EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Mr G Smith

Respondents: (1) Pimlico Plumbers
(2) Mr C Mullins

HELD AT: London South Tribunals

ON: 05, 06 and 07 June 2019

Before: Employment Judge Freer
Members: Ms A Donaldson
Mr H Shanks

Appearances
For the Claimant: Mr D Stephenson, Counsel
For the Respondent: Mr A Smith, Counsel

REASONS FOR JUDGMENT

1. These are the written reasons for the Tribunal's unanimous judgment that the Claimant's claims of disability discrimination are not well founded. Oral reasons were given at the hearing and these written reasons are produced at the request of the Claimant.

2. This is a claim by Mr Smith against Pimlico Plumbers and Mr Charlie Mullins and is the last hearing at first instance of a claim that commenced back in 2011 and is known, particularly in legal circles, as one of a number of recent high-profile cases addressing the issue of employment status.

3. The claim before this Tribunal is one of disability discrimination.

4. It has been accepted by the Respondents that the Claimant was a disabled person at the material times pursuant to section 6 of the Equality Act 2010 with the condition of a heart complaint.

5. The list of issues has been a matter of both discussion between the parties and decision by this Tribunal to the extent that the Tribunal was presented on day three of this three day case with a final version now agreed between the parties save for one disputed element as set out at paragraph 12.1 of that document, which the parties agreed to address in closing submissions.

6. The Tribunal has received oral and written evidence from the Claimant, Mr Smith, and Mr Dominic Ceraldi, former Human Resources Manager of the Respondent.

7. The Tribunal has been referred to witness statements prepared in respect of earlier hearings and also a witness statement prepared for this hearing by Mr Charlie Mullins, founder of Pimlico Plumbers, who unfortunately was unable to attend at this hearing due to illness. The Tribunal has placed weight on that statement as appropriate.

8. The Tribunal has received a bundle of documents relating to liability comprising 405 pages and a bundle relating to compensation comprising 194 pages. It was agreed by the parties that the Tribunal will determine liability in the first instance and then, as appropriate, determine any remedy issues.

9. The Tribunal has been referred to earlier appellate decisions in this case on the employment status issue, but only in respect of established findings of fact.

A concise statement of the relevant law

Direct discrimination

10. Section 13 of the Equality Act 2010 provides:

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

11. On comparison between the Claimant and the case of the appropriate comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23).

12. A Tribunal may not make findings of direct discrimination save in respect of matters found in the originating application. A Tribunal should not extend the range of complaints of its own motion (**Chapman –v- Simon** [1994] IRLR 124, CA, per Peter Gibson LJ at para 42).

13. The Claimant relies upon a constructive dismissal as the act of less favourable treatment.

14. The Claimant relies upon a breach of both an express and implied term.

15. The law relating to constructive dismissal is well-established and requires generally four conditions to be present:

    - There must be a breach of contract by the employer;

    - That breach (or series of incidents) must amount to a fundamental breach;

- The employee must leave employment as a consequence of that breach (whether express or repudiatory); and

- The employee must not affirm the breach

(see **Western Excavating (EEC) Ltd –v- Sharp** [1978] IRLR 27, CA)

16. The common law relating to contractual terms and breach of contract is also well-established. A breach of an express or implied term must be considered objectively (see **BG plc –v- Brien** [2001] IRLR 496, EAT).

17. In the case of **Malik –v- The Bank of Credit and Commerce International SA** [1997] IRLR 462, HL, confirmed that the implied term of mutual trust and confidence is implied into every contract of employment. With regard to a breach of that implied term Lord Steyn stated: “The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee” (see also **Omilaju –v- Waltham Forest London Borough Council** [2005] ICR 481, CA).

18. An employee’s subjective belief as to how they believe they have been treated is not relevant, even if genuinely held (see **Omilaju**).

19. With regard to a ‘final straw’ constructive dismissal, the Court of Appeal in **Omilaju** held that a final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. There is no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer.

20. The Court of Appeal in **Cantor Fitzgerald -v- Callaghan** [1999] ICR 639 addressed the issue of pay and constructive dismissal:

    “. . . the question whether non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment, depends on the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration, and his deliberate refusal to do so. Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events. If so, it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the Court might be driven to conclude that the breach or breaches were indeed repudiatory”.

Discrimination arising from disability

21. Section 15 of the Equality Act 2010 provides:

“(1) A person (A) discriminates against a disabled person (B) if -
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

22. In **Williams –v- Trustees of Swansea University Pension & Assurance Scheme** [2017] EWCA 1008 (Civ) the Court of Appeal endorsed the decision of the EAT, which confirmed that ‘unfavourable treatment’ was different from ‘less favourable treatment’ and is to be measured in an objective sense.

23. When considering a proportionate means of achieving a legitimate aim, the Tribunal will assess whether the aim is legal and non-discriminatory, and one that represents a real, objective consideration and if the aim is legitimate, whether the means of achieving it is proportionate including whether it is appropriate and necessary in all the circumstances.

24. As confirmed in the Supreme Court in **Homer –v- Chief Constable of West Yorkshire Police** [2012] UKSC 15:

“. . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. . . . First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?”

Reasonable adjustments

25. Sections 20 to 21 of the Equality Act 2010 set out provisions relating to the duty to make reasonable adjustments:

“(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.

(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.

21 Failure to comply with duty

A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

26. The applicable schedule is Schedule 8,

27. The Equality and Human Rights Commission has produced a Code of Practice on Employment (2011) ("the Equality Code"). The Code of Practice does not impose legal obligations, but provides instructive guidance. The Tribunal has referred itself to the Code as appropriate. For example, the Equality Act 2010 no longer lists factors to be considered when determining reasonableness, but these factors appear in the Code of Practice (paragraph 6.28). However, it will not be an error of law to fail to consider any of those factors. All the relevant circumstances should be considered.

28. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination (**Archibald v Fife Council** [2004] IRLR 651, HL).

29. The test of reasonableness is an objective one.

30. A failure to consult is not of itself a failure to make a reasonable adjustment. It is necessary to identify the adjustment step/s that should be taken. (see **Tarbuck -v- Sainsburys Supermarkets** [2006] IRLR 664 and **H M Prison Service & Johnson** [2007] IRLR 951, EAT).

31. The correct approach to assessing reasonable adjustments is addressed in **Smith –v- Churchills Stairlifts plc** [2006] IRLR 41; **Project Management**

Institute –v- Latif [2007] IRLR 579; and **Environment Agency –v- Rowan** [2008] IRLR 20.

32. In **Smith**, the comparative exercise required by what was then s.6(1) of the DDA was considered by the Court of Appeal having regard to the speeches contained in the judgment of the House of Lords in **Archibald**. Maurice Kay LJ stated:

   “. . . Notwithstanding the differences of language, it would be inappropriate to discern a significant difference of approach in these speeches. . . it is apparent from each of the speeches in **Archibald** that the proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements”.

33. The EAT in **Leeds Teaching Hospital NHS Trust –v- Foster** [2011] EqLR 1075 emphasised that when considering whether an adjustment is ‘reasonable’, it is sufficient for a Tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage and that there does not have to be a 'good' or 'real' prospect of that occurring.

34. With regard to knowledge the EAT in **Secretary of State for the Department of Work and Pensions v Alam** [2009] UKEAT 0242/09 held that the correct statutory construction of s 4A(3)(b) involved asking two questions: (1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then (2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is also ‘no’, there is no duty to make reasonable adjustments.

35. The Court of Appeal in **Matuszowicz –V- Kingston Upon Hull City Council** [2009] IRLR 288 held that there may breaches of the duty to make reasonable adjustments “due to lack of diligence, or competence, or any reason other than conscious refusal”.

Burden of Proof

36. The burden of proof reversal provisions in the Equality Act 2010 are contained in section 136:

   “(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”.

37. Guidance is provided in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, on a balance of probabilities there must be facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council** [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If there is a *prima facie* case, then the burden of proof falls upon the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

38. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' (see **Nagarajan –v- London Regional Transport** [1999] IRLR 573, HL; and **Igen Ltd –v- Wong**, as above).

39. The Court of Appeal in **Madarassy** above, held that the burden of proof does not fall upon the employer simply on there being established a difference in status (e.g. sex or race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.

40. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were, and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (*per* Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL).

41. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC confirmed:

    "The points made by the Court of Appeal about the effect of the statute in these two cases [*Igen* and *Madarassy*] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other."

42. The approach set out in **Hewage** was endorsed and applied to the Equality Act 2010 burden of proof reversal provisions by the Court of Appeal in **Ayodele –v- Citylink** [2017] EWCA (Civ) 1913.

43. The Tribunal has also taken fully into account all the authorities cited in the submissions from the parties.

Findings of fact and associated conclusions

44. The Claimant worked for the First Respondent as a Plumber from 25 August 2005.

45. It has been established that in law and fact the Claimant was not employed under a contract of employment but was a worker under the extended definition of employment contained in the Equality Act.

46. No events of any material relevance to the claim before this Tribunal arose until regrettably the Claimant suffered a cardiac arrest on 05 January 2011.

47. Under the First Respondent's working practices, there would be contact between the Claimant and the First Respondent's call centre to arrange work. The Claimant would phone the First Respondent's call centre to make the arrangements.

48. At the time of his cardiac arrest the Claimant telephoned the First Respondent's Call Centre to inform it that he was unwell and going to Queen Mary's Hospital in Sidcup. He was transferred to Queen Elizabeth Hospital with a diagnosed heart attack and the Claimant's wife telephoned the Respondent that day and explained what had happened and that the Claimant was in hospital with possible heart problems.

49. The Claimant had an immediate period in hospital and was medically advised to take six to eight weeks to recover. However, on 31 January 2011 he returned to work of his own volition after only three weeks of absence. The Claimant called the call-centre to inform the First Respondent that he was available for work again.

50. On 21 April 2011 the Claimant telephoned Mr Ceraldi directly in his capacity as HR Manager. In that conversation the Claimant requested to work a three-day week because of health reasons.

51. The Tribunal finds as fact that the Claimant said in particular that he was having difficulty lifting materials and supplies. The Tribunal finds that Mr Ceraldi stated that a fixed three-day week would not normally be suitable and offered to provide the Claimant with an apprentice to give assistance.

52. After the telephone conversation and on the same date, the Claimant sent an e-mail to Mr Ceraldi timed at 19.57 (page 189): "Further to our conversation today I am concerned that my request for reduced hours is refused. You offered to provide me with an apprentice to give assistance if needed. This is not an acceptable solution given my current health condition. As you are aware I requested to reduce my hours for health reasons. I recently suffered a mild cardiac arrest (heart attack) and I returned to work approximately one month later. I am still under the care of Queen Elizabeth Hospital who are monitoring my condition. The hospital doctor was surprised that I returned to work so soon. I was advised to have a minimum of 6 - 8 weeks off work. I am on medication

for the rest of my life to control my heart condition. I am finding it stressful to continue the hours that I am currently working. As I am self-employed I wish to work for Pimlico plumbing 3 days per week preferably Monday to Wednesday. I am flexible on the days if and when necessary. I would ask you to reconsider my request and confirm that it is agreed. If you wish to discuss further please call or email me. I hope to hear from you soon".

53. Mr Ceraldi went on annual leave on 22 April 2011 and returned on 03 May.

54. On 03 May 2011 the Claimant saw his GP and was signed off work for two weeks with the described condition of 'stress'.

55. The sections of the Fitness for Work Certificate relating to potential beneficial employer's action and 'comments including 'functional effects of your condition' were left blank (page 335).

56. The Tribunal finds that the GP Fitness for Work Statement was not provided to the Respondent at that time. The Claimant did not return to work to hand it over personally and there is no evidence of a letter or an e-mail being sent enclosing or attaching a copy of the certificate.

57. Later in time on 03 May 2011, Mr Ceraldi sent a reply to the Claimant's e-mail of 21 April. This reply was sent by both e-mail and registered post. The e-mail stated: "I have attached a letter in response to your email. I have also posted the original version via registered delivery which should be with you tomorrow. If you have any queries regarding the content of the letter, please do not hesitate to contact me directly".

58. The letter at page 190 of the bundle said as follows: "In regards to your request for a reduced working week, the Company has a duty to enquire into the reasons for this. I request that you obtain and provided us with a letter from your General Practitioner, detailing your health problems and whether or not they consider them to be a disability, and any recommendations they make in regards to your health and safety and your physical capability to undertake work. In the interests of your health and safety, any future work will be suspended until this matter is resolved. In the interim, would you also please arrange for the return of all Company property, including; Vehicle, Company Uniform, Mobile Telephone, Identification Badges, Blue Box and Working Practice Manual, Sales Invoice Book, Purchase Order Book and any related paperwork with details of Pimlico Plumber's customers".

59. There was no immediate response from the Claimant.

60. Mr Ceraldi learned, probably from Mr Ian Grover, that the MOT on the Respondent's van being used by the Claimant was due to expire on 04 May 2011. The Tribunal has seen the MOT certificate demonstrating that it did indeed expire on that date.

61. The Claimant suggested in oral evidence that registration plates could have been changed between First Respondent vans, but the Tribunal has received

no corroborative evidence of that generally nor in respect of the Claimant's own van. The Tribunal finds as fact that this was the MOT document for the Claimant's van at the time.

62. On 04 May 2011 Mr Ceraldi e-mailed the Claimant (page 191): "In regards to the letter and email I sent yesterday, we need to arrange to pick up the Company vehicle today. The MOT certificate is due to expire today and needs to be renewed. If I do not hear from you before 2pm, we will arrange recovery of the vehicle from your address. Please can you confirm you have received this email".

63. The Claimant accepted that this communication went to his personal e-mail address and its access was not contingent upon the Claimant's access to any work intranet system.

64. The Tribunal accepts Mr Ceraldi's evidence that he telephoned the Claimant that day with no success. He did the same on 05 May 2011, again with no success, so Mr Grover attended at the Claimant's house and retrieved the van. The Tribunal finds as fact that this occurred on 05 May 2011.

65. The Claimant read the letter of 03 May 2011 when he received the recorded delivery version, but could not recall on which day he received it. When he did receive it, the Claimant considered that he had, in his words, "been dismissed".

66. He sought legal advice and his solicitors wrote to the Respondents on 05 May 2011 at 20.43. That letter confirms that the van was removed from the Claimant's possession at around 5.00pm that day. That letter also specifically refers to the fact that the Claimant considered his employment relationship with the Respondent to be at an end.

67. The Respondent company instructed solicitors and there was subsequent correspondence between the lawyers. The Tribunal has been careful to consider the terms of the early correspondence in particular and also a letter from the Claimant's solicitors dated 15 June 2011, which included a copy of the 03 May 2011 GP Statement.

68. Mr Ceraldi wrote again to the Claimant on 31 May 2011 (page 195): "I refer to my letter sent to you on Tuesday 3rd May 2010, asking you to return the mobile phone (including the sim card and charger) and vehicle keys. You should return these items without delay as you are only permitted to use them for business purposes and you are currently not undertaking any work for the company. You may rehire these items at such times as you are provided with work. These items are rented by you from the company and as such are chargeable to you if not returned. The items of not been received within three days of the date of this letter, we will have no option but to charge you for the cost of these items".

69. The Claimant then pursued this matter at the employment tribunal.

70. With regard to the conversation between Mr Ceraldi and the Claimant on 21 April 2011 the Tribunal finds as fact that the Claimant believed that that his

request for a reduced working week had been refused. However, the Tribunal finds as fact that Mr Ceraldi stated that it would not normally be suitable but had not outright refused the possibility.

71. The Tribunal finds that: Mr Ceraldi did not consider he had the authority at the time to make a decision on reduced hours; the Claimant had phoned him direct, so Mr Ceraldi had not spoken to anyone prior to the call about the possibility of reduced hours; although an express rebuttal of the allegation was not made in the letter of 03 May 2011 a refusal of reduced hours is inconsistent with the terms of that letter; the Claimant considered that the terms of the letter of 03 May 2011 were in themselves a refusal of reduced hours, which on a plain reading the Tribunal finds that they were not; although there is not a direct rebuttal of the allegation in the solicitor's letters the Tribunal considers that the focus of the Respondent's solicitors was upon making the point that suspension was put in place until the Claimant's state of health could be ascertained.

72. For those reasons the Tribunal concludes on balance that Mr Ceraldi did not refuse the Claimant's request for a reduced working week as alleged.

73. Also, even if the Tribunal is incorrect in drawing that conclusion, the Tribunal finds the subsequent letter of 03 May 2011 does not convey a refusal but rather a suspension of work pending medical information.

74. The Tribunal concludes that Mr Ceraldi wanted medical input so he could evaluate the next steps, such as a potential risk assessment or reasonable adjustments.

75. The Claimant confirmed in his evidence to the Tribunal that:

76. The Claimant had held no discussions with Mr Ceraldi regarding the Claimant's health condition, and made no request to modify his working arrangements until 21 April 2011;

77. The matters raised in the Claimant's 21 April 2011 e-mail could reasonably have given Mr Ceraldi cause for concern in respect of health and safety risks;

78. In the circumstances, it was reasonable for Mr Ceraldi and the First Respondent generally to view medical information regarding the Claimant's health condition and any recommendations from a qualified medical practitioner regarding the Claimant's fitness for work;

79. It would have been straightforward for the Claimant to ask for this information from his GP, the Claimant would have done this if he had genuinely wanted to continue working for the First Respondent and would have engaged with Mr Ceraldi in a constructive manner;

80. The Claimant confirmed it was reasonable for Mr Ceraldi and the First Respondent to defer making any decision in respect of his ongoing working arrangements until they had received the information requested in the letter

from Mr Ceraldi of 03 May 2011 and had a reasonable opportunity to consider it;

81. There was nothing unreasonable or unlawful about the First Respondent's failure to provide the Claimant with work for the period of time covered by his Fitness for Work Statement - 03 to 17 May 2011;

82. All of the items referred to in the 03 May letter were the First Respondent's property;

83. The First Respondent was legitimately entitled to recover its own property;

84. The First Respondent was legitimately entitled to recover the company van from the Claimant's driveway on 05 May 2011;

85. The First Respondent had left open the option for the Claimant to return to work;

86. A three-day working week had never been identified by any medical practitioner as an adjustment that the Claimant needed, nor as one which would have been appropriate at the relevant time;

87. In terms of the Claimant's return to work following the expiry of his 03 May 2011 medical certificate, by 13 or 14 May 2011 he had already purchased another van for alternative work and towards the end of May 2011 he had started on his new business venture;

88. It was the Claimant's written evidence prepared in respect of remedy that: "Since the dismissal on 3 May 2011 I have worked full-time, five days per week for the past eight years", although work was initially hard to come by. It was also recorded in the medical report of Dr Richard Cooke, Consultant Cardiologist, prepared on 01 April 2019 and under the heading: 'Present work status': "Working as a self-employed plumber and heating engineer. Full-time. Mr Smith said he had no problems working. In his statement he says that he has to pace himself and his son lift heavy objects".

89. The Tribunal was referred to the Company Handbook on terminations (p222) and there was a cross-reference in evidence to the company items to be returned as set out in the letter of 03 May.

90. This gave the Tribunal some pause for thought given that Mr Ceraldi said the equipment would not necessarily have been requested if, for example, a worker had been absent through annual leave, but he did confirm that it would have been likely in circumstances of unavailability set out in the January 2012 witness statement of Mr Scott Mullins at para 38. On balance the Tribunal accepts Mr Ceraldi's evidence for the return of the property as set out in paragraph 32 of his witness statement.

91. The Tribunal has heard evidence on MOT procedure. The Claimant said it is organised two weeks in advance, whereas Mr Ceraldi said it was organised days in advance. The Tribunal concludes that there was little to

suggest that the issue was anything other than genuine, particularly given the terms of the MOT certificate.

92. There was an issue over the nature of a conversation between Mr Ceraldi and Mr Mullins on 03 May 2011. As the Tribunal understands it, it is argued that Mr Mullins had somehow influenced Mr Ceraldi to make the decisions he did. There was no evidence to support this contention and it was denied by Mr Ceraldi. It has therefore not been made out as fact. But even if true, the letter was of suspension pending medical input and so nothing material turns it.

93. It has been further suggested that Mr Mullins also influenced Mr Ceraldi to somehow procure the Claimant's termination of employment. Mr Ceraldi denied there was any input and gave his evidence as an independent person, being no longer employment by the Respondent company and also having left employment on less than good terms.

94. The Claimant's only evidence was his statement in oral evidence that Mr Mullins was involved in everything in the Company and nothing happens without his knowledge. However, the Tribunal concludes that general statement to be highly improbable given the size of the organisation and its activities.

95. The Tribunal concludes that there was no influence by Mr Mullins to procure the Claimant's termination of employment.

96. On the issues, although the Claimant's case is pursued as a constructive dismissal, for completeness the Tribunal concludes on balance that there was no express dismissal of the Claimant by the First Respondent. Such a conclusion is inconsistent with the terms of the 03 May letter and the surrounding facts as set out above.

97. The Claimant argues constructive dismissal by way of a breach of an express term and also a breach of the implied term of mutual trust and confidence.

98. The argument on a breach of an express term is a little difficult to follow. The express term as set out in the Claimant's written submissions appears to be based upon "contractual obligations [for the Claimant] to work a minimum of 40 hours per week, i.e. he had to be available to take on work for a minimum of 40 hours, the First Respondent did not have to offer him work if there was none to offer him, and he was not obliged to take on any particular assignment on any particular day if he was unable or unwell for any reason to do so".

99. The Tribunal was referred to paragraph 40 of the Supreme Court decision on the employment status issue which states: "The Court of Appeal construed this finding, in my view legitimately, as being that, if by contrast it did have enough work to offer Mr Smith, Pimlico would be obliged to offer it to him. In other words Pimlico's contractual obligation was to offer work to Mr Smith but only if it was available; indeed, if the work was available, it would seem hard to understand why in the normal course of events Pimlico would not be content to

be obliged to offer it to him. Mr Smith's contractual obligation by contrast was in principle to keep himself available to work for up to 40 hours on five days each week on such assignments as Pimlico might offer to him. But his contractual obligation was without prejudice to his entitlement to decline a particular assignment in the light (for example) of its location; and of course it did not preclude Pimlico from electing, as seems to have occurred, not to insist on his compliance with the obligation in any event"

100. The obligations set out by the Supreme Court would occur, as it says, in the normal course of events. The obligations identified are mutual, as is necessary for a contract to be in existence when the Claimant was not actually working. However, the reality of the circumstances in this case is that the Claimant had signed off work through sickness from 03 May up to the time he considered the employment relationship had come to an end. The Claimant was in no position to keep himself available for up to 40 hours a week in accordance with his part of the obligations. The First Respondent was aware of that position.

101. The Tribunal concludes that it would be entirely artificial for the First Respondent to be under an obligation to offer work to the Claimant when it is aware that for genuine health reasons he is unable to do it. That would not be in the normal course of events. Indeed, an employer offering work during periods of known illness may in certain circumstances be vulnerable to accusations of disability-related harassment.

102. In the circumstances the Tribunal concludes that there was no breach, and certainly no fundamental breach, by the Respondent of the express term relied upon.

103. With regard to the implied term of mutual trust and confidence, the Tribunal has received argument on whether or not such an implied term applies to the 'contract personally to do work' element of the Equality Act 2010 extended definition of 'employment', which is applicable in the Claimant's case.

104. The Tribunal prefers on balance the arguments by the Respondent that there is no presumption of a universal application of such an implied term to contracts other than contracts of employment, as issues regarding the necessity for implication in those other circumstances must be fact sensitive.

105. However, the Tribunal concludes that it does not need to get drawn into such matters because even on the Claimant's argument all roads lead to **Malik**, which has the requirement that the employer must act "without reasonable and proper cause". In the circumstances of this case the Tribunal concludes that given the terms of the Claimant's e-mail of 21 April 2011, the Mr Ceraldi did have reasonable and proper cause for the actions set out in the letter of 03 May 2011. There was no breach of the implied term.

106. On that basis, the section 13 and section 15 claims fall away as they both rely upon the occurrence of a dismissal.

107. If the Tribunal is wrong on that, it concludes that Mr Ceraldi did not commit an act of direct discrimination. On the Claimant's own evidence the reason for Mr Ceraldi's actions were for non-discriminatory reasons. The Tribunal also reaches that conclusion. The **Shamoon** 'reason why' Mr Ceraldi sent the terms of the letter of 03 May 2011 was for considerations of health and safety for both the Claimant and the Respondent. It was in no sense whatsoever "because of" the Claimant's disability.

108. With regard to discrimination arising from disability, the Claimant was incapable of working at all at the material times due to sickness with the condition of stress. Therefore, suspending his work pending medical confirmation does not amount to unfavourable treatment in the Tribunal's conclusion when objectively considered.

109. Further, even if the Claimant's suspension did amount to unfavourable treatment arising in consequence of the Claimant's heart condition, the Respondent's justification reasons are made out in the circumstances of the case and therefore this claim too would be unsuccessful.

110. The Claimant's suspension was a proportionate means of achieving a legitimate aim.

111. It was a legitimate aim to obtain a clearer understanding of the Claimant's medical condition and its impact, or potential impact, on the Claimant's ability to carry out work for the First Respondent and/or to ensure that the Claimant was not endangering, or potentially endangering, himself and/or others by continuing to work in circumstances where his fitness and/or capacity to carry out work was unclear.

112. The Tribunal concludes that suspending the Claimant from work while medical enquiries were being undertaken was a proportionate means of achieving that aim. Indeed, it is difficult to contemplate what else might reasonably have been done.

113. As stated above, the Claimant accepted under cross-examination that it was reasonable for the First Respondent to seek medical information and recommendations in respect of his situation and to defer making any decisions in respect of his future working arrangement until it had a reasonable opportunity to review and consider that information and advice. The Claimant also accepted in evidence that in his view it was lawful for the First Respondent not to have offered him work in circumstances where he was signed off as unfit to work, as was the case. The Tribunal agrees.

114. With regard to the complaint of a failure to make reasonable adjustments, the Claimant confirmed that the claim was only in respect of a duty arising as from 21 April 2011.

115. The Tribunal concludes as a matter of fact that there was no provision, criterion or practice on the First Respondent as set out as 'pcp's' at paragraphs 11.1 to 11.5 in the list of issues.

116. The Claimant had worked for 20 hours a week from his return to work in February 2011 without censure or comment by the Respondent.

117. There was no material evidence that there was a pcp of "regular and effective service to avoid being suspended or dismissed". The Claimant had been absent from work through illness, and presumably annual leave, without negative repercussions.

118. The Claimant argued that the First Respondent pressured him into returning to work because the First Respondent wanted use of the van. However, the Claimant could have removed his tools from the van so it could be used by anyone else, just as he did immediately before the van was removed at the time of the MOT renewal. The Tribunal finds on balance that the Claimant wished to return to work for his own financial reasons.

119. Even if the 'pcps' are made out and the Claimant could not comply due to his disability and this placed him at a substantial disadvantage as alleged compared to non-disabled persons, the Tribunal concludes that the Respondent has not failed in its duty to make reasonable adjustments.

120. The Claimant was offered an apprentice to assist him, he had not requested time off for rehabilitation or treatment, and the key decision of reduced hours and/or flexible working which addresses the majority of the alleged pcp's and associated disadvantages was pending reasonable medical information.

121. The Tribunal agrees with the Respondent's argument that the issue of reasonableness must include reasonable time for enquiries in respect of the extent of the Claimant's health problems and appropriate adjustments by those under which the duty falls. For example, the Code of Practice lists factors which might be taken into account when deciding if a step is reasonable, which includes whether taking any particular step would be effective in preventing the disadvantage and the practicality of the step. Clearly the First Respondent would not reasonably have been in a position to make that assessment until it had received medical practitioner input.

122. Put another way, the First Respondent would not know, nor ought reasonably to have known, of the extent of the Claimant's health condition and consequential disadvantage to the Claimant until it had a reasonable opportunity for that medical information reasonably to be obtained. The Claimant did not engage with that process and considered that his working relationship was at an end within a day of receiving the 03 May letter.

123. The Tribunal concludes that this claim is also unsuccessful and that all of the Claimant's claims are not well-founded.

Employment Judge Freer
Date: 12 September 2019