RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr W Legge**

Respondent: **Milfab Engineering Limited**

Heard at: **Colchester Magistrate Court**

On: **22 – 25 January 2019**

Before: **Employment Judge Foxwell**

Members: **Mr T Burrows**
Mrs G Everett

Representation

Claimant: Mrs Legge (Wife)

Respondent: Mr J Susskind (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The Respondent unlawfully discriminated against the Claimant for a reason arising from disability contrary to section 15 of the Equality Act 2010 by:

1.1 Suspending the Claimant and convening a disciplinary hearing because of his refusal to drive the Respondent's van on 17 August 2017;

1.2 Conducting a disciplinary hearing on 21 August 2017 in a manner which was confusing and hostile;

1.3 Failing to respond to the Claimant's grievance of 18 December 2017 until 19 March 2018; and

1.4 Not investigating his grievance, grievance appeal and subsequent letters fully and with due care and attention.

2. The Claimant's other allegations of discrimination arising from disability are not well-founded and are dismissed.

3. The Claimant's claims of failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 are not well-founded and are dismissed.

4. The Claimant's claim of unlawful deduction from wages contrary to the Part II of the Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

Introduction

1 The Respondent, Milfab Engineering Limited, is a small engineering company based in Colchester, Essex. In March 2004 the Claimant, Wayne Legge, joined the Respondent as an Engineering Assistant. His work included handling raw materials on site, braising, welding and finishing metals and operating tools and equipment such as an overhead crane or a forklift truck. The work is heavy at times and potentially dangerous.

2 In 2014 the Respondent was acquired by its current Managing Director, Trevor Modell and by a company controlled by him. Since then the business has operated in Colchester and at another site in Sheerness, Kent. It has 25 employees approximately, half of whom are based in Colchester. The Claimant is still employed by the Respondent but in circumstances to which we shall come he has not been at work since August 2017.

3 On 20 March 2018, having gone through early conciliation between 23 January 2018 and 23 February 2018, the Claimant presented claims of disability discrimination and unlawful deduction from wages to the Tribunal. He claimed to be disabled within the definition in Section 6 of the Equality Act 2010 because of a mental health condition, a recurrent depressive disorder and anxiety.

4 The Respondent filed a response not admitting disability and denying discrimination and unlawful deduction from wages. It also asserted that the claims had been presented out of time and that therefore the Tribunal did not have jurisdiction to hear them.

5 The claim and response were considered by Employment Judge Foxwell at two case management telephone hearings on 25 June 2018 and 7 September 2018. On each occasion the Claimant was represented by his wife, Mrs Nanta Legge and the Respondent by Mr Susskind of counsel, both of whom have also appeared at this final hearing.

6 At the first case management hearing Mrs Legge explained that the Claimant was suffering from severe anxiety and was not able to attend a hearing in London. She provided medical evidence to support this subsequently. The Tribunal therefore arranged for this hearing to be at Colchester Magistrate's Court (the Claimant lives in Colchester).

7 Further to Case Management Orders made at the hearing on 25 June 2018 the Claimant provided medical disclosure and an impact statement dated 8 July 2018 to the Respondent. Following this the Respondent conceded that the Claimant was disabled within the statutory definition at the times material to his claim.

8 On 16 January 2019, that is shortly before this hearing was due to start, the Respondent applied for a postponement on the basis that its sole witness, Trevor Modell was required to attend a hearing in the United States. This application was refused by Employment Judge Russell for the reasons she gave in a letter to the parties dated 17 January 2019. The application to postpone was not renewed at the commencement of this hearing. To accommodate Mr Modell's difficulty however the Tribunal agreed to take his evidence by video link (Skype) which it did on 24 January 2019. Mrs Legge also asked for one of her witnesses, Holly Cooper, to give evidence by video link (FaceTime) as she was incapacitated with a bad back. We were able to accommodate this too with the assistance and technical expertise of the Respondent (for which we are grateful). The way in which the video link evidence was dealt with was a refreshing example of parties cooperating to further the overriding objective.

The hearing

9 The Tribunal received evidence and submissions on liability over three days. The Claimant attended to give evidence on the afternoon of the first day but chose not to attend the remainder of the hearing. We heard that the Claimant finds it difficult to leave his home or to do so before the afternoon. The Tribunal and parties sat later than is usual on the first hearing day to ensure that the Claimant's evidence was completed so he did not have to return (unless he chose to) on subsequent days. The Tribunal received evidence from Mrs Legge and Holly Cooper on the second hearing day. Ms Cooper is an employment specialist employed by the Essex Partnership Foundation Trust. Trevor Modell gave evidence on the third hearing day and the parties made their closing submissions that afternoon.

10 In addition to the evidence of these witnesses the Tribunal considered the documents to which it was taken in an agreed bundle and references to page numbers in these reasons relate to that bundle. We also considered Mr Susskind's written submissions and the chronologies he had prepared.

11 The Tribunal reserved its decision which it considered in private on the fourth hearing day.

The Issues

12 The issues in the Claimant's claim of discrimination arising from disability were identified in the course of the two Preliminary Hearings in 2018. The Claimant's claim of failure to make reasonable adjustments required further particularisation which the Claimant provided subsequently. This enabled the parties to prepare the draft list of issues at Tab 6 in the trial bundle. There remained an issue however about whether all of the matters asserted there had been raised in the grounds of claim. We ruled on this as follows at the commencement of the hearing.

12.1 This is the first morning of the final hearing in respect of this claim. We have been asked to rule on the issues that the Tribunal is required to decide. The parties have cooperated well with one another in preparing this case for hearing but nevertheless these remaining points require clarification.

12.2 A draft list of issues is at tab 6 of the trial bundle and Mr Susskind for the Respondent makes the following points on it. Firstly, that the last two claims in respect of the claims of discrimination arising from disability are not pleaded in the Claimant's grounds of claim. These allegations are:

12.2.1 Failing to respond to the Claimant's grievance lodged in December 2017 until 19 March 2018; and

12.2.2 Not completing the grievance process until 19 April 2018.

12.3 He makes two further points in respect of the claim of failure to make reasonable adjustments. The first provision, criterion or practice ("PCP") identified in the list is in the following terms, "proposed removal of flexible working hours" and his point is that the Claimant's case is not about flexible working rather it is an allegation concerning a proposed reduction in hours. Secondly, in respect of a further alleged PCP of being requested to drive he objects to the inclusion of what he alleges to be evidence in the list of issues where it is asserted that a reasonable adjustment would have been to continue to grant an earlier adjustment of not asking the Claimant to drive long distances.

12.4 Mrs Legge's response was to say, firstly, that the two Section 15 claims in issue were identified in the case management hearings and she thought that had been sufficient to put these in issue in the case. She argued that the point on flexible working hours referred to the importance to her husband of having full-time hours available such that he could work as many hours as possible in the working week whilst still accommodating his condition. As far as the driving point is concerned she said that this simply reflected her understanding of the evidence.

12.5 We shall deal with the Section 15 points first. We pointed out during argument that the claim form was submitted on 20 March 2018 and self-evidently the last allegation could not have been referred to at that time. It seems appropriate to us to give permission to amend to include this as an allegation in this claim. As far as the first of the two Section 15 points is concerned the date, 19 March 2018, was not stated expressly in the grounds of claim but there was an allegation that the grievance underlying his complaint had not been dealt with in line with the ACAS Code of Practice. The first bullet point under paragraph 4 of the introduction to the Code of Practice on Discipline and Grievances requires employees to raise and employers to deal with grievances promptly. It seems to us that this is the meat of this allegation and the addition of a date during case management adds very little to that. In so far as it is necessary therefore we consider it appropriate to grant permission to amend to include that allegation.

12.6 We do not accept that there is any prejudice to the Respondent in this approach because these issues were identified at the very first Preliminary Hearing on 25 June 2018 and identified in terms at paragraph 3.7 and 3.8 so that Respondent has had plenty of time to get the evidence together and to deal with these issues.

12.7 To summarise therefore, in so far as it is necessary, the Claimant has permission to amend to include those allegations as part of her pleaded claim. We dispense with reservice of the amended claim as it would be wholly impractical to start on that now.

12.8 We turn then to the matters relating to the claim of failure to make reasonable adjustments and here Mr Susskind will enjoy a little more success. We agree with his submission that the essence of the Claimant's allegation in respect of hours relates to a reduction in hours and is not about flexible working in that sense, although we understand Mr Legge's point about the value to the Claimant individually of having the possibility of working a full working week when he could. We think the PCP is correctly expressed in these terms "the proposed reduction of working hours". There are some conceptual difficulties overall with this as an allegation of failure to make reasonable adjustments but we will have to let that play out in the evidence and see where it takes us. We do not agree that it is appropriate at this stage in the proceedings to remove the proposed adjustment about the flexibility of hours given the greater understanding Mrs Legge has given of what this might mean in the Claimant's case. Whether that is adequately dealt with in the Claimant's evidence remains to be seen. We find, therefore, that that Provision, Criterion or Practice should be amended in that way.

12.9 As far as the last point is concerned, we also agree with Mr Susskind that the reference to evidence in the second bullet point, that is the alleged agreement in August 2016, should be removed from the list of issues. That does not mean that we cannot receive evidence about what may have been agreed as part and parcel of all of the circumstances in this case and, of course, adjustments that may have been agreed in the past can shed light on what was reasonable to do at the time in question but the issue is whether it was then a reasonable adjustment not to ask the Claimant to drive long distances. There may be no distinction between this adjustment and the first bullet point under that head but again this is something that can be explored in evidence or submissions in due course.

13 Accordingly, the issues agreed by the parties as confirmed or amended by our ruling are as follows:

(A) Discrimination arising out of a disability pursuant to Section 15 Equality Act 2010

Is the Claimant out of time to bring a claim under s.123(i) Equality Act 2010 and should the Tribunal extend time on the basis that it would be just and equitable?

In this context, are the events complained of part of a continuing act that would bring the claim within time?

Was the Claimant at all relevant times disabled within the meaning of s.6 Equality Act 2010?

It is accepted that the Claimant had a disability at all relevant dates.

Was the Claimant subjected to unfavourable treatment because of something arising in consequence of any such disability? The alleged unfavourable treatment pleaded (together with the "something" alleged to be arising) is:

1. *A request on 24 July 2017 that the Claimant reduce his hours;*

   The Claimant's case is that the "something arising in consequence of his disability" is the Claimant having taken time off regularly because of his disability;

2. *A request or instruction for the Claimant to drive a company van made on 17 August 2017;*

   The Claimant's case is that the "something arising in consequence of his disability" is the claimant could not drive long distances and/or to unfamiliar locations because of his disability;

3. *Suspending the claimant and convening a disciplinary hearing because of the Claimant's refusal to drive the van;*

   The Claimant's case is that the "something arising in consequence of his disability" is the claimant could not drive long distances and/or to unfamiliar locations because of his disability;

4. *The conduct of that hearing on 21 August 2017;*

   The Claimant's case is that the "something arising in consequence of his disability" is the Claimant would need/needed to avoid any activities or work that exacerbated/would make him more anxious because of his disability;

   (The claimant felt the tone of the hearing on the 21/08/2017 was unsupportive, in particular questioning about his anxiety and panic attacks, this made him anxious; anxiety arises as a consequence of his disability.)

5. *The Respondent informing the Claimant that he could return to work on 19 October when it knew that he could not;*

   The Claimant's case is that the "something arising in consequence of his disability" is that the claimant needed consistency, to be given information promptly, that added up/made sense in order to feel 'safe' and avoid unwelcome involuntary thoughts or excess worrying, increasing anxiousness because of his disability.

(This was unfavorable of the Claimant because it made him anxious which arose in consequence of his disability).

6. *Not withdrawing the threat of disciplinary action and advising the claimant that he would no longer be required to drive the company van until 14/12/2017;*

   The Claimant's case is that the "something arising in consequence of his disability" is that the claimant needed consistency, to be given information promptly, that added up/made sense in order to feel 'safe' and avoid unwelcome involuntary thoughts or excess worrying, increasing anxiousness because of his disability.

   (This was unfavorable of the Claimant because it made him anxious which arose in consequence of his disability).

7. *Failing to respond to the Claimants grievance lodged in December 2017 until 19/03/2018.*

   The Claimant's case is that the "something arising in consequence of his disability" is that the claimant needed consistency, to be given information promptly, that added up/made sense in order to feel 'safe' and avoid unwelcome involuntary thoughts or excess worrying, increasing anxiousness because of his disability.

   (This was unfavorable of the Claimant because it made him anxious which arose in consequence of his disability).

8. *Not completing the grievance process until 19/04/2018*

   The Claimant's case is that the "something arising in consequence of his disability" is that the claimant needed consistency, to be given information promptly, that added up/made sense in order to feel 'safe' and avoid unwelcome involuntary thoughts or excess worrying, increasing anxiousness because of his disability.

   (This was unfavorable of the Claimant because it made him anxious which arose in consequence of his disability).

9. *Not investigating the grievance, grievance appeal and subsequent letters from claimant fully with due care and attention.*

   The Claimant's case is that the "something arising in consequence of his disability" is that the claimant needed consistency, to be given information promptly, that added up/made sense in order to feel 'safe' and avoid unwelcome involuntary thoughts or excess worrying, increasing anxiousness because of his disability.

   (This was unfavorable of the Claimant because it made him anxious which arose in consequence of his disability).

   The Respondent maintains that any unfavourable treatment (if any) was not because of something arising in consequence of any such

disability but for other reasons as pleaded. It also does not accept that the above are valid formulations of a claim under s.15 Equality Act.

(B) Failure to make reasonable adjustments pursuant to section 20 Equality Act 2010

(i) Out of time issues as per (A)(i) and (ii) above.

(ii) Was the Claimant at all relevant times disabled within the meaning of s.6 Equality Act 2010 (as per (A)(iii) above)?

*(iii) 1. **Working hours***

***PCP:** The proposed reduction of working hours*

Disadvantage:

- *This would cause the claimant to lose the flexibility to work with his disability.*
- *Less hours would cause a financial disadvantage to claimant raising his anxiety.*

Reasonable Adjustment:

- *To keep flexibility of hours*
- *Give additional breaks helping claimant to work a 40 hours week.*
- *Continue to grant adjustment that had been verbally agreed in August 2016 which allowed claimant to take days off as holiday or unpaid sick leave for impairment related illness.]*

*2. **Being requested to drive***

***PCP:** requesting the claimant drive a long distance to an unfamiliar location.*

Disadvantage: Claimant's disability, his anxiety condition, meant that he was unable to undertake distance driving to unknown locations.

Reasonable Adjustment:

- *Ask someone else to undertake the driving*

*3. **Investigatory/Disciplinary Process***

PCP:

- *The Respondent not sending out the correct letter*
- *The Claimant being advised that he could only be accompanied by a colleague at the meeting and not given the additional choice of a trade union representative or trusted person*
- *Not halting the disciplinary meeting when requested.*

- *Not providing breaks during the process.*

Disadvantage:

- *Increases to the Claimant's anxiety levels.*

Reasonable Adjustment:

- *Ensure the right letters are sent out*
- *Allowing a claimant to be accompanied by a trade union representative or trusted person to the meeting.*
- *Providing additional breaks to allow the claimant time to think and deal with things.*
- *Halting the disciplinary meeting providing or allowing the claimant to be supported.*

4. ***Not allowing Claimant to return to work***

PCP:

- *Not allowing the Claimant to return to work when he had a Fit for Work certificate from the Doctor.*
- *Not considering the measures that would have allowed the Claimant to return*

Disadvantage:

- *Removing the regular familiar work pattern needed to manage disability.*
- *Breaking his familiar routine and therefore raising his anxiety.*
- *This caused the Claimant to lose the ability to work with his disability.*
- *Not returning to work caused a financial loss further increasing anxiety.*

Reasonable Adjustment:

- *Allowing the Claimant to return to work with his anxiety condition, which he had had for more than 12 Months*
- *Continue to grant adjustment that had been verbally agreed following his return in August 2016 by not asking the Claimant to drive long distances.*

(iv) Are the alleged PCPs valid PCPs for the purposes of s.20(3)?

(v) Did the Respondent fail to make such adjustments?

(vi) Would the pleaded adjustments have been "reasonable" adjustments for the purposes of s.20(1)?

(C) Deduction of Wages under Part II Employment Rights Act 1996

(i) Alleged deductions from wages

(a) Suspended without pay 17/08/2017 & 18/08/2017

Weekly Pay Reduced by 13 Hours
Hourly Rate £12.73 x 13
£165.49

(b) Not allowed to return to work following disciplinary meeting

Fit for Work Certificate from Doctors Certificate from 17/08/2017 to 17/09/2017
Weekly pay £509.20
4 x £509.20 (Period 21/08/2017 to 15/09/2017) £2036.80
Payments made by Milfab during this time
Basic Pay (2 x £254.60) - £509.20
Bank Holiday Pay - £101.84
SSP - £125.09
Payslip dated 25/04/2018 - £522 - £1258.13

£778.67

(c) Not allowed to return to work following disciplinary meeting

4 x £509.20 (Period 18/09/2017 to 13/10/2017) £2036.80
Payments made by Milfab during this time
SSP 4 Weeks x £89.35 - £357.40

£1679.40

TOTAL CLAIMED
£2,623.56

(ii) Were such wages paid to the Claimant and if not, were they properly payable to the Claimant?

(iii) Depending on the Claimant's response to (C)(i), is the Claimant's claim out of time pursuant to section 23(2) and (4) Employment Rights Act 1996?

The legal framework

Discrimination arising from disability

14 Section 15 of the Equality Act 2010 provides as follows:

"(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.*

15 In order to establish discrimination arising from disability a Claimant must produce evidence consistent with him being treated unfavourably because of "something" arising "in consequence of his disability": a double causation test (see *Basildon & Thurrock NHS Trust v Weerasinghe* [2015] EAT 0397). If he does so, the Respondent may still be able to defeat the claim by showing that the reason for the relevant treatment was wholly unconnected with disability or that it was not known that the Claimant was disabled at the time or by establishing the defence of "justification".

16 Unfavourable treatment because of something arising in consequence of the Claimant's disability will be justified only if the employer shows that it was a proportionate means of achieving a legitimate aim. It is therefore for a Respondent to establish the defence of justification. The test to be applied by a Tribunal in considering this is an objective one and not a band of reasonable responses approach (*Hardy & Hansons plc v Lax [2005] IRLR 726*, *CA*). Furthermore, a Tribunal must not conflate the issues of the existence of a legitimate aim and proportionality: they are separate and require separate consideration.

17 What amounts to a legitimate aim is not defined in the Equality Act and is a question of fact for the Tribunal. The measure in question must pursue the aim contended for but it is not necessary for this to have been specified in those terms at the time, an *ex post facto* rationalisation is possible (see *Seldon v Clarkson Wright and Jakes [2012] IRLR 590*) but an aim which is itself discriminatory cannot be legitimate.

18 The principle of proportionality requires a Tribunal to strike an objective balance between the discriminatory effect of a measure and the reasonable needs of the employer's business. Once again, the Equality Act provides no guidance on what is proportionate and, therefore, this is something the Tribunal must assess. In general terms however the greater the disadvantage caused by the unfavourable treatment, the more cogent the justification for it must be.

19 Some evidence is required to establish the defence of justification but Elias P explained the function of Tribunals in this context in *Seldon v Clarkson Wright and Jakes [2009] IRLR 267*, *EAT* as follows (paragraph 73):

> *"We do not accept the submissions … that a tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer. Tribunals have an important role in applying their common sense and their knowledge of human nature… Tribunals must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that the Tribunals must leave their understanding of human nature behind them when they sit in judgment."*

Failure to make reasonable adjustments

20 The relevant parts of Sections 20 of the Equality Act 2010 provide as follows and should be read in conjunction with section 21 and Schedule 8 to the Act:

> *"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

21 A claim of failure to make reasonable adjustments requires a Tribunal to consider a number of questions. Firstly, it must identify a provision, criterion or practice (which really means no more than a way of doing things) which is in issue. Secondly, it needs to consider who the non-disabled comparators are. Thirdly, it needs to identify the nature and extent of the disadvantage the Claimant has suffered or will suffer in comparison with the comparators. Only then can the Tribunal go on to judge whether any proposed adjustment is reasonable *(Environment Agency v Rowan* [2008] ICR 218*).*

22 Even if all of these questions are resolved in the Claimant's favour, liability will not arise unless the employer knew or ought to have known that the Claimant was disabled and that he was liable to be affected in the manner alleged (*Secretary of State for Work & Pensions v Alam* [2010] ICR 665). Whether an employer had actual knowledge of both these matters is a factual question to be resolved on the evidence. Whether an employer who lacks actual knowledge ought to have known requires an assessment of the evidence by the Tribunal.

23 If the duty to make reasonable adjustments arises it does not require an employer to make every adjustment that could conceivably be made, only those which are reasonable. Reasonableness is a matter for the Tribunal to assess objectively; accordingly, the mere fact that the employer considers its approach to be reasonable does not make it so (*Smith v Churchills Stairlifts Plc* [2006] IRLR 41). An adjustment is unlikely to be reasonable if it will not address the employee's disadvantage.

24 In summary, therefore, the questions which a Tribunal must address in determining a reasonable adjustments claim are as follows:

24.1 What is the relevant PCP?

24.2 Who is the Claimant comparing himself with or is a comparator unnecessary?

24.3 What is the adverse effect on the Claimant of the PCP?

24.4 Is the effect substantial?

24.5 Did the employer know that the Claimant was disabled and that he was likely to be affected as he describes?

24.6 If the answer to (5) is 'no', ought the employer to have known these things?

24.7 Is there an adjustment which, judged objectively, ought reasonably to have been made to reduce or eliminate the adverse effect?

The burden of proof under the Equality Act

25 Section 136 of the 2010 Act provides as follows:

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision".*

26 These provisions require a Claimant to prove facts consistent with his claim: that is facts which, in the absence of an adequate explanation, could lead a Tribunal to conclude that the Respondent has committed an act of unlawful discrimination. 'Facts' for this purpose include not only primary facts but also the inferences which it is reasonable to draw from the primary facts. If the Claimant does this then the burden of proof shifts to the Respondent to prove that it did not commit the unlawful act in question (*Igen v Wong* [2005] IRLR 258). The Respondent's explanation at this stage must be supported by cogent evidence showing that the Claimant's treatment was in no sense whatsoever because of the protected characteristic.

27 We have borne this two-stage test in mind when deciding the Claimant's claims. We have also borne the principles set out in the Annex to the judgment of Peter Gibson LJ in *Igen v Wong* firmly in mind. We have not however separated out our findings under the two stages in the Reasons which appear below. We have reminded ourselves that detailed consideration of the effect of the so-called shifting burden of proof is only really necessary in finely balanced cases.

The drawing of inferences in discrimination claims

28 An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. We are aware that discrimination may be unconscious and people rarely admit even to themselves that such considerations have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if they played a part (see *Anya v University of Oxford* [2001] IRLR 377). We have considered the guidance given by Elias J (as he then was) on this in the case of *Law Society v Bahl* [2003] IRLR 640 (approved by the Court of Appeal at [2004] IRLR 799): we have reminded ourselves in particular that unreasonable behaviour is not of itself evidence of discrimination though a Tribunal may infer discrimination from unexplained unreasonable behaviour (*Madarassy v Nomura International plc* [2007] IRLR 246).

29 A Tribunal must have regard to any relevant Code of Practice when considering a claim and may draw an adverse inference from a Respondent's failure to follow the Code.

The time limit for claims under the Equality Act

30 The time limit for claims under the Act is contained in Section 123 which provides as follows:

> *"(1) Subject to section 140A proceedings on a complaint within section 120 may not be brought after the end of –*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable*
>
> *……*
>
> *(3) For the purpose of this section –*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*
>
> *(a) when P does an act inconsistent with doing it, or*
>
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

31 It can be seen from this provision that time does not begin to run in respect of acts continuing over a period until that period has ended. This might suggest that a failure to make a reasonable adjustment is a continuing act but, as was explained by the Court of Appeal in *Kingston upon Hull CC v Matuszowicz* [2009] ICR 1170, the correct position is that a failure to make a reasonable adjustment is an omission which is deemed to have been done either when the omission was decided upon or, if there is no evidence of a

deliberate decision, when the omitted act might reasonably have been expected to be done (there is contrary authority at EAT level but we are bound by the decision of the Court of Appeal). This can give rise to a situation where the primary time limit for a claim for failure to make reasonable adjustments has expired at a time when the Claimant could not have reasonably known this. In such a case a Tribunal is likely to be willing to allow a reasonable extension of time on just and equitable grounds.

32 Where there are a series of acts constituting an act extending over a period the three-month period runs from the date of the last act in the series. A failure to deal with a situation can constitute a continuing act (see *Littlewoods Organisation v Traynor* [1993] IRLR 154). We have reminded ourselves, however, that we must not conflate a series of isolated, separate acts with a continuing act even if those separate acts have common features. A continuing act is an ongoing situation or state of affairs so, in the leading case of *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96, the ongoing state of affairs was that the Commissioner allegedly allowed a culture to continue in which discriminatory acts were tolerated: it was the culture which was the continuing act, not the individual actions of numerous police officers over many years.

33 If a claim is presented out of time the Tribunal may nevertheless extend time for bringing it if it considers that in all the circumstances it is just and equitable to do so. Should we find that this claim or aspects of it have been presented out of time, we have considered two cases concerning the just and equitable extension of time. Firstly, *Robertson v Bexley Community Centre* [2003] IRLR 434 in which the Court of Appeal emphasised that time limits are usually exercised strictly in employment cases and that there is no presumption for exercising the Tribunal's discretion in a Claimant's favour unless there are grounds for not doing so, rather the Court thought that this would be the exception rather than the rule. Secondly, *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 in which the Court of Appeal emphasised that none of the *dicta* in *Robertson* fettered the Tribunal's judicial discretion when considering this point. In our judgment the important thing for us is to weigh all the circumstances and reach a just conclusion whilst bearing in mind that it is for a Claimant to establish the Tribunal's jurisdiction.

Findings of fact

34 The Claimant suffered a heart attack at the beginning of April 2016. He was then aged 48. He required surgery to insert a stent. Following the usual seven-day period of self-certification the Claimant was signed off work by his GP, Dr Gurung on 11 April 2016 with effect from 3 April 2016 to 17 May 2016 (page 99). Dr Gurung described the relevant condition as a heart attack.

35 The Claimant submitted a further fit note signing him off from 12 May 2016 to 20 June 2016 on 12 May 2016. This note described two conditions, the heart attack and an anxiety state (page 100).

36 The Claimant submitted a third fit-note signing him off work on 20 June 2016 for the period to 20 July 2016 which referred simply to "anxiety state" (page 101). The Claimant submitted a further similar fit-note on 19 July 2016 covering the period to 19 August 2016 (page 102).

37 The Claimant told us, and we accept, that he had had occasional problems with anxiety prior to his heart attack but that this became much worse in the aftermath of this event. We find that symptoms of his anxiety are excess worry and intrusive thoughts which serve to increase his anxiety. We accept that he has a need to feel 'safe' to keep his anxiety in check. New or unusual things have the potential to exacerbate his anxiety.

38 On 23 August 2016 the Claimant submitted a fit note indicating that he was fit to begin a planned return to work with amended duties, altered hours and work place adaptations. Dr Gurung added that the Claimant should be placed on light duties and avoid heavy lifting (page 103). This fit note covered the period from 22 August 2016 to 6 October 2016.

39 The Claimant met the general manager in Colchester, Les Lovelock to discuss his return to work and it was agreed that he should begin this on a phased basis with reduced hours and no heavy lifting. Mr Lovelock made a note of this on his copy of the fit-note as appears at page103.

40 On 4 October 2016 the Claimant submitted a further fit-note covering the period to 30 November 2016 which was in the same terms as the previous one, save that it did not refer to avoiding heavy lifting (page 105). Mr Lovelock wrote on this certificate *"Wayne working reduced hours needing occasional time off!"*.

41 The Claimant submitted no further fit-notes in 2016 and he resumed full-time working but told us that he needed time off on occasions which he took as leave or unpaid leave. He explained that he continued to feel anxious and found this tiring. He also told us that his colleagues knew he had to avoid heavy lifting and would help him with that. He said that he could and did use equipment such as the overhead crane, forklift truck and welding and metal-working machinery.

42 On 21 March 2017 the Claimant submitted a fit-note covering the period from 14 March 2017 to 31 March 2017 (page 106). This stated that he was fit for work on altered hours and with workplace adaptations. Mr Lovelock wrote *"again reduced hours as requested"* on this note.

43 The Claimant did not provide any further fit-notes until 17 August 2017 and we shall come to the circumstances of that shortly.

44 On 6 April 2017 the Claimant completed a health questionnaire at the Respondent's request (page 112). This was said to be for the Health & Safety Executive's purposes. He disclosed that he had a heart condition and asthma and that he suffered from chest tightness on exertion. The questionnaire did not ask about any mental health conditions nor did he volunteer information about this. The questionnaire asked for details of any medications and the Claimant provided this. It also asked whether the Claimant had any medical condition which would place him at risk while at work: he did not say so. The questionnaire did not ask about the Claimant's fitness to drive or operate machinery and the Claimant did not volunteer anything about this either.

45 The Claimant attended a health surveillance appointment at Colchester Hospital on 22 June 2017. This concerned routine workforce monitoring and was not related to the Claimant's disability.

46 We find on the evidence that the Respondent knew of the Claimant's anxiety and its effect upon him.

47 It is common ground that Les Lovelock spoke to the Claimant about reducing his hours on 24 July 2017. The Claimant's account is that Mr Lovelock approached him in the workplace and said *"Mr Modell wants to reduce the wages bill"* and then asked him to reduce to 20 hours a week. The Claimant was contracted to work 40 hours a week. The Claimant told us that he declined and explained that he needed to keep a 40 hour contract so that he could work as much as his condition would allow. He said that he told Mr Lovelock that he could not afford to agree to work fewer hours.

48 We did not hear any evidence from Mr Lovelock who no longer works for the Respondent, but Mr Modell said that all the Respondent's employees were asked if they would reduce their hours as a costs-saving measure because of a depleted order book. He suggested that Mr Lovelock had simply *"floated the idea"* without making a concrete proposal. He said that no changes to hours had to be made in the end because of an upturn in work.

49 We do not accept Mr Modell's evidence that the whole workforce was asked to volunteer to reduce hours. Rather, we find that it was the Claimant's team who were asked (see paragraph 123 on page 119H). Furthermore, we accept the Claimant's evidence that Mr Lovelock asked him individually whether he would agree a reduction and not in a group meeting as suggested by Mr Modell. That leaves the question whether the Claimant was asked before or after his team mates. We find it probable that the Claimant was spoken to separately and before his colleagues because Mr Lovelock believed he might agree to reduce hours as his hours already fluctuated. This was the thrust of the Claimant's evidence to us. What is also clear, however, is that Mr Lovelock did not press the point when the Claimant declined. We find on the balance of probabilities that this is when the issue was then put to other members of the Claimant's team.

50 The Claimant was at work on 17 August 2017 when he was asked by a supervisor, Sean Perrott, to drive the works van to Kent. It is common ground that Mr Perrott was simply passing on Mr Lovelock's instruction. The Claimant refused. Three other employees were also asked and they refused too. The Claimant's account is that he told Mr Perrott that he could not do it (rather than chose not to) and he maintains that Mr Perrott and Mr Lovelock were aware that he could not drive long distances or on unfamiliar routes because of anxiety. Mr Modell told us that he needed someone to deliver goods to the Sheerness site to fulfil a customer order. He had given Mr Lovelock the original instruction to ask someone to drive and thought it probable that the Claimant would be asked first as he worked in the goods inwards team (amongst other things). The other three employees asked were machinists. The Respondent had until recently employed a driver but that role had been made redundant.

51 Mr Modell confirmed in evidence that Mr Lovelock told him of the Claimant's refusal of the instruction and that the Claimant had explained that he was unable to drive distances or on unfamiliar routes because of anxiety following his heart attack. Mr Modell

said that it was in this context that he suggested delivering the goods to his house at Hartley in Kent as a convenient mid-point. This precise sequence of events was not put to the Claimant in cross-examination but it was his evidence that he was asked to drive to Hartley, some 57 miles from Colchester via the A12, M25 and Dartford crossing.

52 It is common ground that the Claimant drove to and from work in his pickup truck. He had also made some deliveries for the Respondent since his heart attack using his own vehicle. The Claimant said that these were local trips only which he usually made on his way home. He claimed a mileage allowance for these and left work a little earlier than usual to do this. It is also common ground that the works van was a small Mercedes which was nearly new. Its driving characteristics are said to be similar to those of a car rather than a commercial vehicle.

53 When Mr Modell learned that all four employees had refused the request he instructed Mr Lovelock to suspend them immediately without pay pending a disciplinary hearing. The Tribunal asked him whether he was angry when he made this decision and he denied this but said that he felt frustrated at what he described as a *"mini mutiny"* at Colchester. He said that the business had been struggling for orders and yet no one appeared willing to take on this task to fulfil a customer order. It was clear from his evidence that he knew that the Claimant's explanation for refusing the request was the symptoms of his condition, anxiety.

54 Mr Modell acknowledged that the Respondent was wrong to have suspended the Claimant and his colleagues without pay and said that wages for the period of suspension (two days) were subsequently paid. The Claimant accepts that he received two days' pay some while later but says that this was treated as holiday pay rather than suspension pay, (page 301).

55 On 17 August 2017 Mr Lovelock issued written notices of disciplinary meetings to the four members of staff who had refused the instruction. The one sent to the Claimant is at page 116; he was instructed to attend a disciplinary meeting on 21 August 2017 at which disciplinary action would be considered regarding his refusal to drive the company van. He was told that the potential disciplinary consequence was a warning.

56 The Claimant attended the disciplinary meeting on 21 August 2017 with his colleague, Mr Coppin, but Mr Coppin did not accompany him in the meeting. The Claimant had been told of his right to be accompanied by a work colleague (though not by a trade union representative) and we were not told why Mr Coppin did not come in; the Claimant may simply have not asked him to. The meeting was chaired by Mr Modell who was accompanied by Mr Lovelock, who was said to have made the complaint; we find that the complainant was Mr Modell. The Respondent's notes of the meeting are at pages 117 and 120; page 117 is a proforma containing standard introductory words to which some handwritten notes have been added; page 120 contains the Respondent's official minutes of the meeting, which are half a page of A4. The Claimant chose to record the meeting using his mobile phone and the parties have produced a transcript which is agreed in all material respects (pages 119A to 119L).

57 The meeting began with the Claimant asking for a copy of the company handbook; that was not to hand but Mr Lovelock said he would provide the Claimant with a copy and this was done subsequently by email. Mr Modell then introduced the meeting as a

disciplinary one. He said, amongst other things, that one outcome might be dismissal if the Claimant's action was found to be gross misconduct. He then went on to describe the meeting as an investigatory one. These opening remarks contradicted the written invitation to the meeting which had described it as a disciplinary meeting and said that the potential sanction was a warning. They also contradicted the Respondent's own disciplinary policy which states that an employee will be informed whether he is attending a disciplinary or investigatory meeting (page 188). The remarks were also internally inconsistent. Mr Modell told us that he is dyslexic and tends to rely on word of mouth rather than documents. It is clear to us that what he did at this stage of the meeting was to simply read all the introductory words on the proforma at page 117 without pausing to decide which were relevant or appropriate.

58 In the next part of the meeting Mr Lovelock confirmed that the Claimant had told him on 17 August 2017 that he could not drive to Kent because of his condition. The discussion then turned to the Claimant's fit notes and what these may or may not have said about his ability to drive. Part way through the meeting the Claimant produced a new medical certificate which he had obtained from his doctor on the afternoon of 17 August 2017 (page 107). This described the Claimant's condition as *"severe anxiety disorder"* and stated that he might be fit for work with amended duties and workplace adaptations. The certificate did not identify any particular amendment or adaptation but Dr Gurung added the comment *"avoid any activities or work which will exacerbate anxiety"*.

59 Four broad themes were discussed after the production of the new fit note: was the Claimant fit to work around heavy plant and machinery; could he drive and, if so, how far and was there any medical evidence about this; the reasonableness of the request for him to drive to Kent; and what further medical investigation was necessary. We pause to note that prior to this meeting the Claimant had been providing satisfactory service subject to some informal adjustments (principally help with lifting and some flexibility around leave, without pay if necessary).

60 The tone of the meeting was supportive at times but at others was hostile. For example, Mr Modell asked reasonable questions about triggers for the Claimant's anxiety. He also told the Claimant that he was a valued member of staff and that he had suspended the disciplinary process to enable further medical investigation. On the other hand, Mr Modell questioned the Claimant closely and at length about his driving habits, for example how he visited the seaside. He also suggested that it was only 43 miles from Colchester to Hartley; this would be correct as the crow flies but in reality it is 57 miles by busy roads. Mr Modell also described the latest fit note as *"backfiring on the Claimant"*, implying that it was some sort of ruse. We find that these comments showed underlying frustration with the Claimant. We find and acknowledge also that Mr Modell had a heightened awareness of health and safety issues because of unrelated dealings the Respondent had with the HSE earlier in 2017.

61 The outcome of the meeting was that the Claimant was not permitted to return to work until further medical investigation or clarification had taken place. His suspension remained without pay. The disciplinary process was not withdrawn but was said to be on hold.

62 The Claimant's anxiety was exacerbated by the turn of events. He asked himself the simple question, what had changed? He had been able to work before 17 August

2017 with informal adjustments but was now no longer permitted to, having refused an instruction, as he saw it, on medical grounds.

63 Immediately following the meeting on 21 August 2017 Mr Lovelock telephoned the Claimant's GP to ask for clarification of the comments in the fit-note of 17 August 2017. Unsurprisingly, the GP surgery refused to discuss this matter over the telephone. Later that day Mr Lovelock emailed the GP repeating his request. He asked for a response as soon as possible (page 118). The surgery replied on 30 August 2017 saying that Dr Gurung recommended a referral to occupational health (page 138).

64 In the meantime, on 23 August 2017 the Claimant and Mrs Legge wrote to the Respondent asking for minutes of the meeting of 21 August and stating that the Claimant's anxiety had increased because of it. Mr Lovelock replied that day acknowledging that the Claimant had shown signs of anxiety during the disciplinary meeting and expressing regret about this. He said that the disciplinary process was on hold pending further information on the Claimant's fitness for work (page 140).

65 Unfortunately, the email from the surgery of 30 August 2017 arrived when Mr Lovelock was on holiday; Mrs Legge was informed of this at the time and was told that he would be back on 11 September 2017. Her evidence to us was that this was a time of crisis for the Claimant; she said that this further delay seemed uncaring and made matters worse. We note that Mr Modell was told of the delay because of Mr Lovelock's holiday.

66 Mr Lovelock did not delay when he returned from his break: he emailed the Claimant on 12 September 2017 to say that he had contacted Colchester Hospital to arrange an assessment and he enclosed a form for the Claimant to complete (pages 276–280). We note that Mr Lovelock wrote in the referral document that the Claimant had carried out his work satisfactorily following his return after a heart attack until *"the MD"* (Mr Modell) had raised a concern (see page 280).

67 The Claimant gave the necessary consent for an assessment on 14 September 2017 (page 281) and Mrs Legge requested that this be carried out at their home. The assessment took place on 29 September 2017 and the occupational health report is dated 5 October 2017 (page 282). The report stated that the Claimant was currently unfit for work because of anxiety and depression. There were further occupational health assessments on 8 November 2017 (page 289), 24 January 2018 (page 308), 20 April 2018 (page 328) and 29 May 2018 (page 334) in which there was no change in the Claimant's fitness for work. From 17 October 2017 the Claimant also began to submit fit notes from his GP stating that he was unfit for work due to a severe anxiety disorder. He has remained signed off work to this day.

68 We have considered an account of the Claimant's medical treatment in the autumn of 2017 contained in a report written by J Stirling and dated 27 July 2018 (page 316). The Claimant was referred for assessment by a specialist mental health team on 15 September 2017 because of a deterioration in his mental health. A further deterioration in November 2017 required intensive support. The Respondent knew that the Claimant was unwell because of severe anxiety but would not have been privy to the full extent of his symptoms and treatment at the time.

69 On 9 October 2017 Mrs Legge went to the Respondent's premises to get a mortgage protection form signed and had a discussion with Mr Lovelock about the Claimant. After this he wrote to them in the following terms on 19 October 2017 (page 283):

"Hi Wayne & Nanta,

I want to let you know that following your recent visit and subsequent discussion we want Wayne to return to work asap with no record of a or pending disciplinary proceedings.

We acknowledge this has exacerbated Wayne's condition and hope that this gesture will allow him to return as soon as possible.

We are also happy, if it helps to have Wayne return on reduced hours.

I hope this is acceptable and look forward to your confirmation by return.

Kind regards

Les."

70 Mr Lovelock and Mrs Legge then had an email conversation on 20 October 2017 as follows:

"Hi Les

Thank you for your email.

Can I just confirm that you are saying Wayne can return to work straight away.

Nanta."

"Hi Nanta,

Yes would love to see him Monday morning.

I can advice Trevor has bought in a new Production Manager (Davis Curtis) whom I have discussed Wayne's situation with and he also agrees, we need to get Wayne back ***without*** *anything on his record.*

Dave has been here a week now and making significant changes. All for the better.

Looking forward to seeing Wayne on Monday.

Kind regards

Les."

"Hi Les,

I was surprised by your earlier email and I apologise for not giving any more information in my first reply.

Wayne was at the doctors on Tuesday 17th October 2017 and they have signed a certificate to say that his is currently not fit to work.

I have attached a copy for your records.

Is it possible that you could send Wayne's payslips to our home address. I don't believe we have had any for the last 3 – 4 weeks.

Nanta."

71 The Claimant was, of course, signed off work by this stage and did not return. He told us in evidence that he found it confusing that the Respondent now appeared to want him back without preconditions when he had not been permitted to return to work on 21 August 2017 and that this apparent contradiction added to his worsening anxiety.

72 The Claimant was referred to Ms Cooper, an employment specialist, on 3 November 2017 and she carried out an initial assessment of his employment situation on 23 November 2017. Following this Ms Cooper made telephone contact with Mr Lovelock on 27 November 2017 and arranged an appointment with him on 3 December 2017. Unfortunately, she needed to postpone this and it was rearranged for 11 December 2017. Ms Cooper's note of this meeting is at page 298; it shows that Mr Lovelock acknowledged that the Claimant had given his condition as his reason for refusing the instruction to drive to Kent. Her evidence was that Mr Lovelock was concerned to obtain a written agreement absolving the Respondent from liability if the Claimant was injured in the workplace because of his condition. We accept her account. We find it more probable than not that Mr Lovelock was instructed to ask for this by Mr Modell. Ms Cooper floated the idea of a termination agreement or redundancy but Mr Lovelock said that *"Trevor (Mr Modell) would not agree to pay out therefore if Wayne was unable to return he would have to resign"*. Mr Lovelock also explained to Ms Cooper that he felt *"out of his depth"* dealing with the situation and that he had found ACAS unhelpful.

73 On 14 December 2017 Mr Lovelock wrote to the Claimant to confirm that the disciplinary allegations had been closed and removed from his records. He wrote as follows (page 300):

"Dear Wayne,

I write to confirm the above subject file has been closed and will not show on your

records. Further to this, we have made payment this week for wages lost for suspended days of the Thursday & Friday.

I also confirm in future you will not be requested to drive the company van.

We sincerely hope that you are making progress in your treatment and look forward to you returning to work. We are quite happy to assist in any way for you to return at reduced hours if necessary.

Yours sincerely

L Lovelock"

74 We find that Mr Lovelock sent this letter because of his discussion with Ms Cooper and in the hope of setting a conciliatory tone but the Claimant's evidence to us was that he found it confusing in the same way he had Mr Lovelock's email of 19 October 2017.

75 On 18 December 2017 the Claimant submitted a grievance. Mrs Legge told us that she wrote this on his behalf having taken advice from a solicitor (pages 302–303). The grievance referred to the events of 24 July 2017, 17 August 2017 and 21 August 2017. The Claimant complained about a failure to comply with the company's disciplinary policy, not being permitted to return to work and the Respondent contacting his GP without consent. The Claimant said that his treatment had led to a deterioration in his health.

76 The Respondent's grievance procedure envisages a grievance meeting being held within five days of the lodging of the grievance and a decision being given five days thereafter, though it also states that circumstances may lead to these deadlines being extended. We note that this grievance was submitted shortly before the Christmas holiday and in circumstances where everyone knew the Claimant was unfit to attend a face-to-face meeting and we have looked at these procedural requirements in that light. Mr Modell replied to the grievance by a letter dated 2 January 2018 (page 306). We find that he intended this to be the grievance decision although it was not expressed as such and made no reference to a right of appeal. The letter did not address the grievance points head on but set out Mr Modell's perception of events. Mr Modell did not explain what if any investigations had been done. In the penultimate paragraph of the letter he said as follows:

"I again reiterate, all we need is a doctor's certificate, preferably stating, unconditionally, you are 'fit for work' however, we are prepared to make any adjustments as necessary, providing these adjustments are clearly defined."

77 Acting on her husband's behalf Mrs Legge consulted solicitors again on 22 January 2018. On 23 January 2018 she contacted ACAS to commence early conciliation. This concluded on 23 February 2018.

78 On 8 March 2018 solicitors instructed for the Claimant wrote to the Respondent complaining that there had been an inadequate response to the grievance of 18 December 2017 and demanding that a grievance investigator be appointed. The

Respondent's response to this was to send a grievance decision letter dated 19 March 2018 signed by James Winder, a director of the Respondent. Despite the fact that Mr Winder was present throughout this hearing he was not called to give evidence by the Respondent so we did not hear from him directly. Mr Winder began his grievance decision by explaining the reason for the apparent delay in responding; he said that this was because the Respondent was waiting for the Claimant to be sufficiently recovered to return to work. He also referred to discussions that had been taking place through ACAS. We find that, in fact, the reason for the delay in this decision being sent was Mr Modell's belief that he had dealt with the Claimant's grievance by his letter of 2 January 2018.

79 Mr Winder rejected the Claimant's assertion in his grievance that he had been *"targeted"* when asked to drive on 17 August 2017, pointing out that he was one of four employees asked. Mr Winder also said that there was no medical evidence that the Claimant could not drive. Mr Winder wrote that he had spoken to Mr Lovelock as part of his investigation but he made no reference to Mr Lovelock being aware on 17 August 2017 of the reason for the Claimant's refusal of the instruction despite Mr Lovelock's clear account that he was aware that this was the Claimant's condition. Mr Winder acknowledged that suspension without pay was inappropriate but said that this had since been paid. He rejected the suggestion of a connection between the events in August 2017 and the request to reduce hours made in July 2017 and he described Mr Modell's concerns in the meeting on 21 August 2017 as *"genuine"*. He also characterised the meeting as an *"investigative interview"* within the Respondent's disciplinary process. He said that the Claimant had given consent to his GP being contacted and we think that this conclusion is consistent with the evidence. As far as refusing the Claimant permission to return to work is concerned, he said that this was based on the terms of the fit-note of 17 August 2017. So, for these reasons he dismissed the grievance.

80 The Claimant was notified of a right of appeal which he exercised by letter dated 21 March 2018 (page 323). He asked to be given the evidence relied on in deciding the grievance including witness statements. The appeal was acknowledged by Devon Modell, Trevor Modell's son, on 29 March 2018 (page 324). Devon Modell said that all the relevant information was contained in Mr Winder's letter. The Claimant was asked to confirm by return whether he wished to attend an appeal hearing but the Claimant did not reply to this request until 18 April 2018; he said that he could not attend a meeting and asked for questions to be put to him in writing. This letter crossed with Devon Modell's grievance decision which the Claimant received on 19 April 2018. The letter is wrongly dated 29 March 2018 (page 326). Devon Modell confirmed Mr Winder's decision and said the internal grievance process was at an end. He nevertheless authorised a payment of half pay for the period identified in the fit-note dated 17 August 2017 in the sum of £522 which he described as a *"further gesture of support"*. Further correspondence was exchanged on 23 April and 3 May 2018 but this adds nothing material to the issues we have had to decide.

Conclusions

81 In this section of our reasons we set out our conclusions on each of the issues. We shall start with the claims of discrimination arising from disability, then look at the claims of failure to make reasonable adjustments before considering the question of the Tribunal's jurisdiction. We shall deal with the claim for unpaid wages last of all.

Allegations of discrimination arising from disability:

1. A request on 24 July 2017 that the Claimant reduce his hours

82 We find on the balance of probabilities that the Claimant was the first in his team to be asked whether he would agree to reduced hours. We find that Mr Lovelock asked the Claimant first because he was already working variable hours as an informal adjustment for his condition. This reason arose from the Claimant's disability (there was no evidence to suggest that he had such an arrangement prior to his return to work following his heart attack). We find, therefore, that the essential ingredients of causation for a claim under Section 15 of the Equality Act 2010 are present.

83 We are satisfied on the evidence, however, that the Respondent had the legitimate aim of reducing labour costs when asking the Claimant this. Assessing the matter objectively, we find too that the means adopted by the Respondent was proportionate: the Claimant was simply asked whether he would agree and it was clearly open to him to refuse as he did. There was some logic in asking the Claimant first as he already worked reduced hours from time to time. We find therefore that the defence of justification is made out on the facts and accordingly this claim fails.

2. A request or instruction for the Claimant to drive a company van made on 17 August 2017

84 We do not find on the evidence that it was unfavourable treatment of the Claimant to ask him to drive the works van on 17 August 2017. While there had been restrictions on where and how far he could drive since his return to work, he had been back a year by this time and he had been driving shorter distances for his employer. In our judgment what constitutes a long or unfamiliar journey is a matter of impression and degree and this was a trip which could take less than an hour in good traffic conditions. In those circumstances we do not find that the simple giving of the instruction or making of the request was unfavourable treatment. The way in which the Claimant's refusal was dealt with is a separate matter which we consider later in our conclusions.

3. Suspending the claimant and convening a disciplinary hearing because of the Claimant's refusal to drive the van

85 In our judgment suspending the Claimant without pay was unlawful and was unfavourable treatment. We also find that instructing him to attend a disciplinary meeting was unfavourable treatment in light of the explanation he gave for refusing the instruction. This treatment arose from the Claimant's refusal to drive the van and we find on the evidence that this refusal was because of a possible exacerbation of his condition. We find, therefore, that the double causation necessary for a Section 15 claim is present.

86 There was no legitimate aim in suspending without pay, this was simply punitive. This treatment cannot be justified.

87 We find that the Respondent had a legitimate aim underlying the decision to suspend and to initiate a disciplinary process which was to ensure that staff obeyed reasonable management instructions. Judged objectively, we do not find that the Respondent's approach was proportionate. The Claimant had given an immediate,

plausible explanation for refusing the instruction and we find it impossible to see why he was suspended at all. Suspension is not a necessary pre-requisite of a disciplinary procedure. We have had no explanation why it was necessary to suspend the Claimant's colleagues so cannot conclude that this was a proportionate decision in the Claimant's case to achieve consistency nor have we had any other explanation of why consistency was necessary in any event.

88 Looked at in isolation, a decision to commence a disciplinary investigation would have been justifiable; the Claimant had refused an instruction to do something, drive, which there was reason to believe he could do. We cannot divorce this aspect from the unjustifiable manner in which this decision was brought into effect, however. Accordingly, this claim is established on the facts subject to the Tribunal's jurisdiction.

4. The conduct of the hearing on 21 August 2017

89 We find that the manner in which the meeting on 21 August 2017 was conducted was unfavourable treatment of the Claimant who became visibly distressed during it. There was a confused and confusing introduction. The Claimant was questioned at length and sometimes unfairly about the amount of driving he did and his fitness to operate machinery he had been using for the past year. Mr Modell made assumptions about how far the Claimant drove on trips to the seaside. It would be wrong to characterise the meeting as entirely lacking in compassion or understanding as there is evidence of this too but we are satisfied that this element of a Section 15 claim is made out. A reason for this treatment was the Claimant's explanation for refusing an instruction (which the Respondent was probing) and that explanation arose from his condition. We find therefore that the tests of causation are satisfied too.

90 We find that it is a legitimate aim for an employer to seek to understand an employee's explanation for refusing an instruction and this may involve some element of questioning or challenge. In our judgment, however, the Respondent's approach in this meeting was disproportionate for the same reasons as made it unfavourable. This was not a case of difficult questions being put in a considered and balanced way, rather questioning was confused and at times hostile. Accordingly, the defence of justification is not made out and this complaint succeeds subject to the issue of time.

5. The Respondent informing the Claimant that he could return to work on 19 October when it knew that he could not

91 We do not find that Mr Lovelock's email of 19 October 2017 was unfavourable treatment. The email told the Claimant that disciplinary proceedings had been dropped, acknowledged the harm that had been done to him, said that he would be welcome back to work and that adjustments would be made to his hours. While we accept that the Claimant's condition was such that he perceived this email negatively as a contradiction of what had been said before, we cannot agree that the treatment was unfavourable. On the contrary it sought to reassure the Claimant at every level. This claim fails on the facts.

6. Not withdrawing the threat of disciplinary action and advising the claimant that he would no longer be required to drive the company van until 14/12/2017

92 We do not find that the Respondent delayed withdrawing the threat of disciplinary

action until 14 December 2017. This was communicated in Mr Lovelock's email of 19 October 2017. Neither message used the word "withdrawal" expressly but the meaning of each is clear in our judgment.

93 The Respondent had not stated in terms that the Claimant would not be asked to drive the company van in future until 14 December 2017. The Claimant had asked not to drive in the meeting on 21 August 2017 but there had been no other requests for this assurance in the correspondence prior to 14 December 2017. It appears therefore to have been volunteered by the Respondent at that stage and we find that this was probably prompted by Mr Lovelock's recent meeting with Ms Cooper. We do not find that mentioning this on 14 December 2017 was unfavourable treatment. In so far as the allegation is an assertion that this assurance should have been given sooner, there is no evidence that the Respondent was asked for this at any point after 21 August 2017 and before 14 December 2017. In those circumstances we do not find that this omission amounts to treatment of the Claimant for the purpose of a Section 15 claim on the facts of this case. This claim fails.

7. Failing to respond to the Claimants grievance lodged in December 2017 until 19/03/2018

94 Mr Modell acknowledged the Claimant's grievance by his letter dated 2 January 2018 and we have found that he believed that this was a sufficient response. We agree with the Claimant that it was not. The letter did not address the specific points raised in his grievance nor did it set out the evidence considered. The letter made no mention of a right of appeal. To that extent we find that this allegation is made out on the facts and that it amounted to unfavourable treatment.

95 We have considered the cause of the unfavourable treatment. We find on the balance of probabilities that the reason for the delay in providing a proper grievance decision was Mr Modell's belief, albeit erroneous, that he had answered the grievance by his letter of 2 January 2018. There was no challenge to this assumption until the solicitors' letter of 8 March 2018. Had matters stopped there we may have concluded that there was no causal connection between delay in dealing with the Claimant's grievance and disability but in the first paragraph of Mr Winder's grievance decision he states expressly that a reason for delay <u>was</u> the Claimant's condition and the Respondent's concern over it. This shows that a cause of the unfavourable treatment – delay – was the Claimant's condition. Accordingly, this allegation succeeds.

8. Not completing the grievance process until 19/04/2018

96 We do not find on the evidence that the timing of the appeal decision was unfavourable treatment. The appeal was acknowledged within six working days. Thereafter the Claimant did not respond to Devon Modell's questions for almost three weeks. His letter crossed with Mr Modell's appeal decision. While the Claimant was disappointed by the outcome of the appeal, nothing in the timing was unfavourable treatment of him. This allegation fails on the facts.

9. Not investigating the grievance, grievance appeal and subsequent letters from claimant fully with due care and attention

97 We find that the grievance investigation was not thorough. The conclusions reached by Mr Winder were those favourable to the company and did not accord with evidence we have received from other sources. For example, Mr Winder made no mention of Mr Lovelock's account that the Claimant had explained to him on the day of the refusal why he could not drive to Kent. Our impression is that the conclusion reached was the one most convenient to the Respondent. The grievance appeal contained no independent analysis and was no more than a "rubber stamp" of the original grievance decision.

98 The Claimant's grievance arose from his sense of having been treated unjustly because of something which was a consequence of his condition, heightened anxiety when confronted with something unfamiliar. We find therefore that the double causation test is satisfied.

99 This treatment is not something which can be justified and therefore this claim succeeds under Section 15.

Failure to make reasonable adjustments

100 The Claimant identified four PCP's:

100.1 Proposing a reduction in working hours.

100.2 Requesting the Claimant to drive.

100.3 Failing to carry out the investigation/disciplinary processes correctly.

100.4 Not allowing the Claimant to return to work.

101 We find that each of these alleged PCP's are single instances rather than something with an element of repetition (or potential repetition). It is notable too that in each case the adjustment contended for is the obverse of the PCP itself. We do not find, therefore, that these are in fact PCP's for the purposes of a reasonable adjustments claim, rather they were individual events in the unfortunate series of events which led to this claim more properly analysed under section 15 (see Nottingham City Transport Ltd v Harvey [2013] EQLR 4 and Carphone Warehouse v Martin [2013] EQLR 481). Accordingly, we dismiss the claims of failure to make reasonable adjustments.

Jurisdiction

102 The claims of discrimination arising from disability which succeed on the facts subject to jurisdiction are those related to the Claimant's treatment in August 2017 and the way his grievance was dealt with in the period between 18 December 2017 and 19 April 2018.

103 The allegations relating to the grievance have been brought within the relevant time limit and fall within our jurisdiction. We have asked ourselves whether the August 2017 incidents are part of the same state of affairs so as to amount to an act extending

over a period. We do not find that the nature of the acts in August 2017 are sufficiently similar to the conduct of the grievance for us to reach this conclusion. Moreover, the principal actors in respect of the grievance were Mr Winder and Devon Modell whereas it was Trevor Modell in August 2017. Accordingly, we find that the claims relating to August 2017 have been presented out of time.

104 We have nevertheless concluded that it is just and equitable to extend time for the late claims. While not sufficiently connected with later events to constitute an act extending over a period they are nonetheless part of the continuum of events. In conducting the necessary balancing exercise, we noted that Mrs Legge took legal advice on her husband's behalf in December 2017 and January and March 2018. There was also a gap between the end of early conciliation in February 2018 and the commencement of proceedings in March 2018. We set against this the nature and extent of the Claimant's condition which we find was severely debilitating (this is described vividly in Mr Stirling's report and the Claimant's impact statement at page 352). We also accept Mrs Legge's evidence that her primary focus throughout was on her husband's welfare and that of their family. We have also taken into account the fact that the evidence concerning events in August 2017 was not affected by the delay in bringing this aspect of the claim. Accordingly, we find that we have jurisdiction in respect of all of the successful disability discrimination complaints.

Unpaid wages

105 The Respondent does not operate a contractual sick pay scheme so the Claimant had no contractual right to wages in periods when he was signed off as unfit for work. The Claimant was signed off work from 16 October 2017 so no contractual right to pay arose from then.

106 While the Claimant was fit for work with altered hours or adjustments in the period before 16 October 2017 an employer is not obliged to accept partial performance of this type and if it does not do so no contractual obligation to pay wages arises (see Miller v Five M (UK) Ltd [2005] UKEAT 359). In our judgment, therefore, there is no claim under Part II of the Employment Rights Act 1996 for unpaid wages in the period following the Claimant's suspension when he was fit for adjusted duties.

107 The Claimant was paid for the two days unpaid suspension in December 2017. His complaint in this respect is that this was treated wrongly as holiday pay rather than suspension with pay. In circumstances where we have had no evidence about the amount of paid holiday the Claimant has received since he went off work, we cannot say that there has been any failure to pay wages. Furthermore, such a claim has been presented outside the time limit in section 23 of the Employment Rights Act 1996 and we are not persuaded that it was not reasonably practicable to bring this claim in time or, even were this case, that it was reasonable not to bring it sooner.

108 We observe that the Claimant may not have been paid for the day he attended the disciplinary hearing and this would amount to an unlawful deduction from wages (subject to the time point discussed above) but that was not a matter pursued before us.

109 Accordingly, we dismiss the claim for unpaid wages. For the avoidance of doubt, we state that out decision on this aspect of the claim is not intended to limit any argument

on the financial consequences of the claims of discrimination arising from disability which have succeeded before us.

Further steps

110 As the claim has been successful in part, the Tribunal will list a further case management preliminary hearing by telephone to make orders in respect of the determination of remedy.

Employment Judge Foxwell

Dated: 14 February 2019