THE EMPLOYMENT TRIBUNALS

Claimant: **Mr R Craggs**

Respondent: **BMS Electrical Services Limited**

Heard at: **North Shields Hearing Centre** **On: 24th – 26th June; 2nd – 4th September & 18th September 2019**

Before: **Employment Judge Martin**

Members: **Mr R Dobson**
Mr S Moules

Representation:

Claimant: **In Person and thereafter from 2nd September represented by**
Mr Kirfoot (Counsel)

Respondent: **Mr Ridgeway (Employment Consultant)**

RESERVED JUDGMENT

1. The claimant's complaint of breach of the Working Time Regulations (Holiday Pay) is well-founded and the claimant is awarded the sum of £1,114.40.

2. The claimant's complaint of unfair dismissal is not well-founded and is hereby dismissed

3. The claimant's complaint of disability discrimination on the basis of unfavourable treatment from something arising in consequence of his disability is well-founded. A remedies hearing will be convened with a time estimate of half a day.

REASONS

Preamble

1. In the light of the respondent's written submissions and the Tribunal's concerns about the conduct of the respondent and the respondent's representative, we find it necessary to make some comments at the outset of this judgment. We do this in the context of the over-riding objective which is set out at Rule 2 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The overriding objective requires us to deal with cases fairly and justly insofar as practicable avoiding delay, saving expense, dealing with cases which are proportionate to the complexity and importance of the matter; and ensuring parties are on an equal footing. It further states that the parties and their representatives shall assist the tribunal to further the overriding objective, in particular, they shall co-operate generally with each other and the Tribunal. This case was originally listed for a three day hearing. It has taken over six days to be heard. It should have been completed within three to four days. We are concerned that, as a result of the delays in this case, other cases would not have been listed at a time when there is a substantial backlog in the hearing of cases in this region.

2. The respondent's representative on behalf of the respondent made two applications: - firstly, to strike out the claimant's case part way through the hearing and secondly a submission of no case to answer; both of those applications were time-consuming and overwhelming rejected by this Tribunal.

3. The way the respondent and their representative conducted the proceedings involved a number of late (sometimes very late) applications to submit documents; misleading documents having to be removed from the bundle; the claimant's cross-examination took substantially longer because the respondent appeared to be conducting parallel investigations into the claimant's evidence. Further on several occasions, during the course of the hearing, the respondent's representative raised allegations of bias against this Tribunal, one of which was then retracted and for which he apologised.

4. Irrespective of any concerns that this Tribunal may have had about these matters, it is has gone on to consider the claims and issues in this case and determine those matters solely in accordance with their Judicial Oaths.

Introduction

5. For the first three days of the hearing the claimant represented himself, thereafter for the last three days of the hearing the claimant was represented by Mr Kirfoot. Mr Ridgeway represented the respondent throughout. The claimant gave evidence on his own behalf. Ms Nicola Samuels, Trainee Manager; Mr Ian Derbyshire Sales Manager; Mr Stephen Greenwood, Electrician; Mr William Storey and Mr Gary Samuels Co-Directors of the respondent company all gave evidence on behalf of the respondent.

6. The Tribunal were provided with an agreed bundle of documents, although further documents were added to the bundle as referred to above during the course of the hearing.

The Law

7. The law which the Tribunal considered was as follows:

8. **Regulation 13 of the Working Time Regulations 1998**. A worker is entitled to four weeks annual leave in each leave year.

9. **Regulation 13A**. A worker is entitled in each leave year to a period of additional leave in any leave year after 1st April 2009 of 1.6 weeks.

10. **Regulation 14(2) of the Working Time Regulations 1998.** "Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave."

11. **Section 95(1) of the Employment Rights Act 1996**……an employee is dismissed by his employer if

    (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

12. **Section 6(1) of the Equality Act 2010** "a person (P) has a disability if :- (a) P has a physical or mental impairment and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A more detailed definition of disability under the Act is set out at schedule 1 to the Act. It states that long term effects are where they have lasted for at least twelve months and/or are likely to last for twelve months. It goes on at paragraph 5 to look at the effect of medical treatment and how an impairment is to be treated as having a substantial effect on the ability of the person concerned to carry out normal day to day activities if (a) measures are being taken to treat or correct it and (b) but for that it would be likely to have that effect.

13. **Section 15 of the Equality Act 2010.** "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.

    Subsection 1 does not apply if A shows that A did not know, or could not reasonably have been expected to know, that B had a disability.

14**.** **The Equality and Human Rights Commission Code of Practice 2015 (EHRC).** The Tribunal is obliged to and did take into account and was referred to the Code by both parties' representatives. In particular paragraphs on the guidance on disability and paragraphs 4.9, 5.14, 5.15 and 5.17.

15. The Tribunal was referred to a number of cases by both parties as referred to below.

16. The case of Bear Scotland Limited v Fulton and Others [UKEAT S/0047/13], which held that payments for overtime which a worker is required to work but which an employer is not required to offer (non-guaranteed overtime) is to be treated as "normal remuneration purposes for the purposes of the Working Time Directive and the Working Time Regulations should be interpreted on that basis. It held that non-guaranteed overtime should be taken into account when calculating holiday pay for the purposes of the minimum four week statutory leave required by the directive.

17. The well-known case of Weston Excavating Limited v Sharp 1978 ICR221, which held that the tribunal had to consider whether there was a fundamental breach of contract on the part of the employer, which went to the root of the contract and entitled the employee to treat the contract as at an end; secondly whether the employee left in response to that breach and lastly did not waive his right to do so in the meantime.

18. The case of Omilaju v Waltham Forest London Borough Council (2) 2005 ICR481 provided some guidance on breaches of the implied term of trust and confidence and "last straw" dismissals at paragraphs 14 to 22. The Court of Appeal held that the repudiatory conduct may consist of a series of acts or incidents some of them perhaps quite trivial, which culminatively amount to a repudiatory breach of the implied term of trust and confidence..."a final straw", not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality of the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term".

19. The case of Kaur v Leeds Teaching Hospitals 2019 ICR1 in particular we were referred to paragraph 5 thereof which cited Omilaju with approval. That case held at paragraph 45 "if the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the Omilaju test), it should not normally matter whether it had crossed the Malik threshold at some earlier stage; even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so".

20. The case of GAB ROBINS (UK) Limited v Triggs UKEAT, which held that a band of reasonable responses test should not apply to the last straw conduct if it is the grievance procedure.

21. In the case of Morrow v Safeway Stores Plc 2002 IRLR9 the EAT held that, once a tribunal has established that the relevant contractual term exists and that a breach of contract has occurred, it must consider whether the breach was fundamental. This is essentially a question of fact and degree and a key factor for the tribunal to take into account is the effect the breach has had on the employee concerned. Where an employee breaches the implied term of trust and confidence the breach is inevitably fundamental.

22. In the case of Bliss v South East Thames Regional Health Authority 187ICR700 the Court of Appeal held that it makes no difference to the issue of whether there

has been a fundamental breach that the employer did not intend to end the contract.

23. In the case of Wadham Stringer Commercials (London) Limited v Brown 1993IRLR46, the EAT held that circumstances that induced the employer to act in breach of contract are irrelevant to the issue of whether a fundamental breach has occurred.

24. In the case of Leeds Dental Team Limited v Rose 2014ICR94, the EAT held that the concept of reasonable behaviour by either party should not enter the analysis; this means an employee is not justified in leaving employment and claiming constructive unfair dismissal merely because the employer has acted unreasonably.

25. In the case of Pnaiser v NHS England and Another 2016IRLR170, the EAT held that the tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused the treatment. Finally, it must determine whether the reason was something arising in consequence of the claimant's disability.

26. In the case of Williams v Trustees of Swansea University Pension & Assurance Scheme 2019 1WLR93, the Supreme Court held that section 15 raises two questions. What was the relevant treatment and was it unfavourable to the claimant. It goes on to say that the word "unfavourably" is broadly analogous to concepts such as "disadvantage" or "detriment". That case held that it is a relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under section 15 of the act.

27. In the case of Rayner v Turning Point UKEAT/0397/10, the EAT held that where a condition of anxiety and depression is diagnosed by a GP which causes the GP to advise the patient to refrain from work, that in itself is evidence of a substantial effect on day to day activities. The claimant would have been at work and his day to day activities include going to work. If he is medically advised to abstain and is certified as such so as to draw benefits and sick pay from his employer, that is capable of being a substantial effect on day to day activities. It is of course a matter of fact for the employment tribunal to determine. It went on to indicate that "the GP treating a condition such as depression over a long period of time is in a very strong position to give an authoritive view of materials relevant to the assessment of disability than under the act.

28. In the case Shamoon v Chief Constable of Royal Ulster Constabulary 2003 ICR 337, it was held that detriment involves treatment of such a kind that a reasonable worker would or might see as being to their detriment, amounting to something more than an unjustified sense of grievance; there is no need for the disadvantage to have physical or economic consequences.

29. In the case of Swift v Chief Constable of Wiltshire Constabulary 2004 IRLR 540, the EAT held that the tribunal should ask four questions. Firstly, was there at some stage an impairment which had a substantial adverse effect on the applicant's ability to carry out normal day to day activities? Secondly did the

impairment cease to have a substantial adverse effect on the applicant's ability to carry out day to day activities, and if so when? Thirdly what was the substantial adverse effect? Fourthly is that substantial effect likely to recur?

30. In the case of Morgan v Staffordshire University 2002 IRLR 190, the EAT held that medical notes that referred to anxiety stress and depression do not amount to proof of mental impairment.

The Issues

31. The issues in this case are set out in the case management discussion. At that stage the claimant was represented by solicitors who subsequently came off the record as indicated above, however he was then subsequently represented by them again.

32. The claims and issues are effectively as follows:-

Unfair constructive dismissal

Was there an act or omission or series of acts or omissions by the respondent which caused the claimant's resignation; did they amount to a fundamental breach of contract by the respondent. The claimant relies on the breach of the implied term of trust and confidence and/or a series of breaches of contract resulting in a final straw; did the claimant resign in response to that breach or breaches; did he affirm the contract in the meantime; can the respondent show a potentially fair reason for dismissal and can they prove they acted reasonably in treating that reason as sufficient reason to dismiss the claimant.

33. *Discrimination arising from disability*

Was the claimant a disabled person by reason of impairments of a physical impairment namely heart condition and / or mental impairment namely depression, at the material time;

Did the respondent know or ought the respondent reasonably to have known that the claimant was a disabled person at the material time which identified as 4th May to 9th July 2018 and which the Claimant's representative now suggests should be 31 October 2017;

Did the respondent subject the claimant to unfavourable treatment - the claimant asserts a number of acts of alleged unfavourable treatment;

Did the respondent treat the claimant in that way because of something arising in consequence of the claimant's disability? The claimant relies on his sickness absence, which he says was by both for his heart disease and his depression;

Did the respondent show that the treatment was a proportionate means of achieving a legitimate aim? What was the aim which the respondent was seeking to achieve?

34. *Holiday pay claim*

Did the respondent make an unauthorised deduction from the claimant's wages in respect of his holiday pay entitlement?

Findings of fact

35. The respondent is a small electrical engineering company employing around ten staff.

36. The claimant was employed with the respondent since 1st June 2013 as an electrician. His hourly rate of pay was £15.92 an hour.

37. The claimant's contract of employment is at pages 179 – 182 of the bundle. It states that his normal hours of work will be 40 hours a week. It goes on to state that employees are expected to co-operate in working outside these hours as necessary. Overtime is not paid without prior agreement. The contract refers to a sickness policy and procedure and refers to an appendix 1, which it states is available on request (page 180). That document (appendix 1) has not been produced to the Tribunal. It is understood that the document does not exist. The contract of employment then goes on to indicate that medical certificates must be provided for all days of absence. For the first seven days a self-certificate will be acceptable and for illnesses of more than seven days a doctor's certificate must also be produced. The contract also refers to the company's sick pay which is only applicable to salaried personnel. It goes on to indicate that statutory sick pay (SSP) will be payable for the first twenty-eight weeks of absence upon provision of self-certificates or medical certificates.

38. The Contract is purported to have been signed by Mr Samuels on behalf of the respondent and purported to have been signed by the claimant. It is noted that it appears to have been signed on 15th July by both of them. Initially in their evidence, the respondent's witnesses indicated that Mr Samuels had signed the document, albeit that when he gave evidence, he said that he had not signed it and somebody must have written in his name on his behalf. The claimant said that he had not seen the document before and that it was not his signature. The contract itself was not (rather unusually) in the bundle which had been agreed between the parties. It was subsequently produced during the course of the hearing. The claimant produced a copy of his driving license appears to have a different signature but he did say in evidence that he had different signatures, although he suggested none were the same as the one on the contract..

39. The claimant worked overtime. He has produced a number of payslips for the previous eleven weeks before his absence in 2017, which show that he was averaging at over 57.125 hours a week consistent with the respondent's records of the claimant's pay records during this period. In his evidence to the tribunal, Mr Samuels said the claimant was entitled to twenty-two days holiday, which he said was paid on termination. He also said that the respondent is a small business. He said that it was important for them to provide a service to their clients and that when matters arose outside normal working hours, employees were asked to do overtime and effectively actually expected to do so, unless

there was some particular issue why they could not do so. He said that most employees effectively agreed anyway.

40. Mr Storey and Mr Samuels both indicated during the course of their evidence that they were trying to run a small business and that the running of the business was in many ways more important to them than the welfare of their employees as they took the view that if the business failed then they couldn't support their employees anyway.

41. The claimant and the respondent appeared to have a good relationship during the period of the claimant's employment until the claimant went off sick. The respondent funded the claimant to do extra training. The claimant appeared to be a trusted employee. The relationship has clearly substantially broken down since the claimant left his employment.

42. On 31st October 2017 the claimant suffered some sort of heart attack. The respondent suggested in cross examination that it was a coronary problem and not a heart attack. The claimant left site and went to hospital. The claimant suggested in his evidence that Mr Derbyshire indicated that he would prefer if the claimant finished his shift. Mr Derbyshire in his evidence said he could not recall saying anything like that. What the tribunal know is that the claimant did go to the hospital. He was admitted for heart problems. The respondent was contacted by the site to inform them that the claimant had gone to the hospital.

43. Mr Storey went to the hospital to see the claimant. He said that he gave the claimant some money to cover the TV costs. The claimant suggested in evidence that this was given as some sort of hush money because the respondent had stopped him going to hospital at the time of the incident. The claimant did not lead any evidence other than that suggestion by him as to reason why the money was given. Mr Storey's evidence was that it was given to effectively tide the claimant over and he was trying to help the claimant out. He said he gave the money when the claimant's wife was not around, so as not to cause any embarrassment.

44. The claimant was paid full pay for a couple of weeks though at that stage he was only entitled to SSP. He was signed off sick and discharged from hospital on 2nd November with various medication for his heart condition; some of which he is still taking today. He was also referred for a psychological assessment and rehabilitation.

45. The respondent said that they didn't want to contact the claimant and cause him any further anxiety.

46. The claimant submitted a sick note on 3rd November for period from 3rd November to 23rd November. He was paid full sick pay over that period, although he was only entitled to SSP.

47. He then submitted a further sicknote on 22nd November 2017 for five weeks. The claimant's sick note in November identified his condition as acute non ST Segment Election Myocardial Infarction which we are led to believe is effectively

medical term for heart attack or heart condition. The subsequent sicknote was for the same reason. The respondent noted that the GP on each occasion appeared in the sicknote to indicate that the claimant's fitness did not need to be assessed at the end of the period.

48. When the claimant brought in his second sicknote of 22nd November he came into the office. The claimant said that his wife drove him in. The respondent suggests that the claimant drove to work and then walked up a flight of stairs. Mr Storey asked the claimant to come in to the office at that stage, so that he could have a chat to the claimant about his health. He said that at that stage the respondent did not know anything about the claimant's medical condition or what medication he was on or what timescales there might be for his recovery. Mr Storey said that the respondent had deliberately not been in touch with the claimant up to that point because they didn't want to cause him more anxiety. Mr Storey said in evidence that the claimant that he could not stop as he had to go and pick his children up from school and left the offices. The claimant admitted that he was asked to go into the office and stated he could not do so because he had to leave and pick up his children.

49. On 5th January the claimant submitted a further sicknote for the same condition. There was no-one around in senior management around at the respondent's premises to discuss the claimant's absences with him when that sick note was dropped off.

50. The claimant asked if he could access his tools when he brought in the sick of 17th January dropped off. This was a sick note for the same condition.

51. The respondent did not receive a further sicknote until they received a sicknote on 5th March for a period of four weeks from 15th February which was sent in 2 weeks' late. By that stage the sicknote stated that the claimant had a heart attack. The claimant thought his wife delivered the sick note but he could not explain why it was delivered late. He suggested in evidence that he did not really know when sick notes had to be delivered because he had not been given the sickness policy procedure. The respondent did not chase the claimant about that sick note. Mr Samuels indicated in his evidence that he saw the claimant when that sick not was delivered and assumed the claimant would follow him up to the office but the claimant did not do so.

52. On 14th March the claimant submitted a further sicknote for four weeks. The condition was cited to be Ischaemic Heart Disease, Post Myocardial Infarction. That sicknote was due to expire 16th April but by that stage the respondent had heard nothing further from the claimant.

53. The claimant did not send in that sicknote to the respondent. He said in evidence that he didn't bring in that sick note. He said that his wife often delivered the sick notes. He said that in April 2018 he did not give in his sicknote because Mr Storey's son had recently died of a heart attack. The claimant said that at that stage he was feeling anxious and didn't want to leave his house.

56. In their evidence to the Tribunal Mr Storey and Mr Samuels both said they did not contact the claimant during his sickness absence because they had been advised by their advisor ELAS not to contact the claimant during his sickness absence. They said that they did want to cause him more anxiety. By 4th May they were concerned that they had not heard anything from the claimant. The sick note of 14th March had expired and they had not received another one in April –it would have been due in Mid- April.

57. Accordingly on 4th May 2018, the respondent's wrote to the claimant referring to the fact that his sicknote had expired and to find out about his absence from work and whether or not he had resigned. They asked him to contact them as a matter of urgency and indicated that unauthorised absence was a potentially disciplinary offence. The letter is at page 140 of the bundle.

58. The claimant said that, when he received the letter, he sent a copy of his sicknote through WhatsApp immediately to Mr Storey. He said that he did not receive any response.

59. On 9th May 2018 the respondent wrote to the claimant to invite him to a welfare meeting to discuss his health. They indicated that he could be accompanied by a work colleague or a trade union official. That letter is at page 141 of the bundle.

60. Mr Storey and Mr Samuels said in evidence to the tribunal that they had not contacted the claimant until this stage about his sickness absence as they were advised by ELAS not to contact him and did not want to be seen to be harassing him. Mr Storey said in evidence that the respondents had tried to talk to the claimant when he came in with his sicknotes. Although the claimant appeared to have come in at least a couple of times with his sick notes, it seems that on only one occasion Mr Storey tried to speak to the claimant. This was at the outset of the claimant's sickness absence. On another occasion when Mr Samuels was in the office he said that he saw the claimant. He did not suggest that he asked the claimant to come upstairs to the office, but he simply assumed the claimant would come up to see him but however the claimant did not do so.

61. The welfare meeting took place on 15th May 2018 at the respondent's offices. Mr Greenwood attended with the claimant as a work colleague. He went and collected the claimant from his home and brought him to the meeting and then brought him back home.

62. The meeting was attended by both Mr Samuels and Mr Storey, the co-directors of the business.

63. The Tribunal was provided with notes of that meeting which are at pages 142 to 143 of the bundle. The claimant says that he did not believe that anyone was making notes at the meeting. Mr Samuels said that he made notes.

64. During the course of the meeting the claimant was asked about his medical condition, prognosis, care plan, and about his medication. The claimant raised concerns about his psychological and financial concerns and was concerned that nobody had contacted him about his absence. Towards the end of the meeting

the claimant said that he got up and left because Mr Storey was shouting at him. He also said that Mr Samuels suggested that he GPs give out sick notes for people to sit around and play game on the computer and that the claimant should go and see his doctor again. In his evidence the claimant said he was upset before the meeting and anxious about it. He said he then became upset during the meeting. He told the respondent that he was anxious and depressed and he left the meeting because he was upset and because of the shouting and the comments made by Mr Samuels with regard to his doctor. Both Mr Samuels and Mr Storey say that they were not shouting at the claimant during the meeting.

65. The respondent's notes of the meeting at paragraph 14 state that the claimant states that they were beginning to shout at him and that he did not feel well; it is then noted at paragraph 15 that the claimant gets up and says he must leave the meeting (page 143 of the bundle). Mr Greenwood indicated in his evidence that the claimant did say that the respondents were shouting but he didn't think they were shouting. Mr Greenwood went down to get the claimant after he left the meeting. The claimant then came back into the meeting a few minutes later. Some additional notes at the bottom of the meeting suggest that there was a further discussion which took place over a further thirty minutes. Only a few notes were made of that part of the meeting. It is understood, although not noted, that towards the end of that meeting, the claimant did agree to be seen by the respondent's occupational health advisors as part of some follow up with regard to reviewing his medical condition.

66. In his evidence Mr Samuels said that he did make a comment about the GP but that the claimant had taken out of context. He said that he had suggested to the claimant that the respondent was happy to talk to the claimant's GP as he said the information from the claimant was that he struggling. Mr Samuels said that he did not say GPs sign people off signed off who want to be on the sick so they can sit around playing around on their X boxes. He said his comment related to review matters with the claimant and discussing matters with the claimant's GP. Mr Samuels said in his evidence that there was no note of that in the notes of the meeting because it was discussed in the latter part of the meeting where f the additional notes were made. This were noted to be limited because the claimant did not want to carry on with the agenda for the meeting - page 143 of the bundle.

67. Both Mr Storey and Mr Samuels in evidence deny that they shouted at the claimant during the meeting. The Tribunal noted that, during the course of the claimant's examination Mr Storey became agitated at various points. Indeed at one stage he stood up and shouted at the claimant calling him a "lying bastard".

68 The claimant disputes notes were made of the meeting, although he accepts that those notes seem to be largely accurate, although he is concerned there is no reference to the GP comments made by Mr Samuels in those notes..

68. The respondent says that, at the end of the meeting they were asking for a copy of the claimant's care plan so they could understand his medical condition.

69. On 17th May the claimant e-mailed the respondent to ask about his holidays (page 157-158 of the bundle). On 18th May Mr Samuels replied indicating the claimant would not be entitled to holiday pay (page 156 of the bundle). On 23rd May 2018 the claimant e-mailed the respondent and requested a copy of the employee handbook, contract of employment and the respondent's policies on sick leave and grievances and asked about the opt-out clause with regard to the working time regulations wages and asked again his holiday payment. In that email, he also asked for a copy of the minutes of the welfare meeting. He informed the respondent that he was going to see his doctor early June page 156 of the bundle.

70. The claimant did go and see his doctor on 5th June which is noted at page 50 of the bundle. He was issued with another sick note for four weeks. His medical condition at that stage was identified as depressed mood. He was given medication for his anxiety and depression. The claimant said that he saw a different doctor on that occasion which might explain why there was a change in his diagnosis in relation to his sicknote.

71. On 6th June 2019, the claimant raised a grievance with the respondent about a number of matters. He raise**d** concerns about the respondent not contacting him with regard during his sickness absence. He also raised concerns about the way the welfare meeting was conducted. He indicated that he felt that he was being put under pressure to return to work and that the respondent didn't understand that he was depressed. He also referred to alleged comments that he said Mr Samuels made about GPs issuing sick notes. He said that Mr Samuels said in that meeting that doctors have a job and they will just sign any sicknote off. Most doctors think patients on the sick want to be on the sick and sit playing on X boxes and drink cans. He said that this made him worry that the respondent thought that was what he was up to. He indicated that these things were all contributing to his ongoing stress and worry. That grievance letter is at page 176 of the bundle. The claimant e-mailed the respondent on 6th June with the letter of grievance. He said that he had got a copy of the company handbook or the grievance policy and had not being provided with either of them and was raising a grievance which he attached.

72. In evidence to the tribunal the claimant said that he had heard nothing from the respondent for over six months when he was off on sickness absence, yet they would call him daily when he was in work. The claimant's email sending the letter of grievance is at page 162-163 of the bundle.

73. On 13th June 2018 the claimant e-mailed the respondent again asking about grievance. At that stage he had heard nothing from the respondent. His e-mail is at page 162 of the bundle.

74. On the same day the respondent replied to the claimant's grievance. They acknowledged receipt of his grievance letter and indicated that they were awaiting an occupational health report before being able to comment or arrange a meeting to discuss it. They also asked whether due to his depression, he would be fit enough to attend a meeting. Page 161 of the bundle.

75. It is not clear when the respondent asked the claimant to attend an occupational health meeting. It appears to be sometime during the period after the welfare meeting and the time that the grievance ultimately acknowledged. The tribunal have not seen any correspondence asking the claimant to attend that meeting or any correspondence sent to the occupational health advisors.

76. On 2nd July 2019 the claimant attended an occupational health meeting with the respondent's occupational health practitioner. It appears that the meeting was to be with an occupational health physician. The report is at page 171 – 175 of the bundle. The claimant indicated that he would like to see the report at the same time as the respondent. It was noted that the issues that were being reviewed were the claimant's heart attack. The occupational health physician concluded that the claimant was not fit to undertake his role. The occupational health physician noted that the claimant had been seen by a number of specialists and was still taking medication. He also noted that the claimant had developed depression and noted that the claimant had reported poor sleep, poor appetite and panic attacks. It was also noted that the claimant's mobility seemed to be restricted and he was unable to go shopping or do household chores due to poor motivation and chest pain. The respondent complains that the report largely consists of what the claimant told the occupational health physician, which is often not that unusual. It is also noted that in this case an assessment was undertaken for the claimant's anxiety and depression. It confirmed evidence of severe anxiety and depression. The occupational health physician concluded that the claimant did not appear to be fit for work. He concluded that the claimant did potentially suffer from a disability under the definition of disability under the Equality Act 2010. The Tribunal is aware that we can take account of the medical evidence, but it is ultimately a matter for us as to whether or not a particular impairment is a disability under the definition of the act as it is a legal definition to be determined by the Tribunal

. 77. The occupational health physician stated that the claimant was fit to attend meetings although suggested some adjustments about him being accompanied; provided with a suitable venue and additional time if required during meetings. The occupational health physician also responded to specific questions which appear to have been asked although we have not seen those questions. It is not clear if those questions specifically asked whether or not the claimant could attend meetings, although it is noted that occupational health physician did comment on whether the claimant could attend meetings as he suggested some adjustments in that regard.

77. On 3rd July 2018 the claimant e-mailed the respondent indicating that he had received the occupational health report and asking them about grievance -page 161 of the bundle. In their evidence the respondent said that they did not receive the report until 4th July and wanted to consider it.

78. On 9th July 2018 the claimant e-mailed the respondent at 16:51 to inform them that he was resigning from his position with immediate effect. The claimant indicated that the reason for his resignation was because the respondent had failed to look at this grievance and that he was concerned about the payment of

holiday pay and lack of contact or help whilst while on the sick and discrimination against his sickness (page 145 of the bundle).

79. Incidentally the respondent wrote to the claimant on the same day namely 9th July to invite him to a grievance meeting. The letter is at page 144 of the bundle. It states that the meeting will be held on 13th July and that it will be chaired by Mr Storey. Mr Samuels will be in attendance to take minutes. The letter advises the claimant hat he has the right to be accompanied to that the meeting. Towards the conclusion of this case, the Tribunal was provided with the certificate of posting for that letter which confirms that the letter was in fact posted at 16:04. The letter it would appear was effectively written before the claimant had sent in his e-mail of resignation or resigned from his employment..

80. In evidence before the Tribunal the claimant said that he decided to resign on that day because he was concerned that the respondent was delaying dealing with his grievance. He said that he was concerned that he had waited a long time for his grievance to be heard and that he had heard nothing from the respondents from 23rd May. He did say that he couldn't really explain why he decided on 9th July to resign or what exactly triggered it at that stage but he did say that he was still feeling sick and anxious at that stage and possibly wasn't thinking that straight.

81. At one stage during the course of his evidence the claimant suggested that the reason why he had resigned was after he received the respondent's letter, although it was clear that he could not have done so because of the time when that was sent**.** He then subsequently retracted those comments and said that he had got confused about that evidence and was not really clear when exactly he had received the respondent's letter but that it must have been the next day.

82. On 10th July 2018 the respondent accepted the claimant's resignation page 146 of the bundle.

83 The Tribunal has seen the claimant's medical records. His GP records are at pages 47 – 54. These show that the claimant was suffering from a depressed mood from December 2017 page 53/54 of the bundle. He was given medication. He was issued with a sick note stating he was suffering from a depressed mood in June 2018 (page 50) and is noted as still suffering from depressed mood in December 2018 page 47), where it is it was noted that he had on-going low mood and was again on further medication. He had been on medication for this condition at various times– e.g. June 2018, August 2018 (49/50). There are also various entries in his medical records relating to his heart condition from November 2018 following his admission to hospital at end of October 2017. Further entries in his GP records show a further sick note being issued in August 2018 page 49 of the bundle. The Tribunal notes that the claimant was on medication for his heart condition for eleven months and was issued with a further sick note on 12th October 2018 for his heart condition page 49 of the bundle.

84. We have also had the opportunity to review correspondence from his consultants. It was noted in September 2018 that the claimant was feeling tired

and exhausted with little energy to work. It also notes the various medication which he was taking at that stage for his heart condition page 81 of the bundle.

85. We note that the claimant was referred to psychological services in January 2018 He is noted as being currently depressed page 113 with a low mood. It was noted that his mood had deteriorated since his heart attack in October 2017. It identifies details of the medication which he is taking at that stage. Page 114.

86. The Tribunal has also been provided with a disability impact statement from the claimant and heard oral evidence from him. In his evidence, the claimant said that he still taking medication for his depression. He said that if he wasn't taking the medication he would not be able to leave the house. He said that with his depression he would sit on the sofa with this children and not go out. He said prior to that he had been active and working. He said he didn't want to leave the house for days and did not want to do anything. He said that his heart condition made him breathless and that he wasn't able to sleep. He said he could not walk very far at first without being out of breath. He said that the depression made him unable to leave the house and go to the shops or go to the gym. He referred to one incident in November 2018 he said that he felt bad because he had not been able to go out and leave the house and take his children to a bonfire night. He said that he was withdrawing from socialising and going out and wasn't going to the gym. He said that at times he had chronic fatigue and then at other times he would be awake all the time. He said his wife had to go out with him in the car and he was scared to go out on his own in case he had another heart attack. He said that he had feelings of loss of self-worth and low mood and self- esteem. He spent most of the time on the sofa with his children and not being able to do anything. The respondent representative cross examined the claimant extensively suggesting he had been going to the gym, but the claimant said that, although he had told one of his consultants, he was going to the gym he was not doing so, because he could not leave the house and had only started going back to the gym recently.

87. The Tribunal itself noted that at times the claimant's evidence was somewhat rushed; often fast - talking rapidly over people; and confused at times one example being when he seemed somewhat confused as to whether or not he had resigned in response to the respondent's letter of 9th July although it was quite clear he had already resigned prior to that. We also noted that at other times he was somewhat lacking in concentration during the course of the proceedings. The claimant's disability impact statement is at pages 36 – 38 of the bundle. There is also various notes in the GP records and from his consultants / psychologists refer to him suffering from low mood a for example the psychological wellbeing in November 2018 as noted at page 66. Symptoms of anxiety and depression are noted at pages 112-115 at the time when he seen by the psychiatrist in January 2018. Those are all consistent with evidence he has given about the impact of those conditions on his ability to do normal day to day activities.

<u>Submissions</u>

88. Both parties filed written submissions.

Conclusions

89. In relation to the claimant's complaint of breach of the working time regulations (holiday pay) the tribunal upholds part of this claim.

90. We prefer Mr Samuel's evidence with regard to the 4 days additional holiday pay being claimed. His evidence in that regard was clear and explicit that the claimant had been paid his full entitlement to holiday pay, including the Christmas period which he explained had already been included. We find his evidence to be plausible and credible, whereas the claimant provided us with little evidence in relation to the matter of the outstanding days.

91. We went on to consider the claimant's claim in relation to holiday pay in respect of overtime. We have considered the Bear Scotland case to which we were referred. We consider that overtime with the respondent was non- guaranteed. The respondent did not have to provide overtime, however, we find that the claimant was required to work overtime. In that regard, we have taken account of the documentary and oral evidence. The claimant's contract of employment states that employees are expected to co-operate in working outside their normal working hours. We have also had sight of the claimant's payslips over the proceeding 11 weeks prior to his sickness absence. They clearly show that the claimant was working extra hours over that period. Indeed, he was working an average of 57.25 hours over that period. We have also taken account of Mr Samuel's evidence. His evidence was that as a small organisation, it was important to be able to provide a service to its clients and overtime was at times required to complete jobs for clients. He said that everyone pretty much did agree to undertake overtime unless there was some particular reason why they could not do it.

92 On the basis of that evidence, we find that the claimant is entitled to holiday pay in relation non-guaranteed overtime. He is entitled to 17.25 hours a week over a period of the four weeks referred to in the working time directive at the rate of £15.92 which amounts to £1,114.40. Accordingly, the claimant's claim for breach of the working time (holiday pay) is well founded in that regard and the claimant is awarded the sum of £1114.40 (gross).

Constructive Unfair dismissal.

92. We reminded ourselves that the burden of proof in constructive dismissal claims is on the claimant. We have considered the sequence of events and potential acts / omissions upon which the claimant is relying in turn and as a whole:

93. We did not find that any breach of contract occurred on 31st October 2017. Although there is some dispute about whether the claimant was asked to complete his shift, we do know that the claimant left the site and went to hospital. Both parties agree that Mr Storey attended at the hospital. The parties' evidence about what happened at the hospital is not entirely different, although they have different interpretations of that evidence. The claimant was ill at the time. He raises concerns about why the respondent gave him money. The respondent's

view is that they were simply being a supportive employer. Both interpretations may be correct but we do not consider that there is sufficient evidence to find in favour of either party in relation to that matter.

94. The Tribunal find that there was an entire lack of contact with the claimant during the period of his absence for over six months. The only attempt by the respondents to speak to the claimant about his absence was when Mr Storey, in early November, namely at the time when the claimant submitted his second sick note, asked to have a chat with the claimant and the claimant said he was unable to stay to talk about the matter at that time. Mr Samuel's evidence was that when the claimant came in on another occasion with his sick note, he thought the claimant would come and see him in his office, but he did not suggest that he asked him to discuss his absence. The first real contact was made when the claimant was written to on 4th May because he had not provided his sicknotes. We have looked at the situation as a whole from the lack of contact through to the AWOL letter in relation to whether that may amount to a breach of contract. We do not consider that the letter itself of 4th May would amount to a breach of contract. We consider that the lack of contact by the respondent, irrespective of what contact was made by the claimant to update them on his condition, is unacceptable. We do not however consider it in itself or in the context of the situation as a whole to amount to a fundamental breach of contract on the part of the respondent

95. In relation to the welfare meeting we note from our own observations that both the claimant and Mr Storey behaved in a manner at times in the Tribunal where they were both talking over each other. We can well imagine that that is exactly what happened within the workplace and probably happened at that meeting. We have already commented on the fact that, at one stage during the claimant's cross examination, Mr Storey stood up and shouted at the claimant and called him a "lying bastard". The respondent's own notes indicate that the claimant complained about being shouted at in the meeting and indeed walked out of the meeting shortly afterwards. This was confirmed by Mr Samuel's evidence that, shortly after the claimant complained about being shouted at in the meeting he walked out of it - paragraph 14 and 15 at page 143 of the bundle. We also note that there was comment made at the meeting about the GP signing the claimant off sick. Both Mr Samuels and Mr Storey say that the comment was taken out of context. We do not find that what happened at the meeting nor what was said during in itself amounted to a fundamental breach of contract. As we have said, from what we have seen of both parties, this may have similar to the way they usually conducted meetings between them. In any event, we note that the claimant was invited to go back into that meeting and did back into that meeting. Further, he also agreed to go to occupational health. Accordingly, at that stage, he clearly considered himself to be bound by the contract of employment and did not consider that there was a fundamental breach of contract at that stage.

96. It is when we get to the stage of the claimant raising his grievance that we have concerns about whether or not there could have been a breach of contract. The claimant raised a grievance on 6th June 2018. He did not receive any reply to the grievance, but simply an acknowledgement on 13th June after he had chased about it. He was then informed the grievance would not be dealt with until after

his occupational health meeting. He then chased again on 3rd July following his occupational health meeting after he believed the respondent had received the report from occupational health He then resigned a few days later.

97. This Tribunal considers that there were potentially a series of breaches of contract from 23rd May for failing to provide the claimant with policies as requested; failing to acknowledge his grievance; failing to arrange a grievance meeting culminating in failing to invite him to the grievance meeting until after the occupational health report. We consider that it was potentially reasonable to request the claimant to wait until after the occupational health report was obtained, but in any event the claimant himself agreed to delay until after the occupational health report and accepted the respondent's view that they needed to see the report before they could consider his grievance. Furthermore, although it is not entirely clear if occupational health were asked if the claimant was fit to attend a meeting the respondent clearly did have that in mind because they raised the issue about whether he was fit to attend a meeting with the claimant. Further, occupational health do in fact comment on whether he was fit to attend a meeting and suggest certain adjustments.

98. Accordingly up to 3rd July 2018 the claimant had effectively accepted any breaches of contract. He had not challenged the approach being adopted by the respondent and had indeed acquiesced up to that point.. Accordingly, he has effectively affirmed the contract in the meantime by agreeing to wait until the outcome of the occupational health report.

99. We then had to consider whether the respondent was in breach of contract from 3rd July by failing to arrange the grievance meeting immediately after they received the occupational health report. We accept the respondent's evidence that they received the report on 4 July 2018. We do not consider that the failure to arrange a grievance meeting within 5 days of receipt of the report amounts to a breach of contract. Indeed, the respondent did in fact send an invite to a grievance meeting to the claimant on the 5th day after receiving the report – he had already resigned by the time he received the invite. We think that the claimant acted prematurely in resigning at that time.

100. Accordingly, we do not think there was a breach of contract on the part of the respondent which entitled the claimant to resign on 9 July 2018. Furthermore, we do not consider that there was a series of breaches of contract which led to a final straw in not arranging the grievance meeting by 9th July which entitled the claimant to resign. By 3 July he had effectively affirmed the contract so the only potential breach arose after 3 July 2018. Up to that point, the claimant had effectively waived those breaches of contract and agreed to wait until the occupational health report was received. We think that it was not a breach by the respondent to ask the claimant to await for the outcome of the occupational health report as they recognised that he may not be fit to attend an interview and indeed had been aware of the problems from the earlier welfare meeting. The report itself did address the issue of whether or not the claimant was fit to attend a meeting. The respondent may not have responded immediately by arranging a grievance meeting but they did so within a reasonable time period, which could

not amount to a breach of the claimant's contract even he had waited some months already for it to be arranged.

101. For those reasons we do not consider that there was a fundamental breach of contract on the part of the respondent or a series of breaches of contract resulting in a final straw which entitled the claimant to resign from his employment and treat his employment as at an end. Therefore there was no dismissal pursuant to S95 (c) of the Employment Rights Act 1996.

102. Accordingly, for those reasons the claimant's claim for unfair dismissal is not well-founded and is hereby dismissed.

Disability discrimination.

103. In relation to the complaint of disability discrimination we find that the claimant was treated unfavourably because of something arising in consequence of his disability.

104. We find that the claimant's heart condition is a disability pursuant to the definition of disability in the Equality Act 2010.

105. In their written submissions, the respondent's representative acknowledge that the claimant's heart condition may amount to a disability, but do not concede the point. We note that this physical impairment has lasted for over twelve months. The claimant had a heart attack at the end of October 2017. He was issued with a further sick note for the same condition in October 2018. We also note that the respondent's own occupational health advisers determined that the claimant was not fit to do his job because of his heart condition in July 2018. They also considered the impairment to amount to a disability under the Equality Act 2010.

106. We note that the claimant is still taking medication for this condition. We accept that the condition has had a substantial adverse effect on his ability to undertake normal day to day activities at the relevant time between May – July 2018. We accept the claimant's evidence about being out of breath; having difficulties sleeping or sleeping too much; being unable to leave the house or walk far he talked about being unable to walk down the street without stopping 3 or 4 times., being scared of driving alone in case he had another attack. He couldn't work or go to the gym – the latter which he did often before his heart attack.. Although he has come off some drugs in October 2018 he is still taking other drugs to stop him having another heart attack.

107. We also find that the respondent ought to have known that that this condition could amount to a disability. They had all of the claimant's sick notes over a period of over 6 months, which clearly stated that the claimant was suffering from a heart condition. If they had some concerns about whether it was a disability, then it was up to them to find out the true medical condition. Furthermore, their own occupational health advisors advised them that it amounted to a disability, but they do not appear to have accepted that advice.

108. In relation to the claimant's mental impairment, we also find that this amounts to a disability under the Equality Act 2010. We note that the claimant has suffered from this condition long-term, namely for over 12 months from December 2017 to December 2018. He was referred to a psychologist, as is noted at pages 113 – 114. It was noted that his condition became noticeably worse after his heart condition, which suggests that he had suffered earlier from depression. He was issued with a sick note for depression in June 2018 and issued with a further sicknote in December 2018.

109. Furthermore during the occupational health assessment in July 2018, the respondent's occupational health advisors concluded from their own examination that the claimant was suffering from depression.

110. The Tribunal finds that this mental impairment also had a substantial adverse effect on the claimant's ability to undertake normal day to day activities. In June 2018, the claimant was signed off sick for depression and unable to attend work. The case of Rayner makes it clear that normal day to day activities include going to work. Furthermore, the claimant referred to various symptoms, as are noted in his GP records and correspondence from his consultant / psychologist, which impacted on his ability to undertake normal day to day activities. He said that he could not attend bonfire night in 2018 when his seven year old son asked him to go. His condition is clearly long term and had a substantial adverse effect on his ability to undertake day to day activities which included going to work, but also going to the gym and actually leaving the house. He said he struggled to actually leave the house because of low mood and concerns about suffering another heart attack which seems to have acerbated his previous problems with depression.

111. This Tribunal finds that the respondent again ought to have known that the claimant was suffering from a mental impairment which could amount to a disability. They had a sicknote from him in June 2018, and referred him to occupational health, so were clearly concerned about whether or not he was fit. Indeed, it seems there were so concerned about his mental state that they asked him if he was fit to attend a grievance meeting in June 2018.

112. In relation to his complaint of unfavourable treatment because of something arising in consequence of his disability, we have taken account of the Supreme Court guidance in the case of Williams v Trustees of Swansea University Pension and Assurance Scheme and note that unfavourable treatment is analogous to disadvantage / detriment and is a low threshold. We went on find that the claimant was treated unfavourably in relation to the following:-

113 Firstly, the failure to contact him during his sickness absence. There was one attempt by the respondent to do so, when the claimant handed in his second sick note, but thereafter, there was no further attempts by the respondent to contact the claimant during his sickness absence until they sent him the AWOL letter on 4th May 2018, some six months into his sickness absence. The claimant clearly considered this to be unfavourable treatment. His evidence was that he was concerned that the respondent did not care about him for or his family. He refers to his concerns about the way he was treated during his sickness absence in his

grievance letter at page 177 of the bundle. In cross examination, the respondent did not challenge that evidence or the evidence referred to in the grievance letter. This Tribunal would have expected a reasonable employer to have been in contact with the claimant about his health to find out how he was doing. They were under a duty of care as his employer to look after his welfare and yet failed to do so. This obligation is irrespective of whether he was not handing in his sick notes in time, which appeared to have occurred towards the end of his sickness absence

114. The something arising in consequence of his disability is his sickness absence which was disability related.

115. There is no justification for the respondent's lack of conduct. Their justification was that the claimant should have been in contact with them and provided them with sick notes, which he did although they were late on two occasions, but the respondent should have chased those sick notes if they were not submitted on time. Their main justification appears to be that they did not contact the claimant because they were advised not to do so and cause anxiety to him. They followed that advice. That is not a legitimate aim, nor is it in any way proportionate to fail to contact an employee over a period of 6 months to find out how they are doing when they are off sick with a serious condition.

116. The Tribunal do not consider that there was unfavourable treatment in relation to the welfare meeting for the reasons previously given.

117. The Tribunal does however find that there was unfavourable treatment in respect of the respondent's failure to respond to the request made by the claimant for copies of policies; notes of the welfare meeting; his contract of employment; and sickness procedure as requested in his e-mail on 23rd May 2018. These documents were all requested when the claimant was on sick leave and could not access the documents. In any event, these documents all largely relate to his sickness absence - the sickness procedure; his contract of employment appears to include the sickness procedure and the notes of the welfare meeting clearly relate to his sickness absence. There was unfavourable treatment to deal with that request, which arises in consequence of his disability because they are all relating to his sickness absence which was disability related. No justification has been put forward for the failure to provide this documentation.

118. We also consider that the failure to deal with the grievance was unfavourable treatment. We accept the claimant's evidence about how he felt he had been treated because the respondents had failed to address his grievance. It led him to resign and claim constructive dismissal. Again the failure to deal with the grievance is something arising in consequence of the claimant's disability because the issues raised in that grievance relate to his sickness absence, which was disability related.

119. We accept that it could a legitimate aim not to arrange the grievance hearing until the respondent had received the occupational health report. However, once the report had been received and the claimant had sent an e-mail chasing his grievance, although the respondent might not have been able to arrange the

grievance meeting, we do not consider it was not proportionate for them not to have responded or acknowledged the claimant's e-mail within a period of five days in the context of an employee suffering from anxiety/ depression and who had been waiting for over a month to have a grievance hearing.

120 For those reasons, we consider that the failure to contact the claimant during the period of his sickness absence for in excess six months; the failure to provide the claimant with the various policies as requested by him on 23rd May 2018; and the failure to arrange the grievance hearing all amount to unfavourable treatment due to something arising in consequence of his disability. We do not find there was unfavourable treatment in relation to the dismissal as we have found there was no dismissal.

121. Accordingly the claimant's complaint of unfavourable treatment for something arising in consequence of his disability is well founded. A remedies hearing will be arranged with a time-estimate of half a day.

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EMPLOYMENT JUDGE MARTIN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
15 October 2019