EMPLOYMENT TRIBUNALS

Claimant: Mr P J Wright

Respondent: Belle Vue (Manchester) Limited

HELD AT: Manchester **ON:** 8-10 January 2018

BEFORE: Employment Judge Slater
Mr J Flynn
Mr B J McCaughey

REPRESENTATION:

Claimant: Mr P Wright, Father of Claimant
Respondent: Mr P Mills, Consultant

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of constructive unfair dismissal is well-founded.

2. The complaints of indirect disability discrimination and failure to make reasonable adjustments are not well-founded.

3. The complaints of harassment related to disability, other than the complaint relating to the alleged comment on 5 November 2015, are well-founded.

4. The complaint of discrimination arising from disability in relation to the alleged comment on 5 November 2015 is not well-founded. The other complaints of discrimination arising from disability do not succeed because they have been found to constitute harassment.

5. There will be a remedy hearing on 16 February 2018.

REASONS

Claims and Issues

1. The claimant claimed constructive unfair dismissal, indirect disability discrimination, failure to make reasonable adjustments, harassment related to disability and discrimination arising from disability.

2. The claimant had been ordered at a preliminary hearing to provide information relating to each of his disability discrimination claims. The claimant had provided information in a document dated 6 September 2017.

3. At the final hearing, the claimant was represented by his father. We will refer to Mr Wright senior in these reasons as "Mr Wright" and the claimant, Mr Wright, as "the claimant".

4. At the start of the final hearing, the Employment Judge went through the document dated 6 September 2017 with Mr Wright. Mr Wright identified the matters in that document which were relied on as complaints of disability discrimination. The Employment Judge typed a list of issues incorporating the complaints as identified in that discussion and gave this to the parties at the start of the second day of hearing. The parties agreed on the third day of hearing, having had time to consider the list, that this correctly set out the claims and issues to be considered by the Tribunal.

5. The issues were agreed to be as follows:

Constructive unfair dismissal

5.1. Did the claimant resign because of an act or omission (or series of acts or omissions) by the respondent?

5.2. If so, did the respondent's conduct amount to a fundamental breach of contract, of the implied term of mutual trust and confidence? Did the respondent, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties?

5.3. Did the claimant affirm any breach of contract by conduct/delay?

5.4. If the claimant was constructively dismissed, was the reason for dismissal a potentially fair one – being conduct?

5.5. If the dismissal was for a potentially fair reason, did the respondent act reasonably or unreasonably in all the circumstances in constructively dismissing the claimant for that reason?

Disability discrimination

5.6. Was the claimant disabled at relevant times within the meaning in the Equality Act 2010 by reason of stress/anxiety/depression?

5.6.1. Did the claimant have a mental impairment?

5.6.2. Did the impairment have an adverse effect on the claimant's ability to carry out normal day to day activities?

5.6.3. Was the adverse effect substantial, in the sense of being more than minor or trivial?

5.6.4. Was the adverse effect long term in that it had lasted at least 12 months, was likely to last at least 12 months or for the rest of the claimant's life?

5.7. Were all the complaints presented in time (including consideration of whether they form part of a continuing act of discrimination) and, if not, is it just and equitable in all the circumstances to consider the complaints out of time?

Indirect disability discrimination

5.8. Did the respondent subject the claimant to a detriment?

5.9. Did the respondent apply to the claimant and others without the disability a provision, criterion or practice, (PCP) being the disciplinary procedure?

5.10. Did that PCP put persons with whom the claimant shared the characteristic of disability at a particular disadvantage when compared with persons without that characteristic?

5.11. Did the PCP put the claimant at that disadvantage?

5.12. Can the respondent show the PCP to be a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

5.13. Did the respondent apply to the claimant a provision, criterion or practice, (PCP) being the disciplinary procedure?

5.14. Did that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

5.15. Could the respondent reasonably be expected to know that the claimant had a disability and was likely to be placed at the disadvantage?

5.16. If so, did the respondent fail to take such steps as it would have been reasonable to take to avoid that disadvantage? The claimant suggests that reasonable adjustments would have been a) to investigate more before deciding whether to invoke the disciplinary procedure; and b) having an

informal meeting with the claimant before deciding whether to invoke the disciplinary procedure.

Harassment related to disability

5.17. Did the respondent act in the following ways:

5.17.1. At a meeting on 5 November 2015, Phil Hitchen stated that the claimant was the pettiest person he had met and that he wished he had never taken the claimant back on and that the claimant's medication had made him like that.

5.17.2. In a letter dated 29 June 2016, Phil Hitchen commented on the claimant being trouble and that they thought he was unstable and had brought everything on himself.

5.17.3. In a letter dated 8 July 2016, Phil Hitchen mentioned the claimant's mental state of mind, pointed out that he had caused trouble and cause the H & S Executive to enquire into the company.

5.17.4. In a letter dated 10 February 2017, Phil Hitchen wrote that the claimant had brought stress upon himself and referred to the claimant's mood swings and erratic behaviour.

5.17.5. At a meeting at Bredbury Hall on 17 March 2017, Phil Hitchen said he thought the claimant's ailments were self afflicted.

5.18. Was this unwanted conduct?

5.19. Was the conduct related to the protected characteristic of disability?

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

Discrimination arising from disability

5.21. In relation to the same matters relied upon for the complaints of harassment, if the conduct does not constitute harassment:

5.21.1. Did the respondent subject the claimant to a detriment by that conduct?

5.21.2. Was the claimant treated unfavourably because of something arising in consequence of his disability?

5.21.3. If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

5.21.4. Did the respondent know or could they reasonably be expected to know that the claimant had the disability?

6. At the start of closing submissions Mr Mills informed the Tribunal that the respondent now conceded disability.

The Facts

7. The respondent is a private limited company based in Stockport. It provides bus and coach hire services throughout the United Kingdom and Europe. Mr Hitchen, the Managing Director, started the business approximately 25 years ago. It started as a taxi and private hire. From 2003, the company has been operating school buses for Greater Manchester as part of its business. It now has a turnover of £4 million per year. It employs approximately 95 people, of whom around 56 are drivers, the others being managerial, administrative, sales and garage staff.

8. We were told that there is a national shortage of drivers. A shortage of drivers sometimes means that the respondent's managerial staff, including Mr Hitchen himself, drive buses or coaches to be able to fulfil their contracts with customers.

9. The respondent's witnesses were Mr Hitchen, the Managing Director; Mike Mitchell, the Contracts Manager; and Mrs Pamela Frankland, HR Manager. Mrs Frankland has held the position of HR Manager since January 2015. Previously she worked for the company in other capacities. Mr Hitchen, the Managing Director, had dealt with HR matters until her appointment. He asked that she take over the HR role. She has learned on the job rather than having any formal training or HR qualifications. She had access to specialist advice from solicitors when required. The scope of her responsibilities appears to have been unclear. At times, Mrs Frankland appeared to assume responsibility for dealing with grievances. For example, she carried out some investigation of the claimant's grievance about another employee shining a laser pen in his eyes. However, it appears from her evidence that she did not regard herself as having any decision making powers, at least in relation to disciplinary matters. When asked whether it was her decision that there was sufficient evidence to take the claimant to a disciplinary hearing, she answered that nothing was ever her decision.

10. The claimant began the relevant period of employment on 23 September 2013 as a bus driver with a 25 hour contract. He had had an earlier period of employment and had been taken back on after a gap in employment with the respondent. The claimant has a young daughter with an ex partner. The claimant had a custody arrangement under which he had care of his daughter from Friday to Sunday. From around March 2014, the respondent accommodated the claimant's request to finish at 12.30pm on Fridays because of this custody arrangement.

11. In March 2015, the claimant was issued with a new statement of particulars of employment. His job title was "Yellow school bus/coach/bus service run driver". His normal working hours were stated to be variable. The contract stated:

> "Your working week will be organised according to a rota which the company will notify to you on a weekly basis."

The new contract stated that the claimant was guaranteed to be provided with 40 hours per week during 38 weeks of the year and possibly through the school holidays. The contract stated that, in addition to his normal hours of work, he was required to work any necessary additional for the proper performance of his duties and that he could be required to work at weekends and public holidays as part of his normal working week if he wished to do so.

12. There was no written agreement varying the contractual terms relating to finishing time on a Friday. However, it is common ground that there was a verbal agreement between the claimant and the respondent relating to accommodating the claimant's arrangements on a Friday. There is some dispute as to the terms of the agreement. It appears the respondent had a view that this was less of a guarantee than the claimant understood it to be. The respondent's view was that they would do whatever they could to accommodate the claimant's finish time, but there could be times where, because of a shortage of drivers, the claimant might be required to work later on a Friday. The claimant's view appeared to be that the respondent had agreed they would always allow him to finish at this time on Friday, although he was flexible on other days.

13. At some time in 2015, the claimant told Ian Olsen that, from September, he could finish off school runs on a Friday because his daughter would be starting school and his father would be able to look after her after school.

14. It appears that sometimes the respondent put the claimant on duties which would have required a later finish time than the claimant felt able to do, and there were occasions where the claimant refused to do the duties because of arrangements with his daughter.

15. Some time in the period May to July 2015, the claimant began to do some work in the transport office, although he was still required to do driving duties at times. We accept the respondent's evidence that they intended this to be on a trial basis. However, it appears that this may not have clearly been communicated to the claimant. At some point, the respondent decided that the new arrangement was not working out and decided to return the claimant to full-time driving duties. It is not necessary for us to make findings as to the reasons for the respondent making this decision. There was some suggestion in the claimant's witness statement that he thought he was removed from office duties because of disputes about Friday finish times. However, this argument did not appear to be pursued in cross examination. If this was a belief of the claimant, he has not satisfied us on the evidence, on the balance of probabilities, that the reason for removing him from office duties was his refusal to work beyond a certain time on a Friday.

16. What is clear from the evidence is that the claimant was disheartened by being removed from office work. The exact date the claimant was removed from the office work is not clear on the evidence. However, it appears that by some time in August 2015, the claimant had been told by at least one manager, if not more, that he was no longer doing office duties. The claimant's request in his letter to Ian Duff dated 21 October 2015 to clarify his position within the company and the lack of such a question in his grievance dated 15 August 2015 suggests that the claimant did not understand until some time after 15 August that he had been permanently removed from office duties.

17. We accept the claimant's evidence that, in May 2015, he visited his GP and was prescribed antidepressants and that he had no previous history of depression. We find that, around this time, the claimant informed Mike Mitchell that he was on this medication in case there was any concern about him doing driving duties whilst on the medication. We also find that the claimant told Mr Hitchen some time in May 2015 about his state of mind and that he was on medication. Mr Hitchen placed this a year later in May 2016. We think it most likely that Mr Hitchen has made a mistake as to the date. May 2015 is more consistent with the later grievance of 14 August 2015 which initially went to Mr Hitchen and referred to work related stress and being prescribed medication. Mr Hitchen remembers the conversation in the car park with Mr Wright as being the first time he became aware of the claimant's condition. However, this would not have been the case if the first indication had been in the grievance dated 15 August 2015. Mr Hitchen says he had forgotten about the grievance. However, we consider it more likely than not that the grievance followed the conversation about the claimant's condition.

18. On 14 August 2015, following a conversation between the claimant and Phil Hitchen about issues the claimant had with Mr Mitchell, the claimant sent a formal grievance to Mr Hitchen. He forwarded the grievance to Pamela Frankland the following day at the request of Mr Hitchen. The claimant wrote that 99% of the time he had been allowed to finish his shift on a Friday evening between 4.30pm and 5.00pm to comply with the court order so that he could take care of his daughter, and that this had been ongoing for around 15 months. He complained of supervisors putting him under stress to complete a duty they knew he could not do. He wrote that senior members of staff were aware that he took prescribed medication. He wrote that, in his opinion, they were trying to push him over the edge. He wrote that he had reported in sick on 14 August 2015 with work related stress as a result of the previous day. He said he had not slept and did not feel safe to work being so tired. The contents of the grievance support the claimant's evidence that he understood he had been threatened with disciplinary action by supervisors for saying he could not do certain duties on a Friday afternoon.

19. It appears that Pamela Frankland had meetings on 12, 17 and 19 August with the claimant, Michael Mitchell and another manager, GD, about the claimant's grievance. However, there is no evidence that anything was done following these meetings. There is no written outcome to the grievance. Mrs Frankland was unable to give us any explanation as to why there was no outcome.

20. On 22 September 2015, the claimant's vehicle developed a fault. Whilst his normal vehicle was off the road, he was given a different vehicle. He reported faults with the vehicle, including the smell of diesel, a number of times and asked for another vehicle. He was told that if he did not drive that vehicle he would have to go home. He was relieved from duty. The claimant made an appointment with his doctor because he was not feeling well. He visited his GP on 20 October 2015 and was given a fit note for absence for a week because of breathing difficulties.

21. On 21 October 2015, the claimant sent an email to Ian Duff raising concerns about the vehicle. In this email he also asked for confirmation about his position with the company and referred to the grievance which he had raised on 14 August 2015, saying that he had had no response to that grievance.

22. On the same day, the claimant contacted the Health and Safety Executive with concerns. The reply from the HSE referred to him contacting them about "several issues" but did not identify the issues. Mr Hitchen said that the claimant told him later that he had contacted the HSE about cables in the walkway but this evidence did not appear in his witness statement and is not referred to in any documents. It was not put to the claimant. We make no finding on what the claimant raised with the HSE but, from the timing of the complaint, it appears likely to us that the matters raised at least included, if not consisted solely of, the concerns about the diesel fumes.

23. Ian Duff replied to the claimant on 23 October 2015 saying that the fuel smell had now been rectified. He wrote that Mr Hitchen had confirmed that the claimant's office duties were of a temporary basis as and when required. He wrote that he understood that the claimant became very depressed and suffered from stress from time to time. His email did not make any reference to the claimant's grievance.

24. The claimant replied to this email on the same day. His reply included a statement that he was not told that his position within the company was temporary. He said he felt let down. He wrote: "I can confirm that I do not suffer from stress". He referred to there being a stage in everyone's life where they get fed up. He wrote that he felt let down by the respondent with regards to his position within the company.

25. The claimant returned to work on 27 October 2015. The driving duty he had been doing had been given to someone else and he was put in the role of a spare driver covering sickness. This caused him concern because of not knowing the routes and potential problems with finish times on Fridays. The claimant felt that he was being deliberately given late finishes on a Friday. Whilst we accept that the claimant sometimes had difficulties with finishes on Fridays, we are not satisfied on the balance of probabilities that the claimant was treated differently from other drivers or that the respondent was deliberately making it difficult for the claimant to have time with his daughter on Fridays.

26. There was a particular issue about the work allocated to the claimant on Friday 6 November which the claimant said he could not do because he needed to pick up his daughter. It appears that the claimant was spoken to about this earlier that week by Ian Duff, Operations Manager. This conversation was then regarded by the respondent as a verbal warning and recorded as such in a letter from Pamela Frankland dated 5 November 2015. It appears that the respondent had not followed its own disciplinary procedure prior to issuing the claimant with a verbal warning; the claimant had not been sent a letter inviting him to a disciplinary meeting, given reasonable notice and given an opportunity to be accompanied. The letter noted:

> "You have been issued with a verbal warning by Ian Duff, Operations Manager, for refusing to do allocated work for Friday 6 November 2015 which is part of your contractual duties."

27. The claimant has suggested that he received this letter after he had submitted an application for flexible working. However, we consider it more likely that the claimant has made a mistake about this, given the date on the letter about the warning and the time at which he sent his email with the flexible working application. The flexible working application was sent at 18:49 on 5 November, which we consider was likely to be after Pamela Frankland had left the letter for the claimant.

28. The claimant applied in his email for a flexible working pattern. He wrote that he would like to continue and formalise his current work pattern without frequent alterations. He wrote that his weekly shifts usually consisted of a school run in the morning with bath runs during the day and a school run in the evening starting at approximately 6:30 until 16:30. He wrote:

> "I do not think that the suggested flexible work pattern would be detrimental to the company, as the company for the last 15 months have accommodated my finish time on Fridays so that I can pick up my daughter as per my court order."

29. He wrote that this was a statutory request as he had previously made a verbal request after receiving a court order which the respondent had initially honoured.

30. In the claimant's further information relating to his disability claim sent on 6 September 2017, the claimant had written that, at a meeting with Phil Hitchen and Pam Frankland on 5 November 2015, Mr Hitchen said he was the "pettiest person he'd met and that he wished he'd never taken me back on and that my medication had made me like this". At the start of this hearing, this alleged comment was identified as one of the matters relied upon for a complaint of harassment. However, the claimant gave no evidence about this alleged incident and the respondent witnesses deny that it took place. The claimant has not satisfied us on a balance of probabilities that Mr Hitchen made the alleged comments.

31. On 6 November 2015, Pamela Frankland wrote to the claimant inviting him to a meeting on 9 November to discuss his flexible working application. On the same day there were emails between Ian Duff and Ian Olsen about the possibility of changing the claimant's route; they appear to have been considering this as a way of ensuring the claimant could finish on Fridays at the time he had requested. Ian Olsen commented in one of the emails, "I'm tired of going around in circles over him". Ian Duff commented, "I understand the whole team are looking into daily issues with Phil Wright". His comments are indicative that the supervisors and drivers were feeling fed up with the claimant.

32. The claimant gave evidence that he received a phone call from Ian Olsen, in which Mr Olsen told the claimant that he would not have any finish time after 16:30 on a Friday. We consider it most likely that this conversation came after the flexible working application and the emails of 6 November. The claimant confirmed to Mr Olsen that he was flexible Monday to Thursday.

33. The claimant says he continued to have frequent changes of duty.

34. On one occasion, a manager, GD asked the claimant to do a route he did not know and GD made a derogatory comment to the claimant calling him an "awkward cunt".

35. The claimant appealed against the verbal warning he had received. Pamela Frankland replied to his appeal on 9 November 2015 telling him that the warning still stood. It does not appear that there was any appeal hearing. Mrs Frankland told us that she did not look into the circumstances as to why the claimant said he could not do the duty on 6 November. It is unclear from the letter whether it was Mrs Frankland who made the decision to reject the appeal or someone else. She wrote:

> "After considering your appeal it has been decided that the verbal warning on this occasion will still stand. The work given for Friday was apparently allocated to you earlier on in the week which was considered to be part of your contractual duties. The company are also aware that you do have a court order in place and yes you did receive a revised contract in March 2015. However, it does not state anywhere in that contract that we accept the Friday finish time."

36. Mrs Frankland had a meeting with the claimant on 9 November 2015 concerning his flexible working request. The claimant alleges that Mrs Frankland said at this meeting, "There is going to be something with you everyday" and that the claimant would have to wait three months for a reply and then he would not get his flexible working request. Mrs Frankland denies that she made these comments. The claimant has not satisfied us, on a balance of probabilities, that Mrs Frankland did make these comments. However, we note that there was never a formal response in writing to the flexible working request.

37. The claimant made a holiday request on 10 November to take leave on 11-13 November 2015. There is an annotation by the claimant on the form that he felt the need to unwind after the grievance meetings and other meetings. It is not clear whether this annotation was on the form before the request was made. The request was refused because the notice was too short.

38. On 10 November 2015, the respondent emailed the claimant at home in the evening an amended schedule for the following day. The claimant had a very low mood on 12 November and visited his GP. He obtained a fit note for absence 12-26 November due to low mood and stress at work.

39. There is a letter in the bundle of documents dated 13 November 2015 from Pamela Frankland requiring the claimant to attend a disciplinary hearing on 27 November 2015 relating to the allegation that the claimant had failed to follow a lawful and reasonable instruction to attend work on 6 November and 9 November 2015. She wrote:

> "On both occasions you refused to attend work when you were obliged to do so and failed to provide a reasonable excuse for your actions."

40. We heard no evidence from anyone about this matter so we are unclear whether the letter was in fact sent, and, if it was, what happened. There does not appear to have been a disciplinary hearing on 27 November. The letter was dated at a time when the claimant was signed off work sick and 27 November was the date of his return to work.

41. The claimant returned to work on 27 November 2015 and completed an absence form, giving the reason for his absence as work related stress and stating that he was taking antidepressants.

42. On 30 November 2015, Mike Mitchell made an allegation in an email to Ian Bragg and others that the claimant had been using his mobile phone to his ear when driving. Using a mobile phone which is not hands free whilst driving is illegal as noted in the July 2006 edition of the respondent's company handbook. That edition did not prohibit the using of hands free mobile telephones to receive calls, although it

stated it was preferable not to use a hands free telephone for taking calls at all if possible.

43. The respondent has shown to us the mobile phone policy which was first issued on 8 October 2015. Mrs Frankland has suggested that this was available in the canteen. There is no evidence that the staff were alerted to it by any other means. From notes made by the claimant at the disciplinary meeting on 9 December 2015, it appears that eight drivers spoken to did not know about that policy. We accept the claimant's evidence that he did not know about the policy and this is what the claimant told the respondent during the disciplinary process which arose from the allegation. The new policy prohibited the use of mobile phones, whether hand held or hands free, whilst driving.

44. In the period 3-4 December 2015, five drivers made statements in a very similar form to the effect that they had seen the claimant using a phone to his ear whilst driving. Mrs Frankland, HR Manager, told us she did not know how the statements had come to be written. Mr Hitchen told us that Ian Bragg and Ian Duff had spoken to the drivers, written the statements for them and got them to sign the statements.

45. By a letter dated 4 December 2015 from Pamela Frankland, the claimant was invited to a “disciplinary investigation meeting”. She wrote:

> “The reason for this meeting is that on 30 November you were witnessed using your mobile phone whilst driving a company vehicle. Using a mobile phone whilst driving is against the law and it is not company policy to do so.”

46. The meeting was scheduled for 7 December 2015. We prefer the evidence of the claimant to that of Mrs Frankland that the claimant had not been spoken to about the allegation prior to this letter. Mrs Frankland thought that someone would have spoken to the claimant but could give no evidence that anyone had done so.

47. On 7 December 2015, at the meeting, the claimant was given a copy of the policy which he said he had never seen before. He asked for CCTV footage and was told it was not available. A further meeting was arranged for 9 December 2015.

48. On 9 December 2015, the claimant attended a further meeting with Ian Duff and Pamela Frankland. The claimant was given redacted copies of the witness statements. He asked for a copy of the bullying policy. We accept the claimant’s evidence that this was never provided to him.

49. By a letter dated 15 December 2015, the claimant was required to attend a disciplinary meeting on 18 December relating to the allegation of using a mobile phone while driving. It was clear from this letter that this was to be a disciplinary hearing which could result in disciplinary action. Mrs Frankland wrote that, if the claimant did not attend the meeting without a good reason in advance, a decision could be made in his absence based on the available evidence.

50. The claimant attended a disciplinary meeting with Ian Bragg on 18 December. CCTV footage was viewed. The claimant was told that there was no charge to answer and was given an apology. Mrs Frankland gave evidence that the claimant was given an apology but said she was not present when this was given. There are no notes of the meeting and no written outcome letter.

51. Mr Hitchen told us at the Tribunal hearing that he had been discussing this with Ian Bragg and it was Mr Hitchen's decision that the claimant should not be dismissed. Mr Hitchen makes no mention of his role in this disciplinary matter in his witness statement. It is not necessary for us to make a finding as to whether it was his decision or that of Mr Bragg.

52. The claimant asked at the disciplinary hearing what would happen about the five false witness statements and was given what he regarded as a vague response. There was no investigation into whether the allegations made against the claimant were malicious.

53. We accept the claimant's evidence that he continued to get calls and texts on his mobile from staff at the respondent following this disciplinary hearing.

54. Around this time, there was an incident which led to the claimant making a complaint against another employee: that the employee had shined a laser pen at his car whilst he was driving which momentarily blinded him, and when he confronted the other employee that employee said he would "get" the claimant after work. We note this was a very serious allegation. It does not appear that anyone other than Pamela Frankland took any action following the complaint. Mrs Frankland spoke to the other driver who denied the incident. She formed the view that nothing could be done although she says she told the other driver that, if it happened again, there would be action.

55. The claimant had named another driver who was with him, who the claimant said had also had a laser pen shone at him. Mrs Frankland discovered that the claimant had not been accompanied by that driver but by a driver with the same first name. It appears she did not interview that other driver.

56. Mrs Frankland said she spoke to the claimant and told him what she had done and that the claimant seemed content at the time. The claimant did not recall this. At the highest, Mrs Frankland told the claimant that she had spoken to the other driver and could not take the matter any further. The type of investigation carried out does not appear to be commensurate with the seriousness of the incident.

57. We accept the claimant's evidence that, around this time, GD made a comment to the claimant, "you're still on your period then".

58. The claimant gave evidence about being asked to do work at the last minute which he could not do. There was a continuing issue of the claimant being unhappy about late changes. However, the claimant has not satisfied us that he was treated any worse than other drivers in this respect. We accept that it was the nature of the respondent's business that sometimes changes would be made at short notice, for example when a driver was ill.

59. On 10 May 2016, the claimant was issued with a note from Donna Thompson and Kenny Walsh about a defect on his vehicle, saying that a note of non conformance would be placed on his file. The defect was a blown bulb. The claimant asserts that this defect was not present when he did a check of the vehicle. There was email correspondence about this between the claimant and Donna Thompson but the claimant was informed that the notice stood. Mr Hitchen gave evidence that all non conformances are recorded in this way. The claimant has not satisfied us on

a balance of probability that he was treated any differently to other employees in relation to the issue of non conformances.

60. In the period 12-13 May 2016, the claimant was off work because he felt stressed. In his absence form completed on his return to work, he wrote that he was suffering from "stress at work caused by Donna" and noted that he was taking antidepressants.

61. In June 2016, the claimant was asked by another employee to attend that employee's disciplinary hearing. That employee, MB, was dismissed but was subsequently reinstated by Mr Hitchen without a formal appeal hearing. It is unclear why Donna Thompson dismissed MB but Mr Hitchen clearly formed the view that MB had been dismissed because of the way the claimant represented him at the hearing. Whilst it appears unlikely that this was the case, if the disciplinary matter was dealt with properly, this appears to have been Mr Hitchen's view.

62. Mr Hitchen has given evidence, and referred in correspondence, to the claimant allegedly having said to Mrs Frankland the day after the disciplinary hearing that he had just being trying to wind her up. Mrs Frankland gave no evidence on this matter. The claimant did not deal with it in his witness statement and the matter was not put to the claimant in cross examination. We are not satisfied on a balance of probabilities that the claimant made the alleged comment, although we accept that Mr Hitchen may have come to believe that the claimant did say this.

63. On 28 June 2016, after Mr Hitchen had reinstated MB, the claimant asked to have a private word with Mr Hitchen. There are differing accounts as to what the claimant said but it was clearly some adverse comment about Donna Thompson's conduct of the disciplinary hearing of MB. Whatever the exact words used by the claimant, Mr Hitchen recalled it in an email to Mrs Frankland and Donna Thompson on 28 June 2016 as the claimant saying that he would have nothing but trouble with Donna.

64. From Mr Hitchen's record in that email of what he replied to the claimant, it appears that Mr Hitchen reacted strongly to the claimant's comments. Mr Hitchen wrote that he had replied to the claimant:

> "Since Donna has joined the company I think it's a bit more than coincidence that the company has doubled in size twice! And this coming from a man who has called H & S, been off sick with stress, and takes tranquilisers for depression! Do me an f…ing favour! Bye Phil."

Mr Hitchen wrote:

> "You should have seen his face. It was a picture. (I actually thought he was going to cry)."

65. On that day, the claimant texted Mike Mitchell to say that he would not be in the next day for his half day, writing:

> "I feel under the weather as a result of the comments made by Phil Hitchen this morning."

Mike Mitchell replied:

> "You know the situation we are in at present. If you don't turn in for work tomorrow don't bother turning in again."

66. The claimant gave evidence that he received an unpleasant phone call from Mr Hitchen that evening. He did not give evidence as to what was said and Mr Hitchen could not remember whether or not he made a call. If a call was made, we consider it likely to have been unpleasant in tone, given Mr Hitchen's reaction to the claimant earlier that day.

67. On 29 June 2016, the claimant began a period of absence due to sickness which continued until his resignation in April 2017.

68. On 29 June 2016, Mr Hitchen wrote to the claimant, writing:

> "Further to your absence from work this morning we write to confirm that you are required to attend a disciplinary meeting regarding your absence and your recent actions."

69. Mr Hitchen did not set out clearly the allegations which the claimant was to face. However, he suggested that, if the claimant was suffering from stress, it was because of the trouble he brought on himself by trying to cause trouble within the company, and having colleagues like MB dismissed rather than trying to secure his employment. Mr Hitchen alleged that the claimant had said to Mrs Frankland that he was just trying to wind her up at the cost of that colleague's position. Mr Hitchen also wrote that he had had numerous drivers approach him and inform him of the claimant trying to destabilise operations and generally trying to cause trouble. He wrote:

> "I have to say that your behaviour of trying to cause a mutiny with the drivers, accusing Donna Thompson of being 'trouble' when your record is far from acceptable is no longer required in our company. Either you address your attitude or our working relationship will cease. Ian Bragg, my co director, thinks you are unstable to be carrying schoolchildren around and feels you should not come back into work without a clear bill of health from a doctor.
>
> You have had numerous chances to secure a happy working position within out team only to go off the rails. I am deeply concerned for you. Your mood swings are off the radar and the depression you once described to me would suggest you should seriously consider going to see your doctor at the earliest convenience and having a check up. We wish you well."

70. On 29 June 2016 the claimant obtained a fit note for four weeks' absence.

71. On 7 July 2016, the claimant wrote to Mrs Frankland saying it was not appropriate at that time to attend a disciplinary meeting and seeking clarification of the nature of his "recent actions" referred to in Mr Hitchen's letter.

72. Mr Hitchen wrote to the claimant on 8 July 2016. He wrote that they also did not think it was appropriate for the claimant to attend the meeting until he had been cleared fit for work by a doctor. He referred to the claimant's statement in his letter of 7 July that he had followed company procedure with regards to absence. Mr Hitchen wrote:

> "Your statement of following company procedures is not quite viewed by us in the same manner, I'm afraid. We see it as a stroke by you to cause maximum inconvenience at a time when the season is at its busiest."

73. He referred to the claimant causing trouble in the disciplinary meeting for MB and approaching Mrs Frankland to state that he was "only trying to wind her up". He suggested that the claimant had been disappointed that MB had been reinstated by Mr Hitchen. He referred to the claimant suggesting that Donna Thompson was trouble, "when in actual fact I pointed out that that you were a person who was taking medication for depression".

74. Mr Hitchen referred to previous complaints about the claimant which, in evidence to this Tribunal, he told us related to the claimant's previous period of employment subsequent to which Mr Hitchen had taken the claimant back in employment. He alleged that the claimant had tried to cause a mutiny with the drivers, handing paperwork out about work being allocated and causing the Health and Safety Executive to make an enquiry over their day-to-operations, and wrote that the claimant was a person who was trouble rather than Donna Thompson. Mr Hitchen wrote:

> "We seriously think there is something wrong with your behaviour, Phil. Looking at your record, you have had complaints, you are disruptive and you are not happy unless you can gain attention. We have to say that we are deeply concerned for your state of mind and wish you to seek medical help."

75. Mr Hitchen asked that, if and when the claimant recovered from his illness, he should contact Pamela Frankland and they would resume the claimant's employment, starting with a disciplinary meeting.

76. The claimant wrote again to Mr Hitchen on 13 July 2016 asking him why he had been asked to attend a disciplinary meeting. He wrote that he believed there were a number of misassumptions on Mr Hitchen's part in his letter.

77. The claimant wrote again on 27 July 2016 seeking a response to his letter of 13 July 2016. Mr Hitchen replied on 3 August 2016 referring the claimant back to his letter of 8 July 2016.

78. The claimant wrote again on 8 August 2016. He again asked for confirmation as to why he was required to attend a disciplinary meeting due to absence from work and recent actions and for clarification as to what was meant by "recent actions." He asked that Mr Hitchen supply any relevant evidence and/or information.

79. Mr Hitchen wrote on 10 August 2016 that:

> "It is advised that due to your recent state of health that we resume this matter at a later date."

80. He wrote that, for them to resume, they would require from the claimant's doctor a letter to confirm that he was completely fit and well and able to carry on with his daily working duties.

81. After this letter in August 2016, no contact with the claimant was initiated by the respondent until after the claimant raised the matter of holiday pay in January 2017.

82. The claimant submitted a series of fit notes for his absence, giving the reason for absence as “stress at work”, “work related stress” or “low mood”.

83. In October 2016, the claimant was upset to receive a letter from the pension provider alerting him to the fact that the respondent had failed to make contributions. The claimant sent a copy to HR and was eventually told that this was an administrative error which had happened to everyone. From the respondent’s evidence, it appears that there was a cash flow problem leading to them not making the contributions on time. There is no evidence that this was something directed at the claimant and that it did not affect other employees as well.

84. There was also an issue when the claimant’s SSP entitlement was coming to an end. The respondent failed to send the claimant the relevant information to claim ESA and then failed to sign a form causing further delay. We find that this was due to Mrs Frankland relying on the respondent’s accountant and not knowing what the respondent needed to do in this situation.

85. During his sickness absence, the claimant had only been paid SSP and then moved to ESA. He began to suffer financial difficulties due to loss of income. Because of these difficulties, he decided to ask if he could be paid for accrued holidays. The claimant sent emails to Mrs Frankland on 30 January, 31 January and 1 February 2017 requesting the total number of holidays outstanding.

86. On 9 February 2017, the claimant wrote a complaint to Ian Duff that Mrs Frankland had not supplied the information requested. He also made an allegation of discrimination. Mr Duff replied that he was no longer Operations Manager and directed the claimant to Mike Mitchell with his grievance. In an email from Mr Hitchen sent by Mrs Frankland on Mr Hitchen’s behalf dated 10 February 2017, Mr Hitchen told the claimant that he had taken three days’ holiday in 2016. He apologised for the delay in replying. He wrote:

> “In relation to your ‘work related’ stress I was somewhat confused over this statement. In ‘work related’ was this referring to the stress you brought upon yourself when you represented one of the drivers in a disciplinary meeting and got him the sack, only to have me reinstate him last summer? Or was it after you discriminated against one of the office team to myself only to be dismissed? We have not seen you since that time. Either way the confirmation you gave to me during our last conversation was that you have only been taking half the medication prescribed to you, which was a real concern to myself after all your mood swings and erratic behaviour. We do hope you gain medical assistance required to make a full and speedy recovery. All the best.”

87. The claimant replied on the same day. He asked for the procedure for annual leave entitlement remaining outstanding due to sickness. He also asked for a copy of the employee handbook. After some delay and being sent at first the wrong document, the claimant was supplied with a copy of the employee handbook.

88. Mr Hitchen replied to the claimant's email on 16 February 2017. He wrote that holiday not taken was available for up to 18 months. He wrote:

> “The procedure for holidays not taken due to sickness is new to us.”

89. In an email to Mrs Frankland dated 17 February 2017, the claimant requested that remaining holidays be paid to him. Mrs Frankland emailed the claimant on 10 March 2017. She wrote that his holiday entitlement pay would be paid in March 2017 so he would receive it on 7 April 2017.

90. The contact from the claimant relating to holidays caused Mr Hitchen to decide that they should meet with the claimant about his absence. Mrs Frankland wrote to the claimant in an undated letter received by the claimant on 11 March inviting the claimant to a meeting on 16 March 2017 to discuss his absence.

91. There followed correspondence about the arrangements for the meeting. The claimant wrote that he would not be comfortable meeting at the respondent's premises and asked for an alternative venue. Mr Hitchen wrote that he did not understand why the claimant would not feel comfortable at the respondent's premises, but, in a subsequent email, suggested meeting at Bredbury Hall on 17 March. The respondent agreed to the claimant's request that the claimant could be accompanied by his father at the meeting. The claimant said he would consider giving his consent to accessing his medical records after the meeting.

92. The meeting took place at Bredbury Hall on 17 March 2017. Mr Hitchen, Mrs Frankland and the claimant and his father attended the meeting. Although a letter arranging the meeting had stated that Mrs Frankland would attend the meeting as a note taker, she took no notes; neither did Mr Hitchen nor the claimant and his father. The claimant alleges that, at this meeting, Mr Hitchen said he thought that the claimant's illness was self inflicted. Such a statement is entirely consistent with Mr Hitchen's previous letters and we find that Mr Hitchen did make such a comment.

93. At the case management preliminary hearing, it had been noted that the claimant was contending that Mr Hitchen, at the meeting at Bredbury Hall, had mentioned the possibility of resignation. However, the claimant gave no evidence about this and we make no finding that Mr Hitchen made such a comment.

94. On 21 March 2017, the claimant wrote to Mr Hitchen asking whether the respondent had considered what reasonable adjustments could be made and what timescales would be attached to them. He sent a further email on 28 March 2017 chasing up on this email.

95. Mr Hitchen replied on 28 March, apologising for the delay. He wrote that he had passed the reasonable adjustments matter to their HR team to deal with and come back to Mr Hitchen and he was waiting for this. He wrote that he would chase this up and come back to the claimant as soon as possible.

96. Mrs Frankland wrote to the claimant on 29 March 2017. She wrote that they wanted an Occupational Health report to help identify when the claimant might return to work and the adjustments which might be put in place to assist him. She asked the claimant to confirm he was happy to go ahead. The claimant replied on 29 March 2017 that he was more than willing to attend a medical.

97. On 3 April 2017 Mrs Frankland wrote to the claimant as follows:

> "I have sought advice from our HR team in connection with your accrued holiday pay.

> At this present moment in time you are still on long-term sickness leave. Once you have had a medical with the Occupational Health team which will be arranged on your behalf, only then will we be in a better position to proceed.
>
> If you decide in the meantime to resign from the company then as an employer we will pay them. If you are fit to return to work then you can request the holidays accrued to be taken on your return."

98. Mrs Frankland gave no other explanation for the respondent not making the payment which she had said previously would be made on 7 April 2017. She did not give the claimant the option in this letter of taking holiday and being paid for it as an interruption to sick leave, although both Mrs Frankland and Mr Hitchen say in their witness statements that this was an available option.

99. On 3 April 2017 the claimant replied as follows:

> "I had written assurance from yourself that the outstanding holidays owed would be paid for in the next payroll (i.e. this month). I fail to see what difference the outcome of the medical will make to payments, perhaps you can elaborate? So basically resigning is the only way you will pay the money you have already agreed to pay? This is another act by Belle Vue that confirms and compounds the stressful approach of the company."

100. Mrs Frankland replied on 4 April 2017:

> "I consulted our HR team to gain some information on your requirement and they pointed out about paying your holiday pay. Unfortunately this technicality over the payment has now changed. There was nothing intentional to cause any stress or bad feeling."

101. Mrs Frankland still did not tell the claimant that there was a way he could take holiday and be paid before he was fit to return to work. We find that the claimant was never informed that there was an option to receive any pay for holiday until he was either fit to return to work or resigned.

102. We accept the claimant's evidence that this correspondence about holiday pay was the last straw and led to his resignation.

103. By an email dated 4 April 2017, the claimant resigned with immediate effect. He wrote:

> "I feel that I am left with no choice but to resign in light of my recent experiences regarding the company's treatment and dealings in respect of my employment. The relationship between myself and Belle Vue has irretrievably broken down.
>
> I feel the company has subjected me to abusive treatment and acted in breach of contract on numerous occasions, I have endeavoured to broach and help address the breaches but I am no longer willing to do so.
>
> Agreeing to pay my holidays in this month payroll and at the last minute reversing the commitment, and also suggesting that my resignation would

> trigger a payment is I consider the final fundamental breach of the contract on your part."

104. On 5 April 2017 the claimant notified ACAS under the early conciliation procedure and the ACAS early conciliation certificate was issued on 6 April 2017.

105. On 7 April 2017 Mr Hitchen wrote to the claimant asking him to attend a meeting and discuss whether he would like to withdraw his resignation. Mr Hitchen asserted in this letter that the claimant had been informed that he was able to request to take his holidays in the normal way whilst off sick and that these would be granted and paid.

106. The claimant replied on 10 April 2017. He denied that he received a letter saying that he could request holiday dates. He said his resignation stood.

107. Mr Hitchen wrote again on 11 April 2017. Mr Hitchen wrote that they had no objection to him taking holiday whilst he was on sick leave and would be paid for any holiday taken. He apologised if this was not made clear to the claimant but said he was happy to make the arrangements.

108. The claimant wrote again to Mr Hitchen on 11 April 2017 confirming that his resignation still stood.

109. By a letter dated 12 April 2017, Mr Hitchen confirmed to the claimant that the effective date of termination was 4 April 2017.

110. The claimant presented his claim to this Tribunal on 9 May 2017.

111. We accept the claimant's evidence that he did not bring complaints about earlier treatment at an earlier stage because he hoped to resolve matters and remain in employment. At the time, the claimant and his partner had two houses and it was important that the claimant continued to have a wage coming in.

Submissions

112. Mr Mills, for the respondent, said in closing submissions that, given the evidence the tribunal had heard, disability was no longer in issue.

113. In relation to indirect discrimination, Mr Mills submitted that the claimant had not established particular disadvantage; disciplinary proceedings were stressful for anyone. He also submitted that disciplinary proceedings were a proportionate means of achieving a legitimate aim; the aim being to ensure the respondent complied with obligations that drivers do not operate vehicles whilst using mobile phones.

114. In relation to the conduct relied on as harassment, Mr Mills submitted that this was properly considered as harassment rather than discrimination arising from disability. He invited the tribunal to prefer the respondent's evidence on the first allegation. In relation to the comments in the letters, Mr Mills submitted that the comments were not discriminatory and did not have the prescribed effect. He noted that the claimant had not raised a grievance or resigned at the time. In relation to the complaint about comments at the Bredbury Hall meeting, he submitted that the comments were not discriminatory and did not have the prescribed effect. The

claimant did not refer to this in his resignation letter and had been willing to engage with occupational health.

115. Mr Mills submitted that there were significant gaps between the alleged acts of discrimination and said there was no reason why the claimant could not have presented the claim earlier; there was no reason why it would be just and equitable to extend time.

116. In relation to constructive unfair dismissal, Mr Mills submitted that it was unclear which acts the claimant relied upon. It was evident he was unhappy about a number of things. The respondent accepted there were procedural shortfalls. With the benefit of hindsight, things should have been formally responded to. If there were breaches, these were affirmed by the claimant. The claimant did not raise grievances, resign or indicate he was working under protest. If there was any untoward treatment, it was not without just cause: the claimant deliberately or maliciously contacted the HSE about the respondent; he caused disruption by refusing to accept work at short notice; he advised others not to do work on less than 48 hours' notice; his conduct at MB's disciplinary hearing. There was no breach of contract in relation to holiday pay and Mrs Frankland's email but, if the tribunal found there was a breach, this was affirmed by the claimant's failure to raise a grievance. The claimant attending the meeting with the respondent and expressing willingness to attend an occupational health appointment was a demonstration of the claimant affirming any breach. There were historic shortcomings with procedure but, by the time of the claimant's resignation, the respondent was taking positive steps to seek medical advice and to see what could be put in place to facilitate a return to work.

117. The claimant's father chose not to make any submissions relating to the issues the tribunal had to determine. However, he commented that dealing with the case had given him respect for his son and they felt they had won in terms of family pride.

The Law

Constructive unfair dismissal

118. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) provides that an employee is to be regarded as dismissed if "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."

119. An employee will be entitled to terminate a contract of employment without notice if the respondent is in fundamental breach of that contract and the employee has not waived the breach or affirmed the contract by conduct or delay.

120. An implied term of an employment contract is the term of mutual trust and confidence. This is to the effect that an employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*, said that the tribunal must "look at the employer's conduct as a whole

and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

121. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the "last straw" is not, by itself, a breach of contract: *Lewis v Motorworld Garages Limited 1986 ICR 157 CA.* The last straw does not have to constitute unreasonable or blameworthy conduct, but it must contribute, however slightly, to the breach of the implied term of trust and confidence: *Omilaju v Waltham Forest London Borough Council 2005 ICR 481 CA.*

Disability discrimination

Definition of disability

122. Section 6 of the Equality Act 2010 (EqA) and Schedule 1 to that Act contain the relevant provisions relating to the determination of disability. Section 6(1) provides:

> "(1) A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.

123. Paragraph 1 of Schedule 1 provides that the effect of an impairment is long term if (a) it has lasted for at least 12 months, (b) it is likely to last at least 12 months, or (c) it is likely to last for the rest of the life of the person affected. It also provides: "If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

124. Paragraph 5 of Schedule 1 relates to the effect of medical treatment. It provides:

> "(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if –
>
> (a) measures are being taken to treat or correct it, and
>
> (b) but for that, it would be likely to have that effect.
>
> (2) "Measures" includes, in particular, medical treatment and the use of prosthesis or other aid."

125. "Substantial" is defined in section 212(1) EqA as meaning "more than minor or trivial."

Indirect discrimination

126. Section 19 EqA defines indirect discrimination as follows:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

127. Subsection (3) sets out the relevant protected characteristics, which include disability.

The duty to make reasonable adjustments

128. The provisions relating to the duty to make adjustments are included in section 20 EqA and Schedule 8 to that Act. Schedule 8 imposes the duty on employers in relation to employees. Section 20(3) imposes a duty comprising:

> "A requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage."

129. Paragraph 20 of Schedule 8 provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the relevant disadvantage.

Harassment

130. Section 26 EqA defines harassment as follows:

> "(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 purpose or 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."

131. Subsection (5) lists relevant protected characteristics which include disability.

132. Section 40 prohibits harassment by an employer of an employee.

Discrimination arising from disability

133. Section 15 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."

Other relevant provisions

134. Section 39(2) EA makes it unlawful for an employer to discriminate against one of their employees by, amongst other things, subjecting them to a detriment.

135. Section 212(1) EqA includes the statement that ""detriment" does not, subject to subsection (5), include conduct which amounts to harassment". This has the effect that, if conduct is found to amount to harassment, the same conduct cannot be found to constitute another type of unlawful discrimination where being subjected to a detriment is part of the requirement for that conduct to be unlawful e.g. direct discrimination or discrimination arising from disability.

Conclusions

<u>Constructive unfair dismissal</u>

136. The claimant, who was not legally represented, did not identify specifically all the matters relied upon as together constituting a breach of the implied duty of mutual trust and confidence. During the discussion of issues at the start of the hearing, the tribunal indicated that it would consider all the matters referred to in the claimant's witness statement in considering whether the respondent had been in breach of that term. At the preliminary hearing on 2 August 2017 the claimant had

identified three particular incidents which he relied on as the last straw or straws, namely:

(1) the backtracking by the respondent on 3 March 2017 on its promise to pay for holidays owed;
(2) the lack of resolution after the Bredbury Hall meeting on 17 March 2017, although the respondent indicated that it would assess his condition and make reasonable adjustments. After ten days there was still no contact from the respondent which had in fact asked him to suggest reasonable adjustments at that meeting; and
(3) the statement by the respondent on 3 April 2017 that if he resigned now his owed holiday pay would be paid.

137. The claimant dealt in his evidence with a large number of matters over a number of years about which he was unhappy. We set out below the matters which we have found to have happened as a matter of fact and which we conclude together constitute a breach of the implied duty of mutual trust and confidence. There are other matters which we have found to have happened, detailed in our findings of fact, e.g. inappropriate comments, but we are not satisfied, on a balance of probabilities that these formed part of the reason for the claimant's resignation.

138. We conclude that the following matters together constituted a fundamental breach of contract, being a breach of the implied duty of mutual trust and confidence.

138.1. The failure to provide the claimant with an outcome to his grievance sent in August 2015. Although Mrs Frankland held some meetings about the matters raised in the grievance, there is no evidence that anything was done following these meetings. There is no written outcome to the grievance. Mrs Frankland was unable to give us any explanation as to why there was no outcome. In an email dated 21 October 2015 to Ian Duff which raised concerns about other matters, the claimant also referred to the grievance which he had raised on 14 August 2015, saying that he had had no response to that grievance. Despite this reminder, there was still no outcome to the grievance.

138.2. The failure to provide a written outcome to the claimant's request for flexible working in November 2015. Mrs Frankland held a meeting about this but there was never a formal response in writing to the request.

138.3. The inadequacy of the investigation of the claimant's serious complaint about another employee shining a laser pen at his vehicle whilst he was driving and that, when he confronted the other employee, that employee said he would "get" the claimant after work. Mrs Frankland spoke to the other driver who denied the incident. She formed the view that nothing could be done although she says she told the other driver that, if it happened again, there would be action. The claimant had named another driver who was with him, who the claimant said had also had a laser pen shone at him. Mrs Frankland discovered that the claimant had not been accompanied by that driver but by a driver with the same first name. It appears she did not interview that other driver. We found that, at the highest, Mrs Frankland told the claimant that she had spoken to the other driver and could not take the

matter any further. The type of investigation carried out does not appear to be commensurate with the seriousness of the incident and contrasts with the disciplinary process invoked in relation to the complaint about the claimant using his mobile phone whilst driving.

138.4. The comments made to the claimant by Mr Hitchen on 28 June 2016. The claimant had, after asking to speak to Mr Hitchen in private, made some adverse comment about the way Donna Thompson had conducted MB's disciplinary hearing, which the claimant had attended as MB's companion at MB's request. Mr Hitchen recorded in an email that he had responded to the claimant in the following terms: "Since Donna has joined the company I think it's a bit more than coincidence that the company has doubled in size twice! And this coming from a man who has called H & S, been off sick with stress, and takes tranquilisers for depression! Do me an f…ing favour! Bye Phil." Mr Hitchen recorded that, after he said this, he thought the claimant was going to cry.

138.5. The text sent by Mike Mitchell on 28 June 2016 telling him that, if he did not come in the next day, not to bother coming in again. This followed a text from the claimant that he would not be in the next day because he felt "under the weather" due to comments made by Mr Hitchen.

138.6. The inflammatory letters sent to the claimant by Mr Hitchen on 29 June 2016, 8 July 2016 and 10 February 2017. We have quoted extensively from these letters in our findings of fact and refer back to those findings of fact to give a full picture of the contents and tone of the correspondence. This includes, in the letter of 29 June 2016, a comment that, if the claimant was suffering from stress, it was because of the trouble he brought on himself by trying to cause trouble within the company and a reference to the claimant's "mood swings" being "off the radar" and a report that Ian Bragg, Mr Hitchen's co director, thought the claimant "unstable to be carrying schoolchildren around". In the letter of 8 July 2016, Mr Hitchen wrote, in response to the claimant's comment that he had followed company procedures with regards to absence that: "We see it as a stroke by you to cause maximum inconvenience at a time when the season is at its busiest". He referred back to complaints which occurred during a previous period of employment, after which Mr Hitchen had taken the claimant back in employment, which appear to have had no relevance to the current situation. He accused the claimant of being disruptive "not happy unless you can gain attention". In the letter of 10 February 2017, Mr Hitchen wrote: "In relation to your 'work related' stress I was somewhat confused over this statement. In 'work related' was this referring to the stress you brought upon yourself when you represented one of the drivers in a disciplinary meeting and got him the sack, only to have me reinstate him last summer? Or was it after you discriminated against one of the office team to myself only to be dismissed?" He referred to the claimant's "mood swings and erratic behaviour". We find the tone of the correspondence from a manager to an employee off work with absence covered by GP certificates and whom they had been aware for some time to have been suffering from mental health problems to be extraordinary and unprofessional. There are implied accusations of the claimant not being genuinely ill e.g. the claimant acting to cause maximum inconvenience, yet

also comments made in offensive terminology about the claimant's behaviour e.g. mood swings "off the radar" which would be consistent with the claimant having mental health problems. The correspondence is, at the very least, insensitive and, at the worst, had the potential to contribute to a dangerous worsening of the claimant's state of mental health.

138.7. Informing the claimant in letters beginning with the letter of 29 June 2016 that he would face disciplinary action on his return to work without making it clear what allegations he would be facing, despite the claimant asking for clarification. Mr Hitchen's inflammatory correspondence making various accusations and, on the one hand suggesting that the claimant was acting in a deliberatively disruptive way, with the implication that the claimant was not genuinely ill and, on the other hand, expressing concern about the claimant's mental health, did not provide clarity as to the disciplinary allegations the claimant would face on his return to work. This left the claimant in the worst of all possible worlds: with the worry of knowing that he would face disciplinary action when he returned to work but uncertain of the case he would have to meet.

138.8. Not initiating any contact with the claimant after Mr Hitchen's letter to him of 10 August 2016 until Mr Hitchen's letter of 11 March 2017 inviting the claimant to a meeting to discuss his absence, after the claimant had raised the issue of holiday pay. There was no attempt to make welfare visits or to arrange occupational health assessment.

138.9. Mr Hitchen's comment at the Bredbury Hall meeting that he thought the claimant's illness was self-inflicted.

138.10. The letters sent by Mrs Frankland on 3 and 4 April 2017, informing the claimant that the respondent would not be making him a payment for holiday which she had previously told him would be made, informing him that he would be paid if he resigned but not informing the claimant of the option to give notice to take holiday and be paid for it, interrupting sick leave. The claimant reasonably understood from this that the only way he could receive any payment from the respondent was if he resigned.

139. In relation to all of these matters taken together, we conclude that the respondent, without reasonable or proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. Mr Mills submitted that there was reasonable and proper cause for the respondent to act as it did in relation to some matters because of the claimant's conduct. The respondent has not satisfied us on the facts that the claimant's conduct was reprehensible. There may have been areas where the respondent had cause for concern e.g. about whether the claimant was giving incorrect information to other drivers about notice required to change shift patterns, but this was not reasonable and proper cause for the way the respondent behaved. There may have been reasonable and proper cause for the respondent to conduct a proper investigation and, if the investigation suggested there may be misconduct, to hold a disciplinary hearing. The respondent did not do that. A suspicion of wrongdoing is not reasonable and proper cause for the derogatory and unprofessional comments of Mr Hitchen or any other of the matters we have

concluded, taken together, amount to a breach of the implied duty of mutual trust and confidence.

140. We conclude that the claimant resigned because of this breach of contract, the last straw being the letters from Mrs Frankland about holiday pay.

141. We did not consider that there was such delay in the respondent considering possible reasonable adjustments and making arrangements for an occupational health assessment after the Bredbury Hall meeting that the respondent's conduct in this respect contributed to the breach of the implied duty of mutual trust and confidence.

142. We conclude that the claimant did not affirm any breach. He resigned promptly after the last straw event. We do not consider that the claimant did anything which could be taken as affirming the contract and losing the right to complain about earlier matters, particularly taking account of the fact that the claimant was off sick after 28 June 2016 until his resignation. We do not consider that the fact the claimant did not raise grievances about the matters relied upon means that the claimant has affirmed the contract. This is particularly the case given the respondent's failures in relation to the grievance and complaint raised by the claimant.

143. We conclude, therefore, that the claimant was constructively dismissed. The respondent has not persuaded us that its actions which constituted a breach of contract were for a potentially fair reason. The dismissal was, therefore, unfair.

Disability Discrimination

Disability

144. The claimant relied on stress/anxiety/depression as the relevant condition. At a late stage in the hearing, during closing submissions, the respondent conceded disability. The respondent did not expressly identify the period in relation to which the respondent conceded the claimant was disabled.

145. The tribunal considers that the concession was correctly made in respect of the period from a time when the claimant had suffered from stress/anxiety/depression for 12 months. On the basis of the claimant's evidence as to the impact of the condition on him, the fit notes and references made by the respondent to the claimant's condition in correspondence, it appears the claimant met the definition by, at the latest, the time when he had suffered from the condition for 12 months. It is not entirely clear when the claimant started to suffer from the condition. It is likely to have been some time prior to visiting his GP about this but it was no later than when he visited his GP in May 2015.

146. In respect of any period prior to the claimant having suffered from the condition for 12 months, the test for determining whether the claimant was disabled would require considering whether, at that point, the adverse effect was likely to last at least 12 months or the rest of the claimant's life. Whether this was the case would not be straightforward; it is not permissible to say simply that because it did go on to last more than 12 months, at that earlier point it was likely to last at least 12 months.

147. We decided to consider the merits of the complaints of disability discrimination and the time limit issues and, only if there was a complaint relating to a matter occurring before the claimant had suffered from the condition for 12 months which would have been well founded and not barred by time limit issues, would we need to consider what course of action to take in relation to the disability issue in relation to that complaint. After considering the merits of the complaints, we would not have upheld any complaint of discrimination occurring before the claimant had suffered from the condition for at least 12 months so it is not necessary for us to determine whether the claimant was disabled at any point earlier than May 2016.

Indirect discrimination

148. The claimant relied on the disciplinary procedure as being the provision, criterion or practice (PCP). We conclude that the respondent did apply such a PCP to the claimant and others without the disability. However, the claimant has not satisfied us that the PCP put the claimant at a particular disadvantage compared to people without the disability. The claimant managed to actively and effectively engage with the disciplinary procedure. We, therefore, conclude that the complaint of indirect discrimination is not well founded.

Failure to make reasonable adjustments

149. The claimant relies on the same PCP as for the complaint of indirect discrimination i.e. the disciplinary procedure. The claimant has not satisfied us that the PCP put him at a substantial (in the sense of more than minor or trivial) disadvantage in comparison with persons who are not disabled. The claimant managed to actively and effectively engage with the disciplinary procedure. We, therefore, conclude that the complaint of failure to make reasonable adjustments is not well founded.

Harassment related to disability

150. The claimant gave no evidence in relation to the first allegation, that Mr Hitchen, at a meeting on 5 November 2015, stated that the claimant was the pettiest person he had met and that he wished he had never taken the claimant back on and that the claimant's medication had made him like that. The claimant did not satisfy us, on a balance of probabilities, that this occurred. The complaint in relation to this allegation is not, therefore, well founded.

151. The following allegations are matters of record, being set out in letters written by Mr Hitchen:

151.1. In a letter dated 29 June 2016, Phil Hitchen commented on the claimant being trouble and that they thought he was unstable and had brought everything on himself.

151.2. In a letter dated 8 July 2016, Phil Hitchen mentioned the claimant's mental state of mind, pointed out that he had caused trouble and cause the H & S Executive to enquire into the company.

151.3. In a letter dated 10 February 2017, Phil Hitchen wrote that the claimant had brought stress upon himself and referred to the claimant's mood swings and erratic behaviour.

152. We conclude in relation to these three complaints that the conduct was unwanted. It was clearly related to disability, being express comments about the claimant's state of mind or mental health. We conclude that the conduct had the effect of violating the claimant's dignity and also creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We accept the claimant's evidence that he was upset by Mr Hitchen's comments; we would have been surprised had he not been upset by them. It is not necessary for us to conclude whether it was Mr Hitchen's purpose to violate the claimant's dignity or create such an environment. However, it appears likely from the tone of the correspondence that Mr Hitchen may have intended to wound. If he did not have such an intention, he was reckless in what he wrote and in how it was likely to be received. It matters not that the claimant was not attending work at the time the letters were written to him. The claimant's dignity can be violated whether or not he is at work. We conclude also that, although he was at home when he received the letters, the environment made intimidating, hostile, degrading, humiliating or offensive, was the work-related environment of dealing with correspondence with the respondent. We conclude, therefore, that these three complaints of harassment are well founded.

153. The final allegation of harassment is that, at a meeting at Bredbury Hall on 17 March 2017, Phil Hitchen said that he thought the claimant's ailments were self afflicted. We have found that this occurred. We conclude that this was unwanted conduct. It was clearly related to disability, being an express reference to the claimant's "ailments". We accept that the claimant was upset by this comment. We conclude that the conduct had the effect of violating the claimant's dignity and also creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It is not necessary for us to conclude whether Mr Hitchen intended his comments to have such an effect. We conclude that the complaint of harassment is well founded.

154. The complaints of harassment relating to 10 February and 17 March 2017 were presented in time even if viewed in isolation. Unless they form part of a continuing act of discrimination, the complaints relating to 29 June 2016 and 8 July 2016 are presented out of time. We conclude that these acts form part of a continuing act of discrimination with the acts on 10 February and 17 March 2017. The conduct complained of in relation to all of the incidents is that of Mr Hitchen. The conduct is all of a similar nature. The complaints are all, therefore, presented in time. If we had found that the earlier acts did not form part of a continuing act of discrimination, we would have concluded that it was just and equitable to consider the complaints out of time. We accepted the claimant's explanation that he did not bring complaints about earlier treatment at an earlier stage because he hoped to resolve matters and remain in employment. The claimant did not bring grievances about these specific matters. However, he had submitted a grievance previously and the respondent failed to produce an outcome. Given the respondent's failure to deal properly with that grievance and other matters, we do not consider the claimant can be fairly criticised for not bringing other grievances.

Discrimination arising from disability

155. The claimant argued, in the alternative, that, if the conduct complained of as harassment did not meet the criteria for harassment, that it constituted discrimination arising from disability. In accordance with section 212(1) Equality Act 2010, "detriment" does not, subject to s.212(5), which is not relevant in this case, include conduct which amounts to harassment. Since we have concluded that the matters complained of did amount to harassment (with the exception of the one allegation which was not proved on the facts), the conduct is deemed not to be a detriment and, therefore, a complaint of discrimination arising from disability cannot succeed.

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Employment Judge Slater

Date: 26 January 2018

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

29 January 2018

FOR THE TRIBUNAL OFFICE