused by that exposure and whether removal of the employee from that environment would facilitate a return to work.

Conclusions

Direct discrimination

(1) Ceasing his contractual sick pay/threatening to do the same

177. Mr Roughley stopped the claimant's contractual sick pay on 22 June 2015 and then refused on 4 July 2015 to pay it retrospectively. This was unfavourable treatment, but the treatment was not *less* favourable than the way others were, or would have been treated. The circumstances of any comparator would have to include their failure to attend the counselling meeting without a good excuse. Others in those circumstances were treated the same way. Nor was the treatment in any way because of the claimant's HIV. Mr Roughley's actual reasons were as we have found them at paragraphs 72 and 76.

(2) Applying conditions to the claimant's entitlement to contractual sick pay

178. For the same reasons as above, Mr Roughley did not directly discriminate against the claimant in any conditions placed on the claimant's sick pay.

(3) Failing/refusing to address the claimant concerns and complaints

179. As we understand it, this allegation refers to Mrs Ellis' failure to investigate following the grievance meeting on 31 July 2015. In case we have misunderstood the formulation of the claim, we have also considered Mrs Ellis' failure to reply to the claimant's e-mail of 7 July 2015. In both cases we do not find any facts from which we could conclude that the reason was that the claimant had HIV: see paragraph 89.

(4) Failing/refusing to implement the respondent's own recommendations

180. The respondents did not try to discuss the 2015 Occupational Health report with the claimant and did not fully implement its recommendations. There is nothing to suggest that others would have been treated differently and, crucially, no facts from which we could infer that it was the claimant's HIV condition that was the reason for that treatment. Our findings to this effect also appear at paragraph 89.

(5) Imposing disciplinary sanctions against the claimant

181. Paragraphs 93, 108 and 117, in our view, dispose of this particular allegation of direct discrimination. The imposition of the three impugned disciplinary sanctions was not because the claimant was disabled. It was because of his absences.

Failure to make adjustments

PCP1

182. The first respondent required the claimant to work a variety of duties within the shift window 9.00am to 7.00pm with irregular finish times, including finish times at 7.00pm. It put the claimant to a disadvantage compared to employees without HIV, because his medication had to be taken with an evening meal and had to be taken early enough so that it did not stop him sleeping. Unless he finished work at 5pm, or soon afterwards, this was difficult for him to achieve. In our view, the disadvantage was more than minor or trivial. It was critically important for the claimant to be able to take his medication regularly because his treatment options were so limited. We know from the claimant's actual driving duties from October 2015 that he had regular finish times after 6pm.

183. In our view the substantial disadvantage caused by PCP1 started in October 2015 and lasted until the end of the claimant's employment.

184. It was not reasonable to expect the first respondent to offer precise 9-5 hours to the nearest minute. There were few if any duties with those precise times.

185. In our view, however, it was reasonable for the first respondent to have to make the adjustment of a guaranteed finish time of approximately 5pm. In coming to this view, we have taken account of the following:

185.1. The adjustment would very substantially help to reduce the disadvantageous effect of PCP1.

185.2. There were more than sufficient driving duties finishing between 5.00pm and 5.30pm to enable the claimant to work them.

185.3. The first respondent was, in our view, overstating the disruptive effect of making the adjustment. It was able to offer first refusal of driving duties to long-serving employees without any apparent problem.

185.4. We have taken account of the fact that the working arrangement in October 2016 was approved by Mr O'Brien on the claimant's behalf. In our view this did not absolve the respondent from making the adjustment. It is clear that the agreement reached between the union and Mr Braithwaite did not properly reflect the entirety of the occupational health evidence.

186. The respondent failed to provide a guaranteed finish time earlier than 7pm. Right up until the appeal meeting, Mr Roughley required the claimant to be flexible within the hours of 9am to 7pm. Though it is possible that, with Mr Stafford's intervention, an agreement might have been reached to guarantee the claimant an earlier finish time, no such agreement had been concluded by the time the claimant resigned; indeed the agreement between Mr O'Brien and Mr Roughley on 19 April 2015 was still for middle shifts 9am to 7pm.

187. We therefore consider that the respondent breached its duty to make adjustments.

PCP2

188. From October 2015 until 18 April 2016 the first respondent had a PCP of requiring the claimant to work a shift pattern without two consecutive rest days in any rolling period of 7 days. Put another way, he was required from time to time to work more than 5 days back to back without a rest day.

189. PCP2 put the claimant at a disadvantage compared to employees without HIV. To help overcome his fatigue he did not just need rest days in every working week, Sunday to Saturday; he needed those rest days to be spaced so that he would have two rest days in any rolling period of 7 days. Four rest days in six days (in weeks two to three) did not make up for the 10 consecutive working days that followed (in weeks three to four). We have found that, by the time the claimant took sick leave in December 2015, he had already started to struggle with this pattern. In our view, the disadvantage was more than minor or trivial.

190. The respondent could reasonably have been expected to know about this disadvantage from July 2015, when it received the Occupational Health report. Its wording was ambiguous. The phrase, "each week" could have meant "each working week from Sunday to Saturday" or "each rolling period of 7 days". As it turned out, the claimant's requirements were based on the latter definition of a week. Had respondent taken the trouble to discuss the Occupational Health report with the claimant, it would have discovered that this was the case.

191. It would not have been reasonable for the respondent to have to allow the claimant to take every Saturday and Sunday off. When it came to managing his fatigue, it did not matter whether his consecutive rest days fell during the weekend or during weekdays, provided that they were regularly spaced. We accept the respondent's contention that weekend rest days were the most popular with the workforce in general. The more weekend rest days the claimant took, the less there were available for other drivers.

192. In our view it would, however, have been reasonable for the respondent to have to adjust the claimant's rota to allow for regularly-spaced pairs of consecutive rest days (for example, every Sunday and Monday off). The claimant would have preferred his days off to be Saturdays and Sundays. This was partly due to his conflating the concept of 9 to 5 working with Monday to Friday working. Whilst Tuesday to Saturday working would not have been entirely to the claimant's liking, it would have alleviated the effect of the disadvantage caused by PCP2. The effect of altering the rota in this way would not have been unduly disruptive. Mr Roughley was able to agree to this pattern on 19 April 2016 following the appeal meeting.

193. Our conclusion is, therefore, that the respondent failed in its duty to make adjustments in the spacing of rest days.

PCP3

194. It is beyond doubt that the respondent's written capability procedure provided (PCP3) for escalating warnings on reaching defined patterns of sickness absence. Just as in *Griffiths,* PCP3 put the claimant at a substantial disadvantage compared to non-disabled persons, because his HIV made him more likely to be absent on ill health grounds. In particular, PCP3 put him at a disadvantage on 21 September 2015 when he was given a written warning and on 13 January 2016 when he was given a final written warning. On 10 December

2015 he was also put at the same disadvantage by PCP3 when Mrs Ellis warned him that his future employment was at risk unless his attendance improved.

195. In our view, it was reasonable for the respondent to have to make the adjustment of relaxing the trigger points and forbearing to give those warnings. In particular, the respondent should have discounted the periods of absence on 13-19 April 2015, June-July 2015, and December 2015. Doing so would have considerably alleviated the effects of PCP3 on the claimant, in that his employment would have been much less precarious. It would not be unduly onerous to discount the 13-19 April 2015 absence, as it related to a suspected cancer investigation (caused by a previous HIV-related cancer), that would be unlikely to repeat itself regularly. Discounting the June-July 2015 absence could have some disruptive effect, in that it might set a precedent for future depression-related absences. But that absence might have been less prolonged, or avoided altogether, if the claimant did not have to worry about the effect of his working environment on his HIV condition. It was wrong of the respondent to take into account the December 2015 absence, because it would be unlikely to repeat itself if the respondent made proper enquiries about finding alternative work for the claimant. In the event of the claimant being temporarily restricted from driving in future, it is likely, in our view, that the respondent would have found other duties that would have enabled the claimant to remain at work.

196. The failure to make adjustments should, in our opinion, be treated as having been "done" when the disciplinary sanctions were imposed. The latest occasion on which this occurred was 13 January 2016. Were this the only failure to make adjustments, the claimant would need an extension of time. We nevertheless think that it should be treated as part of a continuing act that extended beyond March 2016. This is because, in our view, it was part of the same discriminatory state of affairs that lasted until the end of the claimant's employment. It has the following features in common with PCP1 and PCP2, namely the failure to make proper enquiries into the claimant's health and the measures referred to in the Occupational Health report that would be needed to correct them. The effect of this finding is that the claim was presented in time in respect of PCP3 and the tribunal has jurisdiction to consider it. For the reasons given above, it is well-founded.

PCP4

197. In December 2015 claimant was put to a substantial disadvantage compared to persons without HIV. His role (PCP4) required him to carry out driving duties. As a result of a change in his HIV medication, he could not drive. The respondent was well aware of the disadvantage.

198. We consider that it was reasonable for the respondent to have to find the claimant alternative duties for at least some of the period 1 to 26 December 2015. Paragraph 104 records our finding that some such work would have been available. Making the adjustment would have alleviated the disadvantage because it would have enabled the claimant to remain at work. That, in our view, was an end in itself, but it would have had the additional benefit of making the claimant less vulnerable to attendance management sanctions.

199. In our view, this failure was strongly connected with the other failures to make adjustments (especially PCP3) and can be said to be part of the same ongoing state of affairs that lasted until termination of employment.

PCP5

200. Our finding is that PCP5 did not put the claimant to any disadvantage that was more than minor or trivial. The claimant was in no greater need of an independent mediator than a person without HIV.

201. If we are wrong in our conclusion about disadvantage, we would in any event hold that the respondent could not reasonably have been expected to appoint an external mediator. First, the claimant was not seeking mediation. He had raised a grievance which he wanted to have investigated. Following investigation he was seeking a report that would uphold his grievance. That is not what a mediator does. Second, the claimant was pursuing an internal process. There is a public interest in allowing employers to following their own internal procedures without having to involve outside bodies. Third, the claimant had every reason to be confident in the respondent's ability to appoint an impartial manager to look into his case. Mr Stafford had heard his previous grievance and upheld it.

202. There was, accordingly, no duty on the respondent to make any adjustment in relation to PCP5.

Indirect disability discrimination

PCP1

203. In our view PCP1 would put persons with HIV at a particular disadvantage when compared to persons without HIV. It is well known that HIV is life-threatening and that HIV-positive patients are dependent on medication to stop the condition from becoming full-blown. We accept the evidence, based on the claimant's own circumstances, that some medication regimes require the drug to be taken regularly with an evening meal and that, if this occurs too late in the evening, it can affect the patient's ability to sleep. The claimant was put to this disadvantage.

204. PCP1 served the aim of ensuring a reliable bus service and distributing shifts fairly. That aim was undoubtedly legitimate. The means, however, were not proportionate. We have balanced the importance of the aim against the discriminatory impact, and having regard to the ease with which the respondent could have found an alternative means of securing the same aim. For the reasons we give in relation to the adjustments claim, we think that the respondent could fairly easily have accommodated a guaranteed finish time well before 7pm.

205. The respondent therefore indirectly discriminated against the claimant.

PCP2

206. Although this is a somewhat artificial exercise, we feel able, based on the evidence in this case and our own general knowledge, to extrapolate from the claimant's own circumstances to accept that they are likely to be shared by other persons with HIV. It is likely that any bus driver with HIV would be more prone to fatigue than a non-disabled person. It is therefore likely that long chains of uninterrupted working days would be harder for an HIV-positive driver to bear than for a person without HIV.

207. We accept that certain days of the week, especially weekends, are likely to be more popular amongst drivers than other days. Requiring the claimant to take unevenly-spaced rest days would therefore serve the aim of allocating the more popular days fairly. That aim is legitimate. Again, however, the means were

disproportionate. We have come to this conclusion for the same reasons as our conclusion that the respondent should have made the adjustment of regularly-spaced rest days.

PCP3

208. The disadvantage caused to the claimant by PCP3 is likely to be shared by all HIV sufferers: they are more likely to need to take sickness absence than non-disabled people.

209. Imposing sanctions based on absence triggers are a way of achieving the important and plainly-legitimate aim of securing reliable attendance in order to run a reliable public service. In this case, however, the sanctions were disproportionate. There was a heavy discriminatory impact – they were imposed because of absences caused by the claimant's disability. The claimant's attendance could have substantially improved by the making of adjustments, such as finding alternative duties, rather than the imposition of warnings. As we have explained in paragraph 195, the trigger points could and should have been relaxed by discounting three specific periods of absence.

210. PCP3 therefore indirectly discriminated against the claimant.

Harassment

Refusal to engage with the claimant's complaints

211. Mrs Ellis failed to reply to the claimant's e-mail of 7 July 2015 and did not investigate following the 31 July 2015 meeting. She did not communicate a refusal to do so. The failure to reply or to investigate is hard to describe as "conduct". Assuming, however, that it was conduct on Mrs Ellis' part, we find that it was not related to the claimant's HIV. We have already found (paragraph 89) that Mrs Ellis was not motivated in any way by the claimant's HIV status. We cannot see any other connection between the claimant's disability and the failure to investigate.

10 December 2015

212. In our view, Mrs Ellis did harass the claimant on 10 December 2015. Although we could not be clear about whether the precise phrase, "job is on the line" was used, we have found (paragraphs 101 and 102) that Mrs Ellis suggested to the claimant that he changed his medication to improve his attendance and that if his attendance did not improve his job was at risk. The comments were about his disability. The effect was to create an intimidating environment for the claimant (so much so, in fact, that, against his consultant's wishes, he almost immediately sought a change in his medication for a condition that had limited treatment options). In our view it was reasonable for the claimant to perceive Mrs Ellis' comments as having that effect. It was intimidating to seek to put so much pressure on an employee with a life-threatening condition to change his medication, especially when the Occupational Health advice in 2009 was so clear about the potential adverse consequences of such a change.

Stopping sick pay

213. We do not think that Mr Roughley harassed the claimant by stopping his sick pay or by requiring the claimant to meet with him. It is legitimate for an employer to try to meet with an employee who is absent on sick leave. Although Mr Roughley had no contractual power to stop the claimant's sick pay, we are

satisfied that he believed himself entitled to withhold pay from employees who failed to attend a counselling meeting. From his point of view it appeared that the claimant had no good reason for failing to attend: the respondent had written to him (albeit that the claimant later denied receiving the letter) and the claimant had failed to respond by the time of the meeting. Mr Roughley's conduct was not entirely disconnected from the claimant's disability: the claimant's sick pay related to an absence that was caused in part by the claimant's HIV. In our view, however, the connection is too tenuous to satisfy the test of "related to a protected characteristic" in section 26. We also do not consider that stopping the claimant's sick pay could reasonably be perceived as having the effect of creating the relevant adverse environment.

4 July 2015 meeting

214. In our view, Mr Roughley did not harass the claimant by asking the claimant about the reasons for his absence. That is an appropriate subject for an employer to raise with an absent employee. There was no connection between Mr Roughley's remark about the claimant's father's age, or about "pulling his socks up" and the claimant's disability (see paragraph 77), and the claimant did not find it offensive at the time. The claimant's HIV had nothing to do with Mr Roughley refusing to believe him about whether he had received letters from the respondent. The decision not to backdate the claimant's sick pay was not motivated by the claimant's disability (paragraph 76) and we cannot find any other way in which the conduct was related to his disability. We also do not think it had the effect of creating the relevant adverse environment.

19 April 2016

215. On 19 April 2016, Mr Roughley confirmed to Mr O'Brien what he understood to have been the outcome of the meeting the previous day, and confirmed that he would be happy with the claimant working middle shifts, Tuesday to Saturday. It is possible to view this exchange as Mr Roughley subjecting the claimant to conduct, in that his conversation with Mr O'Brien was likely to be reported back to the claimant. The conduct was unwanted, in the sense that Mr Roughley was not agreeing to everything that Mr Stafford and Mr Wilson thought had been agreed at the previous day's meeting. But in our view the connection between Mr Roughley's conduct and the claimant's disability is too tenuous to come within section 26. There is also nothing about what Mr Roughley said that would have the effect of creating the proscribed environment. What the claimant found hard to cope with was not what Mr Roughley said, but his failure to guarantee him Monday to Friday, 9 to 5. Whilst that represented a failure to make adjustments, we cannot say it amounted to harassment.

<u>Discrimination arising from disability</u>

21 September 2015 warning

216. Mr Braithwaite treated the claimant unfavourably by giving him a written warning. The reason why he gave the warning was because of a series of absences, of which the two longest periods of absence had arisen in consequence of the claimant's disability (paragraph 92).

217. The warning was a means of achieving the important and legitimate aim of securing reliable attendance to run a sustainable public service. But it was not a very effective means. More effective would have been to put in place the

recommendations of the Occupational Health report concerning shift finish times and rest days. That would, in our view, have lessened the claimant's anxiety about his working environment and its impact on his HIV. That would have reduced the likelihood or the extent of the claimant's June-July 2015 absence. Discounting the period of absence on 13-19 April 2015 would not have seriously affected the respondent's ability to achieve the legitimate aim. It was unlikely that, going forward, the claimant would have many investigations for suspected cancer.

218. Balancing the importance of the aim against the discriminatory impact on the claimant, we find that the means were disproportionate. The respondent therefore discriminated against the claimant arising from disability.

13 January 2016 final warning

219. Mr Barton treated the claimant unfavourably by giving a final written warning. He gave the warning partly because the claimant was already on a written warning. That warning had arisen in consequence of the claimant's disability, in that it had been given for disability-related absences. Mr Barton also gave the final warning because of the claimant's absence in December 2015 (see paragraph 107).

220. As with the indirect discrimination complaint, we find that the warning was a disproportionate means of achieving the respondent's legitimate aim. The respondent could have achieved the aim by making adjustments rather than escalating the warning. The adjustment of providing alternative duties would have avoided, or lessened, the claimant's December 2015 absence. Going forward, it was unlikely that a warning would be needed to maintain the claimant's fitness to drive. His inability to drive was caused by a change in his medication. Such changes were likely to be rare, as the 2009 Occupational Health report made clear.

Failing to provide alternative duties in December 2015

221. In our view this allegation does not fit within section 15. The unfavourable treatment is an alleged failure to provide alternative duties. The claimant must identify the reason for unfavourable treatment and show that it arose in consequence of his disability. It is not enough for the claimant to identify the reason why he *needed* the alternative duties. That is the purpose of the duty to make adjustments. The unfavourable treatment is the *failure to provide* the duties and it is the reason for this failure that the claimant must identify. In our view the claimant has identified no such reason, or any facts to suggest that that reason arose in consequence of the claimant's disability.

Telling the claimant to change his medication in December 2015

222. Suggesting to the claimant that he change his medication, coupled with the warning that his future employment was at risk, was, in our view, unfavourable treatment. The 2009 Occupational Health report had warned against forcing the claimant to change his medication.

223. The reason why Mrs Ellis made the suggestion and warning was because of the claimant's absence in December 2015. That absence arose in consequence of the claimant's disability: his HIV medication meant that he could not drive.

224. We do not understand the respondent to be arguing in this particular case that Mrs Ellis' remarks were a proportionate means of achieving a legitimate aim. In case we have misunderstood the respondent's case, we would in any event conclude that the means were totally disproportionate. Pressurising the claimant into a risky change of medication for a life-threatening condition was an ineffective means of securing reliable attendance. The discriminatory impact far outweighed the potential benefit.

Constructive unfair dismissal

225. We have examined the ways in which trust and confidence was allegedly undermined:

(1) *Ceasing the claimant's contractual sick pay, the handling of this matter, and failing to reinstate the same until after appeal*.

In our view, Mr Roughley did not have reasonable and proper cause to stop the claimant's sick pay. It was not permitted by the contract. Withholding sick pay undermined trust and confidence, but, objectively, the relationship was to a significant extent mended when the claimant's grievance was upheld.

(2) *The handling of the claimant's rota and hours in the light of his disability, Occupational Health advice and his needs to attend medical appointments. In particular the requirement for the claimant to work long hours, 9.00am to 7.00pm, and working more than five days out of seven before rest days*.

The respondent damaged the relationship of trust and confidence by not providing a guaranteed finish time. Mr Roughley temporarily caused further damage to the relationship when discussing rest day patterns with Mr Wilson. That particular damage was, to an extent, repaired when Mr Wilson offered Tuesday to Saturday working.

(3) The issuing of disciplinary sanctions under the attendance policy.

The warning and final warning were damaging to the relationship of trust and confidence because of their discriminatory nature. There was some rebuilding of the relationship with Mr Stafford's appeal decision, but the repair was incomplete because the claimant was still left with a written warning that he should not have been given.

(4) Not giving the claimant alternative non-driving duties.

There was some damage to the relationship of trust and confidence caused by this failure to make adjustments and the impact it had on the claimant's attendance.

(5) On 10 December 2015 Joanne Ellis telling the claimant that his "job is on the line" and instructing the claimant to have his medication changed.

In our view the relationship of trust and confidence was damaged by Mrs Ellis' remarks in a way that also amounted to harassment.

(6) *Not using an independent party for the grievance and appeal against final written warning.*

The respondent had reasonable and proper cause for conducting its internal procedures internally. The claimant had no right to expect an external mediator. In any event, we do not think that the respondent's refusal to provide an independent mediator significantly influenced the claimant's decision to resign.

(7) *Refusing to change the claimant's rota in a manner that had been agreed at the grievance and appeal against the final written warning hearing*

There was not so much a refusal here as an error in communication. Mr O'Brien's understanding of what had been agreed at the meeting was different to what Mr Stafford and Mr Wilson understood, which in turn was different to what the claimant thought the agreement was. The respondent has to accept some of the blame for the poor communication here. The claimant's perception that Mr Roughley was refusing to guarantee finish times prior to 7pm was a significant factor in the claimant's resignation.

226. Taking this conduct in the round, our view is that it passed the high hurdle of demonstrating to the claimant that the respondent was abandoning and altogether refusing to perform the contract. Even allowing for its remedial action, the respondent's conduct was likely seriously to damage, and did seriously damage, the relationship of trust and confidence. The claimant was therefore entitled to resign.

227. We have found at paragraph 131 that the conduct which amounted to a fundamental breach was a material cause of the claimant's decision to resign. There were other reasons for resigning that did not involve a breach of contract on the respondent's part. These included a mistaken perception that Mr Roughley was engaged in a witch hunt and the claimant's incorrect belief that trade union colleagues worked 9 to 5. The extent to which these factors also played on the claimant's mind is a question relevant to remedy, but does not stop the claimant from having been constructively dismissed.

228. The respondent's part in the misunderstanding over the outcome of the appeal was, in our view, not totally innocuous. It was capable of adding, and did add, to a cumulative breach of the trust and confidence term. The claimant was therefore entitled to rely on it as a last straw. He did not affirm the contract before resigning.

<u>Unfair dismissal</u>

229. Having found a constructive dismissal, we have asked ourselves what the respondent's sole or main reason was for it. The focus of our enquiry is on the reason or reasons for fundamentally breaching the contract. This is not a

straightforward exercise, since a number of people contributed to the gradual undermining of trust and confidence and each may have had his or her own motivation. Returning to the incidents of conduct that damaged trust and confidence:

(1) Ceasing the claimant's contractual sick pay, the handling of this matter, and failing to reinstate the same until after appeal.

This was because the claimant did not attend the counselling meeting and Mr Roughley did not believe the claimant's excuse. This reason would relate to the claimant's conduct.

(2) The handling of the claimant's rota and hours in the light of his disability, Occupational Health advice and his needs to attend medical appointments. In particular the requirement for the claimant to work long hours, 9.00am to 7.00pm, and working more than five days out of seven before rest days.

Mr Braithwaite's, Mr Roughley's, and Mr Stafford's stance in relation to the claimant's hours and rest days was because of their belief about what the claimant's needs were and what the respondent could accommodate. This was a reason that, in our view, related to the claimant's capability.

(3) The issuing of disciplinary sanctions under the attendance policy.

These warnings were given because of the claimant's sickness absence. This was a reason that related to the claimant's capability.

(4) Not giving the claimant alternative non-driving duties.

The failure to offer non-driving duties was because the respondent did not properly look for them. The *need* for alternative duties was because of the claimant's capability, but the failure to *offer* them was not.

(5) On 10 December 2015 Joanne Ellis telling the claimant that his "job is on the line" and instructing the claimant to have his medication changed.

As we have found, Mrs Ellis made her remarks because of the claimant's absence and the impact of his medication on his capability to attend work.

(6) Not using an independent party for the grievance and appeal against final written warning.

This did not contribute to the breach of contract.

(7) Refusing to change the claimant's rota in a manner that had been agreed at the grievance and appeal against the final written warning hearing

The breakdown in communication was not, in our view, for a potentially fair reason.

230. Having looked at the entirety of the conduct that breached the contract, we are satisfied that the principal reason for the breach was a set of facts and beliefs that related to the claimant's capability. That reason was potentially fair. We must therefore consider whether the respondent acted reasonably or unreasonably treating that reason as sufficient to constructively dismiss the claimant.

231. Our view is that the respondent acted unreasonably. The respondent failed to make any attempt to discuss the Occupational Health report with the claimant. No reasonable employer, having had such a discussion, would have insisted on finish times up to 7pm, or long stretches of working days without a rest day. No reasonable employer would have harassed the claimant by suggesting that he change his medication and no reasonable employer would have imposed the written or final written warnings; they would have made adjustments instead.

232. The constructive dismissal was therefore unfair.

Wrongful dismissal

233. The claimant was entitled to notice of termination. He was constructively dismissed without notice. His dismissal was therefore wrongful and in breach of contract.

Employment Judge Horne

12.01.2018

Date_____

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

19 January 2018

THE TRIBUNAL OFFICE