EMPLOYMENT TRIBUNALS

Claimant: **Mr J Howram**

Respondent: **Mr Brian Capstick t/a Universal Weed Control**

Heard at: **Hull** **On:** **29 April – 2 May 2019**

Before: **Employment Judge Maidment**
Members: **Mrs S Scott**
Mr M Brewer

Representation
Claimant: **Mrs M Howram, the Claimant's mother**
Respondent: **Mr D Finlay, Counsel**

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal fails and is dismissed.

2. The Claimant's complaints of disability discrimination and harassment fail and are dismissed.

3. The Claimant's complaint of unauthorised deductions from wages succeeds in part and the Respondent is ordered to pay to the Claimant the net sum of £440.

4. The Claimant's complaint seeking damages for breach of contract in respect of unpaid 'food allowances' succeeds in part and the Respondent is ordered to pay to the Claimant the sum of £280.

5. The Respondent failed to provide the Claimant with a statement of particulars of his employment and, pursuant to Section 38 of the Employment Act 2002, is ordered to pay to the Claimant the sum of £1,463.20.

6. The Claimant's complaints in respect of unpaid holiday pay and pension contributions are dismissed on the Claimant's withdrawal of them.

REASONS

Issues

1. The Claimant complains unfair dismissal. The Respondent maintains that he was not an employee and therefore has no right to bring that complaint. In any event, on any basis, the Claimant had not been continuously employed for at least two years. His claim is limited to one of automatic unfair dismissal where he says that he was dismissed for asserting a statutory right in respect of a period of holiday he took shortly before the termination of his employment. The Respondent maintains that the Claimant, if an employee, was dismissed because he was absent without leave and had lied to him.

2. The Claimant also brings a number of complaints of disability discrimination. The Respondent has accepted that the Claimant was at all material times a disabled person by reason of him suffering from dyslexia, dyscalculia, auditory processing delay, auditory discrimination delay and difficulties in the retention and recall of information. He does not accept, however, that, where relevant, he had the necessary knowledge or constructive knowledge so as to be potentially liable for the acts of discrimination alleged.

3. The Claimant maintains that he was treated unfavourably arising from his disability in the Respondent's failure to arrange training for him because of the Respondent considering that he would need more training or a longer period of training, that there was a greater risk of him failing any training, there was therefore more cost to be incurred by the Respondent in training the Claimant and the need to make reasonable adjustments to training.

4. The Claimant then brings complaints of disability-related harassment. He alleges that the Respondent made a comment as follows: "Look at me I hit the jackpot, I employed a disabled person that isn't even disabled". He maintains then that the Respondent shouted at and insulted the Claimant over the telephone when the Claimant was lost whilst carrying out his work. The Respondent is then alleged to have ignored the Claimant after he had got lost when working. Finally, the Respondent and the Claimant's colleagues, Nigel Horner and Shane Horner, are said to have used insults and to have had a dig at the Claimant for getting his routes wrong.

5. In the alternative, it is contended that this (harassing) treatment of the Claimant was unfavourable treatment arising from his disability.

6. The Claimant brings a freestanding complaint alleging a failure to make reasonable adjustments which arises out of a requirement for him to use maps provided by the Respondent. It is said that he had a substantial disadvantage in using and reading the maps due to his dyslexia and as a reasonable adjustment the Respondent ought to have provided a better quality map, used a single colour to highlight routes, put arrows on the routes, given all directions on a smart phone for the Claimant to listen back to, given him maps of larger print, given him written instructions/directions, provided coloured paper for the maps and provided someone to accompany or assist the Claimant in his work.

7. The Claimant then brings a number of complaints alleging unlawful deductions from wages or seeking damages for breach of contract. It had been noted at a previous preliminary hearing that the Claimant's complaint in respect of holiday pay represented a shortfall of one hour's pay. This has been considered and paid by the Respondent to the Claimant such that the Claimant confirmed to the Tribunal that this complaint was withdrawn. A further complaint related to unpaid pension contributions, but, during the course of the hearing, this complaint was also withdrawn in circumstances where the Claimant was satisfied that the Respondent had now opened a pensions account and made the requisite payments.

8. The Claimant does still allege that there was a shortfall in his wages for the 2017 and 2018 seasons during which he provided services to the Respondent and a failure in respect of part of the first 2017 season and the whole of the 2018 season to pay to the Claimant a food allowance agreed to be paid to him in the sum of £20 per week. The Respondent contends that any complaints relating to entitlements in the 2017 season have been brought out of time and the Tribunal has no jurisdiction to hear them.

Evidence

9. The Tribunal had before it an agreed bundle of documents numbering some 321 pages.

10. The Tribunal, having identified the issues at the commencement of the hearing, took some time to privately read the witness statements exchanged between the parties and relevant documentation referred to. This meant that when each witness came to give his evidence he could do so by simply confirming the accuracy of the statement and then, subject to brief supplementary questions, be open to be cross-examined.

11. The Tribunal heard firstly from the Claimant and then, on his behalf, from his former workmate Jordan Hayward and his father, Mark Howram. The Tribunal then heard the Respondent's evidence and that of the Respondent's father, Graham Capstick and two other workers engaged by the Respondent, brothers Nigel and Shane Horner. Whilst a witness

statement had been exchanged between the parties from Mr Tony Brown, the Respondent confirmed that it did not seek to rely on this as relevant evidence and it was not therefore considered by the Tribunal.

12. During the course of the hearing the Tribunal was shown a WhatsApp message on a work group chat sent by Mr Nigel Horner which was shown to and accepted by the Claimant as genuine. Indeed, the Tribunal had within the bundle a sequence of WhatsApp messages in circumstances where there also appeared to be a gap (and indeed potentially quite a crucial gap) in that both the Claimant and the Respondent accepted that there had been a message which was not before the Tribunal effectively notifying the Claimant of the termination of his services.

13. After the completion of evidence and before submissions, the Respondent notified the Tribunal that the relevant messages had been located. It was the Tribunal's view that, regardless of the late disclosure, the messages sent within this period were of potential material relevance to the issues and it was unsatisfactory for the Tribunal to determine the issues without such evidence and knowing now that such evidence existed. However, that was dependent on there being no prejudice to either party by the Tribunal accepting such evidence. The Tribunal put forward that the Claimant be given some time to consider the additional messages and that both the Respondent and the Claimant be recalled as witnesses to confirm the accuracy of the messages and to be open to be cross-examined on them. The parties agreed to the Tribunal proceeding on this basis.

14. Having considered all relevant evidence, the Tribunal makes the findings of fact as follows.

Facts

15. The Claimant was engaged by the Respondent as a weed sprayer from 14 April to 10 November 2017 and again from 22 March to 20 July 2018. The Respondent performed contracts predominantly for local authorities to remove weeds from street pavements. It did so by its workers walking up and down streets spraying the affected areas with weedkiller from a knapsack containing the necessary chemical. The work was carried out at various locations around country with typically five or six workers working out of a van(s) which contained a large tank of weedkiller to be used to refill the knapsacks.

16. The Claimant had been messaged by Nigel Horner, who worked as a foreman for the Respondent, to see if he was interested in working for the Respondent from April 2017. Mr Nigel Horner was the brother of an old school friend of the Claimant, Shane. The Claimant was excited by the opportunity and preferred the thought of working and being paid "*good money*" to continuing at college. His first work for the Respondent was in

the Bristol area and he was picked up by Nigel Horner in the work van as indeed became the standard arrangement.

17. Whilst out of the area the Claimant was housed in digs. He was paid at an hourly rate and, certainly in the early days of his working for the Respondent, was provided with an extra £20 weekly food allowance.

18. The Respondent told the Tribunal that the work was seasonal and, whilst he had some longer term continuing contracts, many of them had to be tendered for on an annual basis in circumstances where he did not always know whether or not he had been successful until shortly before the new season started. He referred to having had in the region of 120 members of staff working for him over a period of around 20 years in circumstances where in some years he might have had around 10 people working for him and in others more like 5-6. He accepted that this represented a significant turnover of staff in circumstances where he said that the job did not suit everyone due to its seasonal nature and the need to work away from home. However, some individuals returned to work for the Respondent for a season over a period of many years, including the Claimant's own father, Graham Capstick, from 2000 and Nigel Horner from 2011. In the "off season" some of the workers were engaged by one of the Respondent's own clients, Weedfree, to work on railway contracts.

19. The Respondent told the Tribunal that he typically waited until close to the season commencing before confirming any offer of work to ensure that he had a full amount of work to offer to any individual to keep them busy during the forthcoming season. Such offers were always made verbally and at no stage during the Claimant's engagement was he issued with any written form of contract. Nor was anyone else.

20. Nevertheless, after the Claimant's engagement had ended and he raised a grievance, the Respondent prepared a written statement of terms and conditions of 'employment' in the Claimant's name for each of the 2017 and 2018 seasons. This reflected that work would be offered on hours that suited the business and would usually be full-time, Monday to Friday, with some weekend working. However, working hours would depend on available work, employment was temporary and seasonal. Reference was made to the usual spraying season running from March to October. The terms stated that full training would be provided and PPE provided at the Respondent's cost. Workers were entitled to holiday pay, but not any company sick pay.

21. Working hours were to be allocated at the end of each week and if the employee agreed to work the hours offered there was a commitment to report to work for the duration of that week. Whilst there was no obligation to accept offered hours or indeed for the Respondent to offer hours of work, it was said in the statement that the likelihood was that there would

be enough or regular working hours for the duration of the spraying season. Wherever possible, a week's notice would be given of the termination of employment and any grievances were to be addressed to the Respondent personally. It was further clarified that the work was weather dependent and that there would be no payment made when the work could not be completed due to adverse weather conditions.

22. This, the Tribunal concludes on the evidence before it, is essentially the arrangement under which the Claimant worked. He started the season with the Respondent expecting to offer him continued work throughout the season and the Claimant understanding that he was committed to working for the Respondent for the duration of the season. There is no suggestion that the Claimant need not have provided his services personally or could on occasions have sent a substitute if he had wished.

23. The Claimant was provided with basic training when he joined the Respondent. This involved him working during the first week with Nigel Horner, Shane Horner and briefly, the Tribunal concludes, with the Respondent. He was then placed to work alongside Shane Horner in a team of two. However, as time went, on the Claimant often worked on his own. Typically, 4 or 5 weed sprayers would be out walking the streets in a particular area with the van driven by Graham Capstick, who acted as a supervisor, located in the proximity of the sprayers who messaged him if they wanted him to drive over to their location to refill their knapsacks.

24. Nigel Horner, as foreman, was responsible for indicating on maps to be provided to the sprayers the streets which they individually had to cover in any working day. This was done by providing A4 size copies from an A-Z roadmap with the roads which needed to be sprayed shaded out using a highlighter pen. The Claimant followed these effective instructions completing a designated area each day and then reported back to confirm that all the streets within his area had been covered by him.

25. The Claimant, it is accepted, was at all material times a disabled person by reason of him suffering from dyslexia, dyscalculia, auditory processing delay, auditory discrimination delay and issues relating to the recall and retention of information. The Tribunal has seen a consultation report completed by Atos Healthcare in respect of an application by the Claimant for a personal independence payment. That assessment was completed in April 2015 when the Claimant was 16 years of age. This refers to the Claimant having difficulty in understanding people it being noted that he understood barely any of the questions directed at him at his assessment except the most simple ones and that his mother had to give most of the information as he did not understand much of the assessment. It was said further that he needed blue aids to help him read, but then had difficulty understanding the information, him having needed one-to-one support when working with textbooks at school. It was said that the Claimant had difficulty with routine daily tasks including washing, going to the toilet and

dressing himself. It was said that he would try to put on his nine-year-old brother's clothes even though they were far too small.

26. The Claimant did not present to the Tribunal, including when giving evidence and being cross-examined, as being impaired to anything approaching that extent. The Claimant understood the questions put to him on behalf of the Respondent and was articulate in response. His vocabulary and understanding of words did not appear to be particularly narrow or limited and he was able to follow proceedings. At times he was able to prompt his mother who was representing him, showing an understanding of concepts relevant to the issues in his complaints, including that of employment status.

27. The evidence is that, whilst working for the Respondent, he was able to participate in jokes and was regarded as very much part of the team. The Tribunal notes a Snapchat picture he took and distributed mimicking the Respondent's facial drop to one side and intended as a humorous mimicking of the Respondent suffering at the time from Bell's palsy. The Tribunal rejects as not credible the Claimant's explanation that this was him seeking to mimic the Respondent when drunk. The Claimant (on his own admission) found it funny and had a bit of a giggle when a work colleague, Jordan Hayward, had laxatives put in his drink - at least until the Claimant appreciated the significant effects this was having on Mr Hayward.

28. The Claimant, after the first few months of his engagement by the Respondent, operated his own bank account. His father, Mr Mark Howram, did not consider the Claimant needed any assistance in so doing. The Claimant now lives independent of his parents in York, has completed a CICS construction course at college and, including whilst engaged by Respondent, drives his own car. The Claimant, as already noted, as part of his work with the Respondent was required to work away from home and stay in digs for up to a week at a time. The reference in the PIP assessment to the Claimant being unable to follow even a familiar journey if there was a diversion does not appear to reflect the reality of both the Claimant's ability to drive and the work he successfully did for the Respondent.

29. Indeed, the Claimant appeared, certainly in the 2017 season, to work well for the Respondent and he was regarded by his colleagues and the Respondent as an individual who had picked things up quickly and as a good member of the team. Nigel Horner and the Respondent had considered the Claimant to be well capable of following his maps and carrying out his spraying tasks after the first week or so of his engagement during which he was shown the ropes. The Claimant himself said that there were very few occasions when he needed to redo the weed spraying in any area, saying this was because he did a good job. He said that he might have missed out the odd street when he worked during the 2017

season, but only ever to the extent that this could be easily fixed in around 10 minutes. Subsequently in cross examination, the Claimant changed his evidence to suggest that at times he had to work at the end of the day redoing areas taking him up to one and a half hours in circumstances where his colleagues would sit in the van and wait rather than assist him so that they could all finish their work for the day. That appeared to the Tribunal to be an exaggeration. The Claimant said that he was not perfect and did mess up, occasionally going the wrong way or missing a street but elaborated that everyone made mistakes. Indeed, the similar evidence of the Respondent's witnesses was that from time to time everyone might miss a street out or need to redo a patch, but that the Claimant did not have to do this anymore than anyone else. There is no evidence up to May 2018 of the Claimant ever being criticised in respect of his performance and the Tribunal has seen a number of WhatsApp messages between the Claimant and Respondent which appear to reflect a friendly and quite casual relationship between the two of them. Certainly, there is no evidence of impatience, abuse or criticism on the Respondent's part.

30. The Respondent's position is that he had no knowledge or belief that the Claimant was disabled. Before the Tribunal, the Claimant said that he told the Respondent and his work colleagues that he suffered from dyslexia. That was not however what was indicated in his witness statement. There he referred to: *"Nigel must have known I was dyslexic…"* which is inconsistent with Mr Horner actually having been told by the Claimant. The Claimant also referred to a chat in the van during a break when Shane Horner was said to have brought up his own dyslexia and referred to the Claimant therefore likely to have trouble with maps because he was dyslexic like him. Mr Shane Horner, in his own evidence, clearly did not recognise himself as impaired by dyslexia or otherwise – the Claimant in fact accepted that he was not sure that Shane Horner was dyslexic. Nor did he accept that either he or the Claimant had any particular difficulty with following maps. The Respondent's recollection of the conversation when dyslexia came up was that there was a reference by possibly Shane Horner and/or the Claimant saying their teachers at school had said they might have dyslexia. In response he asked if anyone had actually been diagnosed by a doctor and they said they hadn't and they were just in a particular class because they were naughty. The Tribunal on the balance of evidence rejects the Claimant's account.

31. The Claimant also refers to an instance in the van where he alleges that the Respondent, in front of the Claimant's colleagues, said: *"Look at me I hit the jackpot, I employed a disabled person that isn't even disabled".* The Respondent denies making such a comment. The Respondent did however recall a conversation when travelling in the van at some point in 2017. He said that the Claimant appeared to be unhappy with some text messages he was receiving from a family member and, when it was queried what his annoyance arose out of, he said that his parents were claiming money on his behalf for a named condition, the name of which the Respondent could not recall but was one which the Claimant's

younger brother had, but not the Claimant himself. The Respondent recalled asking the Claimant then if he had any disability, in response to which the Claimant said there was nothing wrong with him. The Respondent asked if he was sure and that he wouldn't lose his job by saying so. He said he asked once more if there was anything regarding disability that the Claimant wanted to tell him and the Claimant replied that there was not. The Respondent then told the Tribunal that he asked Nigel Horner to keep an eye on the Claimant in case was any sign that he had any difficulty. It is accepted that the Claimant's younger brother suffers from Ehlers-Danlos syndrome which is genetic but that the Claimant has only mild symptoms of flat feet with no effects on his mobility or otherwise. On balance, it is likely that this conversation took place as described by the Respondent and that this was the condition referred to by the Claimant. The conversation did not however involve the Claimant disclosing that he was for any reason disabled. The Tribunal considers it unlikely that the Respondent referred to *"hitting the jackpot*" in circumstances where the Tribunal cannot conclude that the Respondent saw this disclosure as somehow something to his benefit. Even if, as suggested on the Claimant's side, the Respondent might have had in mind quotas (long since removed) for the employment of disabled persons, the Respondent's lack of sophistication in matters of employment law does not suggest that he would have understood anything meaningfully positive for him and/or his business in having a disabled worker.

32. Again, whilst the Claimant maintained that he struggled with following the maps provided, there is no evidence of that. The evidence in fact is that the Claimant rarely went wrong and the Respondent and the Claimant's colleagues thought that he had picked up the job quickly and was able to follow the maps as well as anyone, accepting that the maps were at times imperfect to everyone, for instance, where roads including cul-de-sacs were shown very close together.

33. The Claimant further maintains that he raised with the Respondent his alleged difficulty in following maps and asked for the routes he had to be followed to be highlighted in a blue colour to enable him to read the maps more easily. Again, this evidence came out in cross examination and was not contained in the Claimant's written witness statement in circumstances where this would quite obviously have been a highly relevant matter to mention. In cross examination, the Claimant then referred to asking for 'colours' to be used rather than, in particular, a blue colour. Jordan Hayward gave evidence that he himself had raised that it would be a benefit to him because of his own dyslexia to have routes coloured in blue or yellow. The Tribunal considers that if anyone had an issue in this regard it might have been Mr Hayward, but not the Claimant. The Claimant's ability to read the Tribunal bundle, witness statements and handwritten documents without any aid or highlighting of them does not indicate and makes it unlikely that the Claimant would have raised this matter with the Respondent. When put to the Claimant that he had never

asked the Respondent for any blue plastic overlay sheet to assist in his reading, he said that he never thought to ask about the provision of blue plastic overlays as the last time he had used them had been when he had been at primary school.

34. The Tribunal has referred to the training the Claimant received when he began his work for the Respondent. This relatively informal and undocumented training was standard within the Respondent and again the evidence is that the Claimant "*jumped to it*". The Claimant was, however, not permitted from a safety compliance point of view to be weed spraying on his own unless he held a PA1 and PA6 certificate which required attendance at an external training provider. The Tribunal accepts the Respondent's evidence that he did not immediately put the Claimant forward for this training because he wished to see whether the Claimant was up to the job and able to complete his first season. However, the evidence is then that he intended that the Claimant would undertake the training for the certificates in March 2018. On 25 January 2018, the Respondent, at the end of a message to the Claimant, said: *"… Plus could do with getting you through your spray tickets…*". The Claimant thanked the Respondent for that referring to him as "*Bud*", quite a standard form of address the Claimant used when communicating with the Respondent. The Respondent replied saying that the training would be sometime in March. The Tribunal accepts the Respondent's evidence that he subsequently telephoned the training provider in March only to find that the course was full and that he then intended that he would seek to put the Claimant through the course in or around June, the next occasion when it was run. However, as will be explained, the Claimant's attendance was overtaken by events.

35. The Claimant complains that he was called names by the Respondent and his colleagues and that he was scolded and/or ignored by the Respondent for making mistakes. In evidence he said that if he suggested following a particular route or had to double back on himself when out spraying he would be called an idiot by the Respondent. No specific instances were referred to. The Tribunal notes that the balance of evidence is that the Claimant rarely made mistakes. The Claimant said that the Respondent and his colleagues referred to him as "*dyslexic*", "*moody*" and "*depressed*". He also said, when giving his account of the aforementioned conversation relating to his parents' application for benefits on his behalf, that he had been called a "spacker". That was not something the Claimant mentioned in his grievance letter or witness statement in circumstances where this would have been the most serious and most obviously upsetting comment which had been directed at him. In the circumstances, the Tribunal cannot conclude that this particular term or the word "*dyslexic*" was directed towards or said about the Claimant at all.

36. The Claimant in his witness statement said that he had been referred to by the effective nickname of *"gull"* which he said short for *"gullible*" in circumstances where the Respondent and his colleagues thought that the Claimant was naive and suggestible. The evidence of the Respondent, Nigel and Shane Horner is that without any particular logic or thought, as a group, they had developed quite random nicknames for each other and that the Claimant had been named gull, short for seagull, following them seeing some graffiti depicting a seagull whilst working in Bristol. Mr Nigel Horner said that he had been called *"hillbilly*". The Tribunal generally found Nigel and Shane Horner to be quite straightforward witnesses and ultimately prefer their account of the meaning of the name to that of the Claimant. The Claimant has not sought to explain how he considered that name related to his disability impairments.

37. The Tribunal notes that the Claimant accepts that, as regards all the alleged name-calling, he did not say anything to the Respondent or his colleagues and certainly did not complain about the treatment he was receiving. He said that he did not want to do so as he wanted to carry on working as he needed the money. The Tribunal notes, from the Claimant's demeanour before it, that he appeared to be someone quite capable of standing up for himself and someone who would react if he felt he was being badly treated. The Tribunal notes that the messaging between the Respondent and the Claimant betrays no form of insulting behaviour and in fact a friendly and relaxed relationship between the two of them despite the disparity between them in terms of age and experience of the world. The Claimant, in one of his final messages to the Respondent prior to the termination of his engagement, referred to the Respondent out of everyone including his family as helping him through the issues he had had (predominantly related to personal debt) and ended the message: *"Just wanna say thanks mate means a lot".*

38. After the Claimant's engagement had ended he raised a written grievance dated 23 July about payments, training and health and safety but did not suggest that he had been subjected to offensive, bullying or harassing behaviour. A further letter of grievance was submitted dated 31 August which ran to 6 pages and only in the penultimate paragraph referred to a feeling that he had been unfairly dismissed and discriminated against, but again with no reference to insulting or bullying treatment of him.

39. It was the Claimant's case that the name-calling and ill-treatment had taken place throughout both the 2017 and 2018 weed spraying seasons he worked for the Respondent. Obviously, after the end of the 2017 season the Claimant had a choice whether or not to go back to work for the Respondent from the commencement of the 2018 season and chose to do so, stating in cross examination that he would have been happy to an extent if when he had gone back in 2018 things had been the same as in 2017.

40. On the basis of the evidence the Tribunal does not conclude that the insults and ill-treatment claimed by the Claimant in fact took place.

41. The Claimant had been regarded by the Respondent during the 2017 season as a good worker who fitted in well with the team. The Respondent was happy to offer the Claimant work for the 2018 season and wanted to continue to use him as a weed sprayer.

42. During the winter period to the Claimant had taken up some alternative work including through an agency at Greencore working night shifts. The Claimant's account for the Tribunal was that he returned to the Respondent in 2018 as something of a changed person. Whether due to his having worked a period of nights or otherwise, the Claimant accepted that he was moody and somewhat depressed and that his change in mood/demeanour would have been evident to his workmates.

43. Indeed, the Claimant effectively conceded that his work in the 2018 season had not been as good as previously albeit he was of the view that what he had done had been good enough.

44. Nevertheless, there is no evidence of any particular errors having been made by the Claimant or any significant concerns the Respondent had with the Claimant's performance until the Claimant made a mistake when spraying in Bristol. After the Claimant had sprayed a particular area it was assessed by the Respondent's local authority client and a complaint was raised that some grass on a verge had been incorrectly killed. On 2 May 2018, the Respondent gave the Claimant a verbal warning and reiterated the standards he expected. The Tribunal accepts that the Claimant was at fault when carrying out this work. The Claimant effectively confirmed this in a message he sent to the Respondent on 2 May saying: *"sorry about all this Cap I dunno what the fuck has gone on bud but it really is a mess."* The Respondent replied: *"Look pal, think you're a decent lad and wouldn't like to think I'd have to let you go. But I have to think of myself and the company, everybody's work is reflected onto me at the end of the day and that's where the buck stops. So you really have to straighten things out and if you can then we can roll on."* The Claimant responded that he definitely would, because he didn't want to lose his job.

45. An issue then arose regarding the Claimant going on holiday. The Claimant's general evidence was that the Respondent used to ensure that he and his colleagues used their holidays up and got paid for them. He said that he had asked previously for some time off to attend a festival giving notice a week before he wished to go but that this had been refused. No other specific issue was raised regarding the Respondent's attitude towards him taking holiday.

46. The Claimant subsequently had an opportunity to go on holiday to Turkey with a friend and asked the Respondent if he could take off the period from 25 June to 9 July. The Respondent granted this holiday request and the Claimant indeed went abroad with his friend.

47. Whilst the Claimant was away the Respondent messaged him asking him if he would be spraying on what was Tuesday 10 July. The Respondent expected that the Claimant would be back and available for work on that day. The Claimant responded*: "Tuesday? Don't get back till Wednesdays at 3 in morning back home sorry worded it wrong in that text and not coming in Wednesday when get home at 3 in morning…"* The Respondent replied commenting that the Claimant was then: "*basically off for 3 weeks".* The Respondent then messaged that he wanted to have a chat with the Claimant when he got back. The Claimant responded that others were having more days off than him to which the Respondent referred to being told by the Claimant that the holiday would be from 25 June until 9 July continuing: *"I don't mind people taking holidays but not the piss. Speak when you back".* The Claimant responded that he was not taking the piss but had been told the wrong dates and was offering to try to make up the time by working a weekend.

48. The Claimant messaged the Respondent on Friday 13 July asking for his help because he needed £100 that day continuing: *"I know I've lied about work and dates Cap but I will graft myself now mate that's a promise I don't wanna lose this job…"* The Respondent replied informing him of a job for Sandite paying £110 per day over 10 weeks asking the Claimant to let him know as soon as possible if he wanted it. The Claimant messaged the Respondent on Sunday 15 July asking for £65 to pay a bill that was overdue. The Respondent replied that he would, if he could do anything to help the Claimant the following day.

49. On Monday 16 July the Claimant asked in a message: *"Am I deffo coming back to work bud?".* The Respondent replied that he could if he wanted to saying that they were starting in Bristol on 30 July and that there could be work this Friday and Monday in Hull referring to the Claimant then sitting his PTS exam. This was a reference to an exam the Claimant was taking to enable him to be certified to undertake railway work during the winter season for Weedfree, who often acted as effectively the Respondent's customer contracting out work to him. The Respondent had passed onto the Claimant information about the PTS test which he received from Weedfree in the anticipation that the Claimant would complete the necessary login details and perform a test for Weedfree online using the Claimant's own laptop.

50. The Claimant, in any event, responded hoping that there might be further work that week and, this being Monday 16 July, the Respondent messaged the Claimant after 9pm saying that he might have work for the Claimant tomorrow. The Claimant responded at 21:59 stating "*what time*

bit late notice Cap". In response the Respondent sent in three separate messages concluding at 22:02: "about 7:20am". "Hull." "???". The Claimant did not respond to these final messages. The Tribunal can not accept the Claimant's account that he had fallen asleep immediately before these final messages from the Respondent, moments after the Claimant himself had been actively messaging. The Respondent, the Tribunal accepts, assumed that the Claimant would want the work.

51. There is a significant dispute as to whether or not there was an attempt to pick the Claimant up at home between 7am – 7:30am on the morning of Tuesday 17 July. The Claimant's case is that no one called to collect him. He was asleep, but if someone had come to collect him he said that the three Staffordshire Bull terriers who lived with him and his family would have barked to an extent he would have heard them and been woken up. Mr Mark Howram, the Claimant's father, said that it was not possible for anyone to have knocked on the door as the dogs would have gone mad and the family would all have been woken up.

52. Mr Mark Howram said that he had security cameras pointing up the driveway which ended at the front door of the house and that he had reviewed the footage an hour each side of when the Claimant was meant to be picked up and that it was evident to him that no one had come to the house. Unfortunately, such footage was not able to be preserved and is not in evidence before the Tribunal. The Tribunal has also seen mapping evidence taken from the tracker of the van which the Respondent contends did come to the Claimant's house that morning. However, whilst if requested quickly, detailed information would be available, the request for this information was made at a time when only limited tracking data survived. Effectively, the tracking evidence the Tribunal has seen shows the van at particular points it appears at hourly intervals. However, the times given for particular locations appear unreliable including in circumstances where recordings were made when the vehicle engine is switched on and off yet the timing record shows data collected at exactly the same hourly intervals. At most the tracker shows locations reached at spot intervals with a line drawn between those locations recorded at those spot times. The mapping does not show the exact route taken by a vehicle between those recordings, simply the start and end location. The records are unhelpful to the Tribunal in determining whether or not the vehicle ever came to the Claimant's house.

53. The Tribunal notes, however, a clarity and consistency of evidence given by the Respondent, his father Graham Capstick and Nigel Horner. That is to the effect that Graham Capstick, who retained the vehicle overnight, drove from his home in Goole to Mr Nigel Horner's house in Cliffe before then going to the Claimant's home relatively close by in Hemmingbrough. Their account is that Mr Nigel Horner remained in the van. Mr Graham Horner went to the door and knocked on it with his fist. On receiving no answer he returned to the van. He then telephoned the Respondent to

say that the Claimant had not been able to be roused. They then drove to Mr Shane Horner's girlfriend's house in Howden before continuing to Hull for their day's work. Mr Graham Capstick was particularly convincing in his paternalistic attitude towards the Claimant, describing him as being a good lad and wanting to get him up for work. The Claimant himself described Graham Capstick as the elder statesman of the team. Mr Graham Capstick said he could not understand why the Claimant was not ready and waiting for them to pick him up anyway. The Tribunal cannot understand from the evidence any reason as to why the Respondent or any of his colleagues would wish to create a situation where they had to work in Hull that day a worker down. There does not appear to be a possibility that Mr Graham Capstick could have knocked at the door without the Claimant's dogs barking, but of course that assumes that the dogs and indeed other family members were present in the house that early morning and it is possible that they were not.

54. In any event, the Tribunal accepts that the Respondent's genuine understanding from a telephone call he received from his father was that the Claimant had not attended for work. The Tribunal rejected the contention that there was a conspiracy as put forward by the Claimant to make out that the Claimant had not been ready for work to create a pretext for his dismissal. The evidence in fact suggests that the Respondent was willing to continue to provide the Claimant with work. The Respondent did not need to create a pretext for dismissal, particularly given the Claimant's failure to return to work after his holiday.

55. It is clear that the Respondent tried to call the Claimant later on the morning of 17 July. The Claimant responded by a WhatsApp message apologising that he had missed the call and saying that he hadn't seen the messages on the phone and that he really could have done with working the shift as he needed the money. He asked if the Respondent could indeed help him out moneywise.

56. The Respondent replied that if the Claimant wanted the money he should have turned up for work continuing: *"I think you've had plenty of chances now*". The Claimant responded asking what the Respondent meant as he hadn't see his messages referred to above around 10 at night and saying that he could have come in that day. The Respondent replied that the Claimant's colleagues had knocked at his door that morning, saying: "*again you have let me down. I'm fed up with the lies."*

57. The Claimant's response was in a message expressing that if anyone had knocked on his door they would have woken the whole house up with the dogs. He repeated that he was not lying. The Respondent's response queried why the Claimant wasn't ready for work anyway and said that no one should have needed to knock on the door.

58. That evening the Claimant messaged the Respondent asking what was happening. The Respondent responded: *"I will pop your written warning in the post. I think you're a good lad but for some reason it hasn't worked out this season. And to carry on with you scares me to be honest. I think we need to have a sit down chat. My reputation is everything in this business and I can't afford people letting me down…"*

59. The Claimant responded: "*Tbh Cap I just feel like everyone judge me too much on that cock-up in Bristol and just feel like everyone's judge me differently to be honest and I'm still the same lad just got a bit more stress on my head the winter lost my car because can't afford it mate just trying to get back on track but I see where coming from with your rep it's took you a long time to get you there bud I am sorry if I have affected it I really am as out off everyone my family etc… You've through the most of it is end of road just wanna say thanks mate means a lot…"*

60. The Claimant, having had no further response, messaged the Respondent in the afternoon of 19 July asking if he was still needed to work that Friday and asking what was going on. The Respondent responded: *"I'm sorry I can't take the risk. Had a dressing down myself over a couple of things i.e. staff and missed bits… Last year you were spot on this year you have let me down. If you sort yourself out, I could reconsider."* The Claimant replied: *"you've fucked me over these last couple of weeks big time cap then telling me you're not taking me back after a holiday or planned well I'll be in contact soon cap you can't do stuff like that".*

61. The Respondent reverted to the Claimant shortly afterwards stating: *"If you'd stuck to your agreed dates there wouldn't be a problem."* The Claimant in a subsequent message at 4:01pm suggested that he shouldn't have been given his first warning because he was not a licenced sprayer and that the Respondent had "*just done the fast route to get rid of me and you was all saying before I went I was gunna go anyway and you can post my P 45 and my wages slips."*

62. The Claimant has alleged that the Respondent and indeed the Claimant's colleagues had referred before the Claimant went on holiday to Turkey that he would be *"got rid of"* when he came back. The Tribunal cannot accept that evidence. The Respondent's treatment of the Claimant when he returned from holiday, including in continuing to offer him work, makes such alleged statement unlikely to have been made certainly by the Respondent himself.

63. There was then subsequent messaging regarding the payments the Claimant said he was owed. Nigel Horner sent the Claimant a message on a work WhatsApp group site saying "*tata"* with an emoji added before the Claimant's number was removed from the messaging group. The

Claimant's evidence before the Tribunal had been that Mr Horner had in the same message referred to him as *"knob head"* which on discovery/ disclosure of the actual message from Nigel Horner was clearly not an accurate recollection.

64. The Tribunal has heard a significant amount of evidence relating to how the Claimant was paid. When the Claimant commenced the 2017 season he had no bank account and was paid in cash periodically and in varying sums. Neither the Claimant nor the Respondent has any record and certainly no clear recollection as to how much he was paid in the early weeks of that season. The Claimant was then paid indirectly through bank transfer to the bank account of the Claimant's father. Again, however, the payments were not in consistent amounts paid always at the same time each week. Nevertheless, in respect of this period the Respondent at least produced wage slips which were sent, albeit once again sometimes erratically, to the Claimant via WhatsApp. The Claimant then opened his own bank account into which payments were made.

65. During the 2018 season payments were made into the Claimant's bank account throughout. However, the Claimant was sent frequently advances on wages and indeed sometimes given cash advances which were then deducted from subsequent wage payments made by bank transfer. Sometimes money was sent by bank transfer to one of the Claimant's colleagues which was to be divided up between colleagues and paid over in cash to them.

66. When the Claimant started providing services in the 2017 season he also received a food allowance of £20 per week. The Respondent's witness statement evidence was that during the season this ceased and instead the Respondent paid directly for food for the Claimant and his workmates. The Respondent then maintained that there was a discussion with all of the workers at which it was agreed at the start of the 2018 season that they would receive a pay increase up to a rate of £10 per hour from, in the Claimant's case, £8.75 per hour and that the food payment would cease.

67. However, the wage slip evidence shows that the pay increase to £10 per hour in fact occurred towards the end of the 2017 season. When asked by the Tribunal what had occasioned this increase at this point in time in the Claimant's wages, the Respondent referred to the Claimant working well and the increase being effectively a recognition of this.

68. The Claimant's account is that there was never any agreement, certainly by him, to forfeit the food allowance in return for an increase in his rate of pay. The Respondent was referred, when cross-examined, to numerous entries from his own bank statement showing payments to a number of individuals with the reference 'food' or 'food allowance'. The Respondent's account was that, if people needed money, he was willing

to help where he could and that he often just clicked the relevant button on his banking app without thinking to change or clarify any reference to the reason for the payment made. However, to a question from the Tribunal, the Respondent stated that the payments made were for a variety of reasons and "*only sometimes*" for food, indicating that there were still during 2018 some payments made to individuals by way of a form of food allowance.

69. During the 2017 season the Claimant ought to have received the total net sum by way of wages of £7421.27. He started to receive payments firstly by bank transfer into his father's account from 2 June 2017 and, working from the pay slips the net pay he ought to have received from 2 June to the end of the 2017 season was the total sum of £5547.74. The payments into the Claimant's father's and then, from 21 September 2017, into his own bank account amounted to a total of £5369.96. This produces a discrepancy of £177.78 but in circumstances where it is absolutely clear to the Tribunal that there would have been a significant amount in cash advances to Claimant during this period, as was the custom throughout the period of his engagement by the Respondent.

70. As regards the 2018 season, from the wage slips it is clear that the Claimant ought to have received the total sum of £4474.72 net of tax. By bank transfer he received the total sum during this period of £3568.22 but within this amount £160 was earmarked to be paid to another of the Claimant's workmate's, Robbie. There are then indications within the Respondent's records of the Claimant receiving £200 in cash and £117 in cash from colleagues who had received amounts from the Respondent by bank transfer for distribution to members of the team. That produces a total receipt on the Respondent's records of £3725.22 and a shortfall therefore of £749.50. The Claimant's mother has herself spent considerable time in seeking to perform a reconciliation of the Respondent's records as against what the Claimant believes he actually received in circumstances where, out of the aforementioned figures ascertained by the Tribunal, there was an acceptance by the Claimant that additional sums had been paid to him. The Claimant within his schedule had calculated a shortfall in fact of £440. It is noted that the Respondent's calculation produced a shortfall of £136 but in circumstances where the Respondent thought that in reality there would have been no shortfall at all.

71. The Claimant was engaged during the 2018 season for 17 weeks but three of those weeks were non-working.

72. The Claimant's average gross weekly pay in final 12 weeks of his work in the 2018 season was the sum of £365.80.

Applicable law

73. Section 104 of the Employment Rights Act provides that:-

> *"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee …. Alleged that the employer had infringed a right of his which is a relevant statutory right."*

74. To bring such a complaint the Claimant must have been in the Respondent's employment and not merely a worker or someone with self-employed status. It is often said that to be a relationship of employment there must be an 'irreducible minimum' without which employment cannot exist – control, mutuality of obligation and personal service. There is still then be a need to look at all the circumstances of an individual's situation to see if and how they point one way or the other. Section 104 then requires a test of causation to be satisfied. The section only renders the employer's action impermissible where that action was done because the employee had asserted a statutory right (as defined). In establishing the reason for dismissal, this requires the Tribunal to determine the decision-making process in the mind of the dismissing officer which in turn requires the Tribunal to consider his conscious and unconscious reason for acting as he did.

75. The issue of the burden of proof in whistleblowing cases (where similar issues arise as with claims based on the assertion of a statutory right) was considered in the case of **Maund v Penwith District Council 1984 ICR 143**. There it was said that the employee acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that he or she is advancing. However, once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal. However, there is an important qualification to this which applies, as in the current case, where the employee (assuming the Claimant was one) lacks the requisite two years' continuous service to claim ordinary unfair dismissal. In such a case the Claimant has the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason.

76. Nevertheless, it is appreciated that often there will be a dearth of direct evidence as to an employer's motives in deciding to dismiss an employee. Given the importance of establishing a sufficient causal link between the making of the protected disclosure and the dismissal, it may be appropriate for a Tribunal to draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact. The Tribunal is not, however, obliged to draw such inferences as it would be in any complaint of unlawful discrimination.

77. *"Disability"* is one of the protected characteristics listed in Section 4 of the Equality Act 2010. Whether someone is a disabled person is defined in Section 6 of the Act. The Act deals with the burden of proof at Section 136(2) as follows:-

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions".*

78. The duty to make reasonable adjustments arises under Section 20 of the Equality Act 2010 which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

> *"(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.*
> *(4) The second requirement is a requirement, where a physical feature 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.*
> *(5) The third requirement is a requirement where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid."*

79. The Tribunal must identify the provision, criterion or practice ('PCP') applied/physical feature/auxiliary aid, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the Claimant. 'Substantial' in this context means more than minor or trivial.

80. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

81. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which, as well as the employer's size and resources, will include the extent to which the taking of the step would prevent the effect in relation to which the duty is

imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

82. In the case of **The Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation when it deals with reasonable adjustments is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."* Pursuant, however, to **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**, there only needs to be a prospect that the adjustment would alleviate the substantial disadvantage, not a 'good' or 'real' prospect.

83. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the Respondent to have to take in order to prevent the PCP/physical feature/lack of auxiliary aid creating the substantial disadvantage for the Claimant. This is an objective test where the Tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

84. The Claimant frames this complaint alternatively as one of indirect disability discrimination pursuant to Section 19. Here there is a need to show a group disadvantage for those who share the Claimant's disability.

85. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

> *"(1) A person (A) discriminates against a disabled person (B) if – A treats B unfavourably because of something arising in consequence of B's disability,and*
> *A cannot show that treatment is a proportionate means of achieving a legitimate aim."*

86. Again, there can be no liability if A shows that A did not know and could not reasonably be expected to know that B had the disability.

87. The complaint of harassment is brought pursuant to Section 26 of the Equality Act 2010 which states:

> *"(1) A person (A) harasses another (B) if -*
> *A engages in unwanted conduct related to a relevant protected characteristic, and*

the conduct has the purpose or effect of—
violating B's dignity, or
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."

88. Section 136 is relevant to establishing that the unwanted conduct in question related to the relevant protected characteristic. In order to shift the burden of proof, there is a need for the Claimant to adduce evidence to suggest that the conduct could be related to the protected characteristic, i.e. the Tribunal could reasonably conclude the detrimental treatment to be disability related.

89. Section 26 does require there to be unwanted conduct related to a protected characteristic. This is wider than the predecessor legislation which required the conduct to be *"on the grounds of"* the protected characteristic, but the breadth of the current Section 26 must have limits.

90. Harassment will be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

91. A claim based on *"purpose"* requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what the true motive or intent actually was. The person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift from accuser to accused.

92. Where the Claimant simply relies on the *"effect"* of the conduct in question, the perpetrator's motive or intention – which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view. It must also ask, however, whether it was reasonable of the complainant to consider

that conduct had that requisite effect. The fact that the Claimant is peculiarly sensitive to the treatment accorded her does not necessarily mean that harassment will be shown to exist.

93. Section 123 of the Equality Act 2010 provides for a three month time limit for the bringing of complaints to an Employment Tribunal. This runs from the date of the act complained of and conduct extending over a period of time is to be treated as done at the end of the period. A failure to comply with a duty to make reasonable adjustments is an omission rather than an act. A failure to do something is to be treated as occurring when the person in question decided on it. This may be when he does an act inconsistent with doing it. Alternatively, if there is no inconsistent act, time runs from the expiry of the period in which the person might reasonably have been expected to implement the adjustment. The Tribunal has an ability to extend time if it is just and equitable to do so.

94. The Claimant's complaints in relation to unpaid wages/other entitlements are also subject to a three month time limit but time can only be extended where a Tribunal is satisfied that it was not reasonably practicable for the claim to have been submitted in time.

95. Applying the legal principles to its findings of fact, the Tribunal reaches the following conclusions.

Conclusions

96. The Claimant's first complaint is of unfair dismissal. To bring such a complaint the Claimant must have been in the Respondent's employment and not simply a worker. No representations were made on the Respondent's behalf on this point. On the evidence, the Tribunal concludes that the Claimant entered into a contract with the Respondent to provide work personally. There was significant mutuality of obligation in that the Claimant if he wished to remain providing services to the Respondent was expected to work throughout the season. The Respondent offered the Claimant the prospect of work during each season on the basis that (and not until) he was confident that he could keep the Claimant busy with work throughout the season and with every intention of doing so. There was then significant control of the Claimant in where, how and at what times he provided his services. The Claimant was provided with all the equipment necessary to do so. It was recognised that he had an entitlement to paid leave, that notice would have to be given to terminate the arrangement and that the Claimant could be subject to the Respondent's discipline if he did not perform as required. The Claimant was during each of the 2017 and 2018 seasons an employee of the Respondent.

97. Even if, however, continuity of employment was not broken by a temporary cessation of work in between weed killing seasons, the

Claimant had less than two years' continuous employment such that he has no right to claim ordinary unfair dismissal. Indeed, that is not the Claimant's complaint. Instead, the Claimant maintains that he was automatically unfairly dismissed (and as such there is no need for any particular period of qualifying service) because of his assertion of a statutory right. The term 'assertion of a statutory right' is potentially misleading. For instance, an employee who takes statutory holiday and who is then dismissed for having taken that holiday is not dismissed for having asserted a statutory right. To assert a statutory right, it is necessary for the Claimant to have alleged that the Respondent had infringed a right of his. The Claimant does not point to any instance, prior to the termination of his employment, where he says he complained to the Respondent that it had not honoured his rights in respect of holiday or otherwise. The Claimant had requested, had been granted and had taken a period of holiday. Whilst there might have been a lack of clarity regarding payment for this holiday, allegations of that nature emerged after the termination of employment. There was in the circumstances no assertion of a statutory right as required by section 104 of the Employment Rights Act 1996.

98. In any event, to succeed in the complaint the Claimant would have had to have shown that the reason or principal reason for his dismissal was his assertion of a statutory right. He has failed to do so. Indeed, the Tribunal accepts that the Respondent dismissed the Claimant for a reason related to conduct which resulted in a breakdown of the Respondent's trust and confidence in the Claimant. Essentially, the Respondent ran out of patience with the Claimant, the Claimant having been at fault in a job in Bristol which caused the Respondent embarrassment with his local authority client, the Claimant then not returning to work after his holiday on the date he had notified the Respondent and in finally not making himself available for work on 17 July after an arrangement made the previous evening for him to do so. The Tribunal is absolutely clear, from the evidence, that following the Bristol incident the Respondent was willing to give the Claimant another chance. Indeed, even following the Claimant's late return from holiday, the Respondent was willing to offer the Claimant further work. However, the Respondent's patience was exhausted when on 17 July the Claimant was unavailable for the work he had been offered. The Claimant's behaviour in respect of the holiday was a relevant factor in the termination of employment, but the Respondent was upset with the Claimant, not because he had taken a period of holiday or was due payment for it, but because he had applied for specific dates of holiday in circumstances where he ought to have known that he would not be back in time to attend work. The Claimant effectively overran his authorised holiday and was unavailable for work on days he was expected to work. There was no predetermination that he would be dismissed on his return. The Respondent offered the Claimant work on his return. The Claimant's complaint of unfair dismissal must fail.

99. Turning to the Claimant's complaints of disability discrimination, the Tribunal deals firstly with the complaint of discrimination arising from disability where it is said that the Claimant was treated unfavourably by the Respondent not arranging training. There was no unfavourable treatment. The Respondent did arrange and conduct initial training with the Claimant and there is no evidence that any other employee would have been trained any differently. The Claimant furthermore was going to be put through the PA1 and PA6 certification training and if any unfavourable treatment arose out of the Respondent seeking to get the Claimant on the March course late in the day, the failure of the Claimant to be trained at that point in time arose purely out of the course being full. The PTS training was training to be conducted through Weedfree for work on railways which the Claimant would have performed as a worker/employee of Weedfree and not of the Respondent. The Respondent had no responsibility for ensuring that the Claimant had this training, but passed on to him necessary information received from Weedfree in any event.

100. The Claimant's case is based on the Respondent being reluctant to train the Claimant in circumstances where he would need more or a longer period of training, where there would be a greater risk of failure, where the training would therefore cost more money and where there would need to be reasonable adjustments to it. The Tribunal on its findings of facts simply does not accept that the Claimant would have struggled to complete the training in the manner contended for.

101. The Claimant then makes a number of complaints of disability-related harassment. These fail on the Tribunal's factual findings that the unwanted conduct alleged against the Respondent and the Claimants' colleagues simply did not occur. The Tribunal has not found that the Respondent said: "*look at me I hit the jackpot*" with reference to employing the Claimant as a disabled person. The Tribunal rejected the contention that the Respondent shouted at or insulted the Claimant over the telephone when the Claimant was lost. The evidence does not support the Claimant being lost whilst weed spraying or, if he ever did go wrong, going wrong more than anyone else and there is no evidence of any specific shouting or insulting of the Claimant on any such occasion. The Tribunal similarly has found no evidence of the Respondent ignoring the Claimant after he got lost. Again, there is no reason for the Respondent to have been concerned regarding the Claimant's performance at work in this regard. It has been put forward by the Claimant that looking at the WhatsApp messages there can be seen requests, usually for advances of wages, which the Respondent did not respond to quickly or immediately. The Tribunal does not find this to amount to an ignoring of the Claimant and. in any event, there is no basis upon which the Tribunal could conclude or infer that any delay in response had anything at all to do with the Claimant as a disabled person. Finally, the Claimant complains that the Respondent, Nigel Horner and Shane Horner used insults and had a dig at the Claimant for getting the routes wrong. Again,

the Claimant did not often or to any significant extent get his routes wrong and the Tribunal has rejected the Claimant's contentions regarding the insults he says he was subjected to.

102. Nor does the Tribunal conclude in the alternative that these complaints can stand as well-founded complaints of discrimination arising from disability. In this context is said that the Claimant was insulted, abused and ignored because of lapses in his performance and difficulties at work which in themselves arose out of his disabling condition. The Tribunal does not find that there were significant material lapses in performance and where the Claimant did go wrong he went wrong, as other employees went wrong from time to time, because he is human not because of any physical or mental impairment.

103. In any event, as regards complaints of discrimination arising from disability, the Tribunal does not on the basis of its factual findings consider that the Respondent knew or ought reasonably to have known that the Claimant was a disabled person. Nothing in the Claimant's demeanour, work or performance in his job suggested that he was disabled and the Tribunal again has rejected the Claimant's contention that the Respondent was made aware directly by him or indirectly by others that he suffered from dyslexia or any other disabling condition.

104. The Claimant's next claim of disability discrimination alleges a failure to make reasonable adjustments. The Tribunal accepts that the Respondent applied a provision, criterion or practice of requiring all weed sprayers to use maps provided by the Respondent. However, on the facts as found, the Tribunal does not conclude that the Claimant suffered a substantial disadvantage when compared to non-disabled employees in using/reading the maps provided. The evidence is that the Claimant was able to follow the maps and devise his routes as well as anyone in circumstances where everyone would make the occasional mistake but the Claimant in fact was regarded as proficient in this aspect of his role. No duty to make reasonable adjustments in respect of the maps arose. In any event, the Tribunal considers that the Respondent did not have the requisite knowledge either of the Claimant being a disabled person and, more particularly, it did not know nor ought reasonably to have known that the Claimant would suffer a particular disadvantage in the use of maps. Again, the Tribunal has not accepted that the Claimant sought from the Respondent that his routes be marked in a particular colour to assist him in reading them.

105. This complaint is brought to the alternative is one of indirect disability discrimination. Again, the PCP has been found to have been applied to all weeds sprayers. However, there has been no attempt to define a relevant group who suffered the disadvantage of not being able to read the maps. This would have been difficult in the context of employees suffering from dyslexia suffering from it to different degrees and with

different types difficulty created for them. In any event, the Claimant individually, as already found, was not himself disadvantaged by the use of the Respondent's maps.

106. All of the Claimant's complaints of disability discrimination must therefore fail and are dismissed.

107. The Tribunal finally turns to the complaints in respect of specific financial entitlements. The Tribunal noted at the start of the hearing, in discussion with the Claimant's mother, that the holiday pay complaint and the amount sought had been identified at the earlier preliminary hearing and had now been paid to the Claimant. Such complaint was therefore withdrawn. During the course of the proceedings, any complaint in respect of the failure to pay pension contributions in respect of the Claimant was shown by the Respondent to have been rectified such that it was also confirmed that this complaint was withdrawn. That leaves complaints in respect of unauthorised deductions or shortfalls in wages and in respect of unpaid food allowances.

108. As regards the 2017 season the Tribunal has calculated from the records a discrepancy/shortfall in the sum of £177.78 in circumstances where the Tribunal cannot in fact conclude that there has been any shortfall as the Claimant would during the relevant period have also received a number of cash advances of wages. The burden of proof lies on the Claimant to show what was properly payable to him in the relevant period and that there has been an unauthorised deduction. That burden has not been discharged.

109. In any event, the Tribunal considers that any complaint in respect of shortfalls in payment of the 2017 season has been brought outside the requisite time limit. The Claimant's employment in the first season concluded on 10 November 2017. The Claimant's Tribunal complaint was brought only after the termination of his next engagement in July 2018. Whilst there is an open question, which the Tribunal has not had to determine, as to whether or not there was continuity of employment for the purposes of the Employment Rights Act by there being a temporary cessation of work between seasons, that is relevant only in terms of continuity in order to preserve employment protection rights. It does not create or enable it to be concluded that there was a continuing or continuous deduction from wages. In fact, the Claimant was employed under a distinct contract which terminated on 10 November 2017 and thereafter there was no contract of employment in place with him until he recommenced working for the Respondent for the 2018 season with effect from 22 March 2018. This complaint therefore is out of time.

110. The Claimant has maintained that it was not reasonably practicable for the claim to have been brought in time because he did not understand

and, in particular given his disabling impairment, could not understand how he had been paid and that a shortfall had arisen. The Tribunal concludes that the Claimant did not at the end of the 2017 season believe that there had been any shortfall in the wages paid to him and indeed the Tribunal's factual findings regarding the amount paid to him reflect that there is no evident shortfall for that season. Had the Claimant considered that the issue of his wages ought to be looked at, he could have done so by a comparison of the payments he knew he had received as against the wage slips which had been provided. He could have sought the assistance of, in particular, his mother to enable him to perform a reconciliation between the two. That is exactly what he did after the termination of his employment and there is no reason why he could not have done so at an earlier stage. Had there been an unlawful deduction the Tribunal would have been forced to conclude that it had no jurisdiction in the matter. It was reasonably practicable for the claim to have been brought in time.

111. As regards the unpaid wages complaint in respect of the 2018 season, the Tribunal has found on the documentary evidence a shortfall of £749.50 in circumstances where the Tribunal knows this to be an inflated figure in circumstances where the Claimant had also received additional undocumented cash advances. The Tribunal notes that on the Claimant's side a number of cash advances have been reconciled such that a shortfall on the Claimant's side is said to exist of £440. The Tribunal accepts that the Claimant has shown with reference to the documents and the evidence of the reconciliation undertaken by him that there was such a shortfall and the Respondent is ordered to pay to the Claimant the net sum of £440 as a consequence.

112. As regards the payment of food allowances, clearly there was at one stage a contractual agreement that the Claimant would receive payments of £20 per week. It is then for the Respondent to show that it has effectively varied the Claimant's contract of employment. He has, the Tribunal finds, failed to show such variation in circumstances where his evidence has been inconsistent and contradictory and has not enabled the Tribunal to conclude that an agreement was reached with the Claimant that any particular payment ceased as from any particular date in return, for instance, for any particular increase in his hourly rate. The Claimant worked for 14 weeks during the 2018 season during which such payment ought contractually to have been made to him such that the Respondent is further ordered to pay to the Claimant the sum of £280.

113. The Claimant was never during his employment provided with written particulars of his employment. His average gross weekly wage in the 12 week period prior to the termination of his employment has been calculated by the Tribunal in the sum of £365.80. The Tribunal concludes that an award in respect of the Respondent's failure ought to be made on the basis of four weeks' pay. This is in circumstances where there was a

complete failure to provide written particulars, clearly where the failure to provide the particulars has been directly relevant to the Claimant's complaints in these proceedings and a significant amount of evidence the Tribunal has had to hear and disentangle to ascertain the Claimant's true entitlements. The Tribunal therefore orders the Respondent pay to the Claimant the further sum of £1463.20 pursuant to Section 38 of the Employment Act 2002.

Employment Judge Maidment

Date 23 May 2019