Case Number: 1401285/2019 D.

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Luck**

Respondents: **Hanson Quarry Products Europe Limited**

Heard at: **Exeter** **On: 17,18,19 February 2020, at Exeter, 8,9 June remotely via CVP. DELIBERATIONS 25,26 June, 8 July (via CVP).**

Before: **Employment Judge Hargrove**
Members. Ms W Richards Wood
Mrs M Rowntree.

Representation
Claimants: **Mr Jones of Counsel,17-19 February, Mr A Worthley of Counsel, 8-9 June 2020.**
Respondents: **Ms C Davies of Counsel.**

RESERVED JUDGMENT AND REASONS.

The unanimous judgment of the tribunal is as follows:

1. **The claimant's claim of constructive unfair dismissal is well-founded.**
2. **The claimant's claims of victimisation are not well-founded.**
3. **The claimant's claim of unlawful deductions from his wages is well-founded only in respect of the period between 23 August 2019 and the claimant's resignation.**
4. **There was a 25% chance that, absent unfairness, or victimisation, the claimant's employment would have ended in any event within 6 months after it did.**
5. **The claimant's claim of a failure to provide a written statement of terms and conditions complying with Sections 1 and 4 of Employment Rights Act is not well-founded.**

1.**Background**.
By a claim form presented on **16 April 2019** the claimant made claims in respect of his then current employment as a relief HGV driver for the respondent. These claims were identifiable as being of: –

(1) Age discrimination, direct and or indirect, contrary to Sections 13 and 19 of Equality Act; particularly relating to a refusal to allow him to return to

work following a period of sickness absence. The claimant was born on 14 April 1952, and at the material time, from October 2018 to September 2019, was 67 years of age.

(2) Victimisation contrary to Section 27 of EQA because of his association with his daughter, also an employee of the respondent, who had herself presented claims to the employment tribunal of sex discrimination on **20 August 2018** (which remain outstanding for hearing in October 2020 and whose employed with the respondent terminated on the **26 November 2019**).

(3). Unlawful deductions from wages contrary to Section 13 of Employment Rights Act in the form of underpayment of sick pay at the rate of 39.5 hours per week rather than the claimant's claimed contractual rate of 50 hours per week.

(3) Failing to provide him with an up-to-date written statement of terms and conditions complying with section 4 of Employment rights act, contrary to section 38 of the Employment Act.

2. Following receipt of a full response from the respondent on the 16 May 2019, the case was the subject of a case management hearing on the 1 November 2019. In the meantime the claimant had resigned from his employment on the **9 October 2019**; and it was anticipated that the claimant would bring further claims of constructive dismissal by way of amendment of his existing claims, which he did on the 28th of November 2019. In the expectation of that event, it was ordered that a full hearing take place at the Exeter hearing Centre on **17 to 19 February 2020**, and full case management orders were made.

3. The first day of that hearing was taken up by the tribunal reading into the case and a lengthy discussion of issues.

4. The hearing was not completed in the next two day period, but the tribunal heard evidence from the claimant and from his daughter, Sarah Luck, in support of his claims, both of whom relied upon written witness statements, two in the case of the claimant. Sarah Luck's evidence was not challenged in cross examination.The tribunal also heard evidence from the respondent from Mr Nicholas Elliott, a distribution manager based in Rutland, who principally dealt with the claimant's lengthy grievance process in 2019; and from Erica Williams, Distribution resource manager based in Frome, Somerset, who dealt with HR issues, and more particularly, the lengthy return to work issues which arose in the claimant's case in 2019, leading up to his resignation on the 9th of October 2019 and subsequent claim for constructive dismissal.

5. By the end of that tranche of hearings, Counsel had helpfully provided an **agreed list of issues. (Attached as appendix 1).** There was also a helpful lengthy chronology from the respondent. Further orders were made for the resumption of the hearing in Exeter on **22 to 24 April 2020**. These included provisions for the respondent to serve a further witness statement dealing with matters arising from the late amendment to the claimant's claims relating to his victimisation claim; the provision by the claimant of a full schedule of loss, and copies of further medical evidence not yet disclosed by the claimant. These were all provided to the Employment Tribunal by 11 March 2020, including a further witness statement from the respondent from Mr Jeremy Dyal, who dealt with the claimant's sick pay issue as well as the return to work issue.

6. Due to the intervention of the COVID-19 pandemic, it was not possible to resume the hearing on the **22 April 2020**, which was converted to a telephone case management hearing. It was originally envisaged that the resumed hearing would be confined to the hearing of evidence from the respondent's final witness, Mr Dyal, and possible but limited further cross examination of the claimant.

However, on 22 April the claimant's solicitor indicated that he wished to rely upon further recent documents on the 50 hours issue, which were ordered to be disclosed to the respondent . The possibility of a resumed hearing taking place remotely was raised by the Tribunal, and a hearing was provisionally listed for **8-9 June**. The claimant objected. A further telephone hearing took place on **15 May**. At that stage, the claimant's solicitor additionally applied to recall the claimant, and to reopen cross examination of the respondent's witnesses Elliott and Williams. The respondent objected. The Tribunal ordered the claimant to provide written reasons for the application and a draft third witness statement from the claimant, and the respondent to provide written objections. These Orders were complied with before the third case management hearing on **29 May**, which took place by CVP and telephone. The Members joined by CVP to deliberate on the claimant's written application, and the respondent's objections. We decided unanimously that the claimant's application to reopen his evidence, limited to the content of his third witness statement , would be allowed subject to the respondent being permitted to rely upon an additional witness in response, Ms Clare Soper, if provided by no later than 10 am on 4 June. The claimant's application to reopen cross examination of Elliott and Williams was refused. The claimant's application for disclosure of further pay information for other drivers was likewise refused, as having been made too late.The Tribunal ordered the hearing to be resumed remotely by CVP. The claimant did not object at that stage. It was indicated that the claimant could attend remotely via a link at his Solicitor's Kingsbridge office, distancing provisions being put in place.

7. The factual background to the issues which arise in this case is complex. Rather than setting it out merely in the form of a detailed chronology, the tribunal proposes to deal with it on a topic by topic basis.

8. **The claimant's employment history relevant to the pay and hours issue. "The 50 hours issue".**

The claimant started work with the respondent as a day driver on **20 April 2015** working from Hingston Down quarry, Gunnislake, Cornwall. He was at that time issued with a statement of terms and conditions. This document is at pages 74 to 83 of the joint bundle. Materially, it is stated to be a fixed term contract commencing on **20 April 2015** and ending on the **19 April 2016.** There was a contractual working week of 39.5 hours in clause 8, with normal hours Monday to Friday to be worked between 7 am and 5pm, and between 7 am and midday on Saturdays, which could be varied with reasonable notice subject to the needs of the business in accordance with clause 4 (which specified circumstances in which the company could require additional hours work over and above the normal contractual working us, as to which the employee was expected to "cooperate in working such reasonable additional hours as are mutually agreed between the Company and its employees".)

9. Under clause 5 the weekly rate of pay was fixed "as per the Pay and Conditions Agreement" (PCA). Rates of pay were reviewable in January of each year. Any additional hours worked between 6 am and 6 pm Monday to Friday were to be paid at the standard hourly rate and, for any hours worked outside that period, including Sundays and bank holidays, an unsocial social hours enhanced payment at differing rates as per the PCA. A version of that agreement, agreed between the TGWU and GMB, later combined as Unite, and the company, and dated 1 January 2004, with some amendments thereafter, is at pages 83A to 83S. We accept that the terms of the PCA were incorporated into the claimant's contract of employment. There are provisions about the company sick pay in clause 11 of the contract, also mirrored in the PCA. In particular, company sick pay was payable on a sliding scale according to the number of years service. Between 2 to 5 years

service entitled the employee to 11 weeks pay in each 12 month period. Payments made during absence due to sickness or injury were to be subject to the deduction of any amount equal to benefits received by the employee under the statutory sick pay scheme for the same payment period.

10. Notwithstanding that the fixed term period for the contract expired on **19 April 2016**, the claimant's employment continued but as a relief driver. The claimant's daughter, also a relief driver, was due to go off on maternity leave on the **1 June 2016.** As a relief driver, the nature of the claimant's job changed to the extent that he was required to make deliveries in an area covered by South West England, and South Wales driving a variety of HGV vehicles including eight wheelers, tippers and concrete mixers. As from **8 June 2016** the claimant's pay grade was increased from CE to C2, and thus from £8.73 per hour to £9.13 per hour. This change was notified to the claimant in writing in a letter dated **14 June 2016** which was signed by the claimant "to acknowledge receipt of this letter of offer and accept the terms and conditions contained in this letter and the documents enclosed with this letter", and returned by the claimant on the **19 June 2016**. See page 93. However there was no note of what the additional documents were. These facts give rise to the claim for a breach of Sections 1 and 4 of ERA.

11. The following issues arise from the above facts: –

11.1.the claimant claims that he in fact worked and was paid for 50 hours per week from the time that he was a day driver; that he and other drivers were notified by the transport manager, Mr Plant, that their working hours were to be increased to 50 hours per week; and that it continued up to the time he went off sick in November 2018.

11.2. The claimant further claims that the terms of his contract changed from contractual working hours of 39.5 hours per week to 50, but that he was not notified thereof by the issue of a fresh contract of employment, in particular from 1 June 2016, in breach of sections 1 and 4 of the 1996 Act.

11.3. The claimant claims that he was entitled to be paid contractual sick pay at the rate of 50 hours per week from the date upon which he went on the sick in November 2018, and that that should have continued, having regard to his length of service of 2-5 years, for 11 weeks. See also paragraphs 26 and 27 below.

11.4. In addition, in relation to sick pay the claimant claims that he was fit to return to work on full pay in **February 2019,** and again in **May 2019**, and that his subsequent pay was unilaterally ended as from the **9 September 2019**. The tribunal will detail the latter circumstances later in this description of relevant events and issues.

11.5. **Executive summary.** Relevant to the claimant's claims of constructive unfair dismissal, and to the claims of victimisation and age discrimination, the claimant relies upon the above circumstances as being breaches of an express term in his contract of employment, as well as a breach of the implied term of trust and confidence. The respondent denies that it was in breach of any express term as to pay, or any acts constituting a breach of the implied terms, whether as victimisation or discrimination, or otherwise. The respondent asserts that its acts were at all times with reasonable and proper cause, and not because of its belief that the claimant was supporting his Daughter's claim, or because of his age. The respondent also denies any breach of sections 1 or 4 of the 1996 Act.

12. **The claimant's victimisation and age discrimination claims.**

The claimant's daughter returned from maternity leave sometime in 2016. By way of background, her witness statement alleges various acts of sexual harassment since prior to the date when she went off on maternity leave, and following her return. Sarah Luke's evidence was not the subject of cross-examination, and we make no findings of fact in respect of her treatment. However she raised her own

claim of sex discrimination in the Tribunal on **20 August 2018,** and eventually resigned on **26 November 2019**, after this claimant's resignation on **9 October 2019**. This is relevant to the claimant's claim of victimisation under Section 27 EQA with his claimed support for his daughter as his protected act. Section 27 (2) defines each of the following as a protected act –
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act."
Section 27 (1)(b) states that A – the employer - victimises B if he subjects B to a detriment because he believes that B has done, or may do a protected act. The claimant's case is that he was subjected to detriments by the respondent because it believed that the claimant had done or was going to act in one or more of the ways described in Section 27(2) (b) to (d). At the outset of the hearing, he also relied upon the principle of associative victimisation, upon the basis that the respondent believed that he would support his daughter's claim of a protected act. However, by the time of the closing written submissions, Mr Worthley, sensibly in our view, abandoned associative discrimination. It adds nothing or very little to the wide definition of protected act in Section 27.
The detriments to which the claimant claims he was subjected because he had done the protected act are set out at paragraph 23 of the **agreed list of issues**. It is to be noted that they mirror the allegations of **breach of contract** set out in paragraph 3, and the acts of **age discrimination** set out in paragraph 10, with the exception of the disciplinary process next described. We have already summarised the facts relating to the 50 hour week issue. We now summarise the background facts relating to the other issues. In his closing submissions Mr Worthley withdrew the claimant's **age discrimination** claim.
13. On Monday, the **29 October 2018,** three months after Sarah Luck had presented her sex discrimination claim to the tribunal, the claimant arrived at work at Hingston wearing his daughter's hat and a blonde wig or hairpiece. This was reported by employees to management by email see pages 132 and 132A, and stills at 132B to E. On the same day Aaron Burgers, distribution manager, wrote inviting the claimant to a disciplinary investigation meeting on the **7 November** to discuss "inappropriate and unprofessional conduct in the workplace on 29th or October and breach of dignity at work policy". The respondent's investigation notes are at pages 134-141. He claimed that he was showing solidarity and support for his daughter in her "ongoing situation" and as his trade union representative. He did not deny what he had been wearing on 29th of October. On **18 December 2018** the claimant sent back his version of the notes of the meeting. On the **15 January 2019** Aaron Burgers emailed the claimant stating that he was recommending that the matter go to the next stage in the disciplinary process, and that it would be passed to an independent manager who would invite him to a hearing. See page 163. No further action appears to have been taken before his resignation in October 2019.
14. In the meantime, on **11 November 2018,** the claimant had an episode of what was thought to be presyncope while shopping at Morrison's and was admitted to the Minor Injuries Unit at hospital. See paragraph 28 below for more details. We understand presyncope to be an episode of dizziness, lightheadedness, or vertigo and blurring or narrowed vision, short of unconsciousness. One of its possible causes is high blood pressure (HBP). On **12 November** the claimant texted Trevor Brown, the driver foreman, who had acted as the notetaker at the disciplinary investigation, stating that he was going to his GP and blamed Mr Burgers for

causing him too much stress, claiming that it was bullying and harassment at work and threatening to go to ACAS and to an employment tribunal. He said he had high blood pressure. See page 142. The claimant went off sick. There were subsequent return to work meetings on the **19 June** and **9 September** 2019, but the claimant never effectively returned to work thereafter. The claimant submitted sick-notes from his GP on a two weekly basis up to the end of January 2019 which cited "special investigations and examinations" (see pages 330–333).

15. On **22 January 2019 t**he claimant was referred to an external occupational health company, IDC, see pages 157–159. It recounted the sick-note history and enquired what the investigations were "to get a better understanding so we are able to assist with a return to work". In the meantime, on **24 January 2019** the claimant had obtained from the DVLA a letter at page 164 thanking him for notifying his blood pressure but stating that "as your resting blood pressure is currently below 180/100 MM HG, the DVLA does not need to make medical enquiries and therefore you may keep your group 2 bus and lorry driving licence", but if his condition changed or worsened and his resting BP went above 180/190 he must notify DVLA by downloading the relevant questionnaire.

16. The claimant had a telephone consultation with Dr Prajapati (Dr P) on **31 January 2019** and he subsequently produced a **first OH report** concerning the claimant's high blood pressure history. This also referred to him having been admitted to A and E ("in recent months") and had undergone a number of investigations including an ECG, an echocardiogram and ambulatory blood pressure monitoring, which, according to the claimant, had been reported as normal. It referred to a previous problem following heavy lifting at work. Dr P recommended that the claimant obtain a fit note from his GP confirming that his resting blood pressure reading was normal and stating that the claimant's vision was compatible with driving group 1 or 2 or two vehicles. He recommended Mr Luck obtain medical evidence prior to management considering whether the claimant was fit to return to his contractual role.

17. On **4 February 2019** the claimant emailed a fitness certificate of that date from his GP to Erica Williams (EW). This is at page 334. It recommended a phased return to work on amended duties "as agreed with employer, local driver and not heavy lifting". (No discussion or agreement had in fact taken place at that stage, but the claimant asked for a return to work meeting. It is clear from internal emails at that stage that EW had not yet seen Dr P's report).

18. The claimant sent reminders to EW, who did not receive Dr P's report until the **7 February**. On **5 February** the claimant had emailed: – "…however I feel that a short-term resolution for you with your advisors to sort things out, is that I have some of my holiday for this week and if necessary next week as well". The claimant then took paid annual leave from the 5 to 14 February while the matter was to be resolved. The claimant complains about this, and it not being reinstated when matters were not resolved. Internal emails at page 169 onwards from EW (Jeremy Dyal was copied in) indicate that enquiries were being made about the phased return to work conditions, and about his fitness to return to driving class 1 or 2 vehicles.

19. On **18 February** 2019 EW emailed the claimant (page 187) asking for clarification from his GP as to his fitness to drive, and asking in particular for further clarification regarding his eye injury and blood pressure. The claimant responded on **19 February**, page 186, again confirming that the points raised had already been covered "both by my Doctor in her fitness to work, and the IDC plus DVLA who issue my vocational HGV licence and I meet all their criteria." He provided to her a copy of the DVLA letter of 24 January.He again asked for a return to work meeting.

20. On **25 February** EW contacted the claimant again asking for clarification and saying that a colleague had a call booked with the OH that day. The claimant replied to the effect that he had agreed to take 9 days holiday to enable the problem to be sorted out, and that he now wanted the holiday reinstated.

21.On **28 February 2019** the claimant raised a whole series of wide-ranging grievances, about his treatment with Clare Soper, Operations Director based in Leicester. See pages195-196. These included his treatment related to the disciplinary proceedings, breach of GDPR, ignoring OH advice in not getting him back to work, breaches of the Human Rights Act Articles 10 and 14, and of the EQA in relation to disability, and unlawful deduction from wages in paying him sick pay on 28 February when he was not sick. The receipt was acknowledged on 1 March.

22. Dr P sent a **second OH report** on **1 March** in response to further questions raised by Ms Blayfield, an HR business partner of the respondent. In particular, it advised that blood pressure readings provided by the claimant to DVLA, should not be relied upon unless provided by an appropriately trained clinician. See page 203. The report was sent to the claimant and the respondent.

23. On**12 March** the claimant sent a reminder to Clare Soper about his grievance, to which Ms Soper responded on the **14 March** stating that a suitable manager would be identified to hear his grievance, and that his return to work and pay deduction issues would be picked up by Jeremy Dyal. The claimant emailed a copy of his sick pay calculations to EW. See pages 217-218. He claims that Mr Dyal told him that it would be copied to payroll and that a payment would be made to him by bank transfer, and that Mr Dyal confirmed the agreement to ACAS. See the claimant's second witness statement dated 17 February 2020 and paragraph 26 below for Mr Dyal's response, described in more detail in paragraphs 7-11 of his witness statement disclosed in April 2020, after the first tranche of hearings. The statement also attaches an email dated 14 March 2019 from Mr Dyal to the claimant, (which does not appear to have been in the original bundle, but was added at page 476). There are clear conflicts of fact between Mr Dyal and the claimant which we will need to resolve.

24. On **17 March** the claimant was issued with a new licence by DVLA (which the claimant revealed to Mr Elliott at the first grievance hearing on **18 April**, and at a return to work interview with Philip Harvey, Distribution Resource Manager, on **19 June 2019** – see pages 285-287).

25. On **25 March** the claimant was invited to a **grievance meeting** to be chaired by Neil Warner, Quarry Manager. The claimant objected and on **3 April** he was notified that the grievance would be heard by Nicholas Elliott. It in fact took place on **18 April** but was adjourned and completed on **8 May**. The notes of the April hearing are at pages 245A to F, and the resumed hearing in May at pages 250 to 259.The outcome was notified on **23 May** at pages 263-267.

26. In the meantime, other relevant events had taken place. On **28 March** EW sent an email to all local drivers. See page 226. It raised in particular the following issue:

"… It seems to have become accepted practice for some drivers to finish early to fulfil personal commitments. Drivers in need of an early finish must make a request through either Steve Parfitt (when on Hinckley work) Paul Evans or myself and obtain acceptance of the request. Drivers who request early finishes for personal reasons will receive payment for hours worked only (subject to the contractual minimum). Drivers should make every effort to utilise holidays rather than rely on early finishes. To confirm, the 10 hour guarantee per day that was agreed locally is only payable if you are available for work."

The claimant relies upon the contents of this letter to support his claim that he was entitled to a minimum of 50 hours per week pay, which fed also into his entitlement to sick pay. In addition, he also claims that his daughter received 50 hours per week pay when off with stress in 2017, and when she was medically suspended from work. He contrasts this with his own treatment when he neither received sick pay, nor was he suspended, although, as he claims, he was fit for work.

27. The claimant was initially paid SSP from **February 2019,** not at the contractual rate of 39.5 hours per week, nor at the contractual rate of 50 hours , as claimed by the claimant**.**

On **2 April 2019** the claimant emailed Clare Soper claiming that he was entering his seventh week without being paid and that Mr Dyal had assured ACAS that he would have reinstated his nine days holiday taken in February, and that the respondent would repay the SSP to HMRC that he was not entitled to since being signed fit for work from the 5th of February. Mr Dyal denies making any such concession about holiday pay. EW wrote to notify the claimant, and said that they were awaiting a further report from Dr P. See pages 230-234.

28. A **third OH report** was obtained from Dr P on **15 April**. This report is at pages 227-229. Materially it referred to 3 reports/ letters; a GP's report from Dr Mantle dated 29 March 2019, a consultant ophthalmologist report from Dr Raman dated 7 January 2019, and a letter from Dr Edwards dated 13 November 2018. The latter is at page 417, and refers to the incident when he was in Morrisons Supermarket on **11 November 2018** when he had felt unwell and had to hold on to the supermarket trolley for support. He had managed to walk to the car, and his wife had driven him to the Minor Injuries Unit where his BP was found to be high at 179/83. He also had visual disturbance. Dr Edwards diagnosed an episode of pre-syncope. In his OH report under the heading of **Advice**, Dr P stated:

"There is clinical suspicion from the medical evidence received, that Mr Luck is experiencing unprovoked episodes of disabling dizziness. I remain concerned about Mr Luck's compliance with anti-hypertensive medication. Given my understanding of the circumstances, Mr Luck is advised not to drive and must notify the DVLA about his dizziness.

In summary there is no reason to amend previous OH advice about Mr Luck. I recommend that Mr Luck can return to his contractual group 2 driving role when he is allowed to resume driving by the DVLA. I can see no reason why Mr Luck cannot return to his contractual role if he has confirmation from the DVLA that he is fit to drive group 2 vehicles. In the interest of compliance and probity, it is recommended that management obtain evidence from the DVLA through Mr Luck that he is fit to drive; in order that this evidence can be accepted, it should contain information that Mr Luck has disclosed his condition of dizziness to the DVLA."

29. After the first tranche of hearings, in April 2020, the claimant disclosed a further copy of Dr Edwards' letter of 13 November 2018, and a copy of a report to the claimant's GP from Mr Raman , Ophthalmologist , dated 29 August 2017, <u>not</u> 7 January 2019, which found a left eye retinal vein occlusion and vitreous haemorrhage , the former of which had resolved completely. There was some deterioration of vision in the left eye compared to the right. He recommended a follow up in 6 months (February 2018). Dr Mantle's report of March 2019 has not been disclosed. However, on the 10th of February 2020, shortly before the start of the first hearing, the claimant disclosed a further tranche of medical reports and letters dating from November 2018, and a cardex summary of GP attendances with Dr Mantle from November 2018 to July 2019 at pages 434-438. These refer to a number of attendances for high blood pressure, and in particular, refer to a further

episode of dizziness at Christmas 2018, which Mr Luck describes at paragraph 17 of his first witness statement . He claims that he referred it to Dr Mantle and that it was considered to be a side effect of his BP medication.

30. On the **16 April 2019** the claimant presented his first claim to the tribunal, which was acknowledged and sent to the respondent on **18 April**. However, the claimant entered into EC prior to issuing his claim, and Mr Dyal would have been aware of that from March 2019.

31. On **17 April 2019** Mr Dyal emailed the claimant having seen the latest IDC report from Dr P, in which he specifically cited the **Advice** passage from Dr P at paragraph 27 above. The email continued "In accordance with this advice I would be grateful if you could contact the DVLA and confirm to me/Erica what the outcome is please regarding your class 2 licence? Our objective remains the same, as it always has, that we want you to return to work but I hope you understand that we have a duty of care towards you and others".

33. The claimant claims in paragraph 33 of his witness statement that in response to the content of the report he contacted the DVLA to notify, and read out to them what Dr P had said in his report over the phone, and, at the DVLA's request, returned a completed DIZIV report, on or about **24 April 2019. A blank version of that form is at pages 428A to D.** There is corroboration of his evidence because on **2 May 2019** DVLA wrote to the claimant's GP Dr Mantle stating "we have been notified that your patient is experiencing/has experienced dizziness", and enclosing a form for her to return. That form, DIZ2V is at Pages 429 to 430 and opens with the statement, typed, "Your patient has declared attacks of severe dizziness". Doctor Mantle hand-wrote the following responses to questions:

Q1. please indicate the diagnosis if available – pre-syncope.

Q2. Are the attack(s) disabling or is it likely they would affect driving were they to occur when driving? – Yes.

Q3. Does the patient have warning of the attack(s)? – No. I do not believe so.

Q4. For how long has the patient been free of **disabling** dizziness? – Months 4+.

Q5. Has any episode ever caused loss of consciousness? – No.

Q6. Is patient receiving treatment currently? – No.

If yes, please indicate current treatment date commenced and response – Not for dizziness. Is hypertensive and takes Ramipril 5 mg daily, Indoprimide 1.5 mg daily, Amlodipine ? mg daily.

Q7. Is there any other medical conditions likely to affect driving? – No.

If yes please specify – does have visual issue – reduced acuity left eye – see attached letter

Q8. Please give the name(s) of any other consultants involved. – Please see attached letters which give full details of history and specialists involved.

That letter was signed by the GP on 13th of May 2019. This is confirmed in the GP note for that day.

34. On **20 May 2019** DVLA wrote to the claimant a letter headed " **DVLA medical enquiry into your fitness to drive".** It indicated that an initial assessment of his fitness to drive had been made and the information referred to " our team of qualified doctors" … "Our doctors can usually make a decision based on the information we have already received, however they may require further information from you or your GP and or other medical professionals. This is to better understand your medical condition and fully assess how this impacts on your ability to drive safely. As you may appreciate our investigations will take some time to complete and we will keep you updated of progress".

We conclude that DVLA's considered response was in the letter of 14 August at paragraph 41 below, confirming that the claimant was safe to drive.

35. On **20 May**, Mr Dyal emailed the claimant asking for a response to his email of the 17th of April referred to at paragraph 31 above.
36.On **23 May** Mr Elliott notified the claimant of the grievance outcome. See pages 263-267. As to the grievance outcome, only two of the allegations were partially upheld. The first related to the delay in dealing with his return to work process "with a missed opportunity to review your assertions that you were able to drive legally". The second related to the delay in notifying him of his reversion to SSP at the end of his period of contractual sick pay on 28 February 2019. Mr Elliott dealt separately with his allegation that he was fit to return to work to drive an HGV in February 2019: He recommended that an independent local doctor familiar with the DVLA guidelines with access to the claimant's medical records be appointed to prepare a report to be shared with DVLA until his fitness to drive was determined. He recommended that the claimant be returned to basic pay from 3 February until his fitness was assessed. See page 267.
37. The claimant wrote to Mr Elliott challenging the outcome on **28 May** page 268 stating that he wished to take the grievance to stage two; that no specific figure had been agreed as to the amount to be paid; but that it had been agreed that it should be on the basis that he had been on medical suspension (under HSAW Act 1974) from the 4th of February, not the 3rd; and generally as to the calculation of the holiday pay reinstatement. The claimant did not agree to a further medical assessment as he was awaiting a response from DVLA in relation to the last OH report as to his dizzy spells. He wrote again to EW, Elliott being apparently on holiday, with details of his back sick pay claim on 30 May, and asked for confirmation that he was on medical suspension as above. He asserted that the grievance outcome did not accord with what Mr Elliott had said on 8 May. EW responded on 31 May stating that the stage 1 grievance remained outstanding until clarification from Mr Elliott.
38. On **6 June** there was a telephone conversation between the claimant and Mr Elliott, and on **7 June** a payment was made into the claimant's bank account of £3355.79 , which was apparently calculated on the basis of back pay calculated at the rate of 39.5 hours per week less SSP, plus holiday pay. The claimant challenged this payment on a series of grounds in a detailed email of 8 June – pages 278-282.
39. On **19 June** a first formal return to work meeting took place with Mr Harvey, at which the claimant again asserted that he had had his licence renewed by DVLA on **17 March**, " following HGV medical. HBP was discussed at medical and found to have reduced to normal level." See note 285-287.
40. A further reference to IDC was made on **9 July** – pages 288-293 - and the claimant attended a telephone consultation with Dr Hall- Smith on **8 August**. The **fourth OH report** at pages 294-295, and its follow up on **23 August,** are of importance to the outcome of the case. In summary, Dr Hall-Smith stated that he had the opportunity to review all of the correspondence on file including copies of hospital letters, correspondence from his GP and Dr.P's advice. In addition, "Mr Luck has recently provided a printed summary of his GP consultations and so I am confident that I have up-to-date knowledge with regards to his current health status". He said that he had taken a full and detailed history from him with regards to the events on the 11th of November and on Christmas Day 2018 that have led to his extensive investigation and the advice has been given in relation to his fitness to drive. He described what the claimant had told him in some detail. The report continued: – "He had a medical for the renewal of his HGV licence in March 2019. This was carried out by a doctor in Exeter who did not have access to his medical records but who recorded the details of his hospital investigation on the form. Mr Luck believes that the DVLA made contact with his GP to confirm the

history at that stage but I can see no reference to that in the summarised records. The DVLA did issue him with a renewal of his licence following that medical.“ The letter continued with a reference to advice from Dr P stating that “he needed to inform the DVLA about his symptoms and he duly did that”.
“My own view based purely on the information available to me, is that Mr Luck is almost certainly fit to drive. He has had no further episodes and the episodes themselves were not, in my opinion, disabling. (Tribunal’s underlining). The requirement to report to the DVLA does depend on the interpretation of wording and certainly episodes of dizziness which are sudden and disabling, need to be reported. The advice to report was given in good faith at the time, as it is the DVLA medical advisors who are the final arbiters on fitness to drive issues. Now that they are involved I do feel that it will be necessary for them to confirm fitness.”

“In an attempt to progress this case, I did try to phone the DVLA medical advice line for doctors during the consultation. I was unable to get through, but did succeed in talking to one of the DVLA doctors (Dr Prasad) on Friday 9 August. She was unable to discuss the case but did access the file and has promised to review it as a matter of urgency. She was unable to advise over the telephone whether Mr Luck could drive pending her decision.
“In summary, Mr Luck is currently in limbo. He has undergone extensive investigation for what appears to have been very minor, transient symptoms. Nevertheless, this was taken seriously at the time and he did undergo a lot of tests. Other than raised blood pressure, no pathology was identified, and the passage of time has confirmed that he has not suffered any further episodes. Whilst I believe the DVLA will confirm his fitness to drive, the matter is now in their hands and I do feel that he should await their guidance before resuming HGV driving.“
41. At the end of the first tranche of hearings in February 2020 the claimant was ordered to provide a copy of the GP report obtained from a doctor in Exeter in march 2018, said to have been provided to the DVLA. At a subsequent telephone case management hearing on 22nd of April 2020 the claimant’s solicitor said that he was unable to locate the Doctor and could not remember his name . However it was claimed that the claimant had contacted the DVLA for a copy. No copy was produced at the time of the resumed hearing in June 2020. We draw no conclusions adverse to the claimant as to that failure. We are aware that due to Covid, the DVLA has been seriously hampered in its work. There remains an issue, however, as to why in this case the claimant chose to approach a different doctor and at a particularly sensitive time.
42. On **14 August 2019 t**he DVLA wrote to the claimant Page 296, stating: –
“From the information we have received you satisfy the medical standards for safe driving and I am pleased to tell you that: –
You may keep your Car/motorcycle and Lorry/bus driving licences. This will be subject to a medical review and will be looked at again when your driving license runs out. Two months before the expiry of your driving license we will send you forms which you can use to reapply for your driving license.
I**f your medical condition gets worse or your doctor tells you not to drive, please let us know.”(writer’s emphasis).**
43. It is clear that on the basis of that letter, on **23 August** 2019 Dr Hall Smith wrote to Mr Elliott stating: –
“Further to my recent telephone consultation with Mr Luck and contact with the DVLA medical advisors, I am pleased to advise that he has received confirmation that he is fit to drive.
He has kindly provided a copy of the letter from the DVLA confirming that he may keep his lorry licence, and on that basis, I would regard him as fully fit to resume

his normal driving duties. Please do not hesitate to contact me if I can be of any further assistance."

44. On **2 September 2019** Clare Soper wrote to the claimant inviting him to attend a further return to work meeting with EW on 9 September. The claimant had copied the latest occupational health report and letter from Dr Hall Smith both to Ms Soper and to Mr Elliott and Mr Dyal.

45. There are two sets of the notes of the return to work meeting with EW on **9 September**; the version made by the respondent's note taker at pages 302-304, and the claimant's version at page 439. The claimant had wanted to record the meeting on a Dictaphone but was refused. In truth, we do not consider that there are any material differences in the two versions. The claimant was wanting a phased return to work but as a local driver not a relief driver, as he had been working prior to going off sick in November 2018, and as recommended in the last GP sick note of February 2019. There was a discussion about this proposal and the claimant raised claims that he would not be able to drive to Randles yard where the local trucks were parked due to poor lighting conditions and rough ground. He asked if a risk assessment had been carried out. The claimant also raised issues about his outstanding sick pay and holiday pay issues which had been the subject of his earlier grievance. It does not appear to be in dispute that EW handed to the claimant a draft letter (not on headed paper) under the claimant's name and address dated 2 September 2019 in the following terms which she requested the claimant to sign:

"Dear Peter,

In respect of your entitlement to drive a large goods vehicle.

Thank you for your cooperation in the process of establishing your fitness to drive a large goods vehicle. This has taken some time to complete and I am sure you share the view that we consider extremely important the fitness to drive of our drivers and the safety of all road users.

Following your declaration of an episode of dizziness in November 2018 Hanson are obliged to ensure you are fit to drive a lorry before allowing you to return to driving at work. In order to establish fitness to drive and provide advice on the same Hanson engaged the (IDC) to review your medical records and conduct examinations. Whilst I am confident you are aware that you must tell the DVLA if you suffer from dizziness that is sudden I need confirmation that you have informed them.

Please confirm you have informed the DVLA of the sudden dizziness experienced in November 2018.

I Peter Luck informed the DVLA of my episode of dizziness that occurred in November 2018.

Signed Peter Luck…….. Date……."

There was also an issue whether the claimant had been taking his blood pressure medication. The claimant said he had. The claimant said he would send the latest letter from Dr Hall Smith to EW. In addition, it is clear that the claimant also raised a claim that he had not been given a new contract when he had been appointed as a permanent relief driver after his Daughter's return from maternity leave, because there are email enquiries about the issue which EW made internally after the meeting. It appears that no new contract was sent to the claimant (but see paragraph 10 above).

46. The claimant declined to sign the letter during the meeting. He claims that it required him to admit that he had had an episode of dizziness in November 2018 which he did not accept. The claimant sent an email to EW on 11 September setting out his version, and asking for another return to work meeting.

47. On **19 September 2019** Miss Soper wrote to the claimant in the following terms: –
"This letter serves to confirm our position following your return to work meeting with Erica Williams on 9 September 2019.
We arranged for you to have a return to work meeting with Erica Williams which is good practice following a period of absence.
At this meeting you declined to confirm that you are fit for work by signing the letter that was prepared for you and you have not returned to work. You have not provided a valid medical reason for your continued absence and you are now absent without a valid reason. Therefore; in accordance with company policy you are not eligible for contractual pay or sick pay.
Furthermore; as you are absent without authorisation you are in breach of your contract of employment and may be subject to disciplinary action." Page312
On the same day the claimant emailed a lengthy letter of complaint repeating many of the earlier points which he had raised during the grievance and the return to work meeting, and asserting a constructive dismissal. Page313.
48. On **30 September 2019** the claimant emailed a further grievance letter to Clare Soper at page 316, setting out his position and stating that he would be returning to work on Wednesday, the **2 October 2019** and that if he was refused and not paid it would be a breach of contract. He also threatened to add additional claims to his existing tribunal claims.
49. There was also an exchange of emails between Mr Dyal and the claimant on **1-2 October 2019** at pages 317-318 in which the parties set out their relative positions.
50. The claimant resigned his employment by email on **9 October** in which he set out in some detail his reasons, which form the basis of his claims of constructive dismissal and victimisation relating to his Daughter's dispute with the respondent. It does not however mention age discrimination. The letter is at pages 319-321. JD responded "I acknowledge receipt of your resignation which I have assumed to be with immediate effect. Best wishes for the future. " Page 322.
51. That concludes a summary of the principal events giving rise to the claimant's claims, and the agreed list of issues.
52. **Further relevant statutory provisions, and the tribunal's self-directions.**
52.1. **Unpaid wages claim.** Section 13 (1) of the ERA provides that "An employer shall not make a deduction from wages of the worker employed by him unless –
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."
Section 13 (2) defines the words "relevant provision".
Section 13 (3) materially provides that: "Where the total amount of wages paid on any occasion by any employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker upon that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker's wages on that occasion."
Section 27 extends the definition of wages to include contractual sick pay and statutory sick pay (SSP) under the Social Security Contributions and Benefits Act 1992. In the absence of any contrary provision in the contract, wages are " properly payable " under Section 13(3) when the worker presents himself for work, or is ready, willing and able to work. This coincides with the common law contractual entitlement to sick pay.Contractual sick pay was payable to the claimant under the terms described in paragraph 9 above. SSP was payable (for a period of 28 weeks)

subject to the provisions in Sections 151 to 154 of the 1992 Act. Materially, section 151 (4) provides "For the purposes of this part of this Act a day of incapacity for work in relation to a contract of service means a day on which the employee concerned is, or is deemed in accordance with regulations to be, incapable by reason of some specific disease or bodily or mental disablement of doing work which she can reasonably be expected to do under that contract".
Regulation 2 of the SSP (General) Regulations 1982 defines extensively "deemed incapable of work". At the end of the evidence the tribunal drew the attention of counsel to the provision in regulation 2, and invited the parties to address us upon it in their closing written submissions. The essential pay issues in the case included:

(1) Whether, and if so when, did the claimant become ready, willing and able to work, and thus when he became entitled properly to be paid his wages, and at what rate: 39.5 hours per week or 50 hours per week?
(2) In relation to sick pay, during what period was he entitled to be paid contractual sick pay, and at what rate, 39.5 hours or 50 hours per week? During what further period was he entitled to SSP?
(3) What was he in fact paid, including after he raised his grievance?
(4) Was their any actual or threatened unlawful underpayment of wages or sick pay up to the date of the claimant's resignation?

52.2. **Constructive dismissal.** Under section 95 (1) (c) of ERA there is a dismissal where the employee terminates the contract with or without notice in circumstances such that he or she is entitled to termination without notice by reason of the employer's conduct. As was stated by Lord Denning in **Western Excavating (ECC) Ltd v Sharp:**- "If the employer is guilty of conduct which is a significant going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. He is constructively dismissed."
The breach of contract may be a breach of an express term or of an implied term. In the present case, the claimant asserts that there was a breach of both such terms; an express term relating to working hours and sick pay; and the implied term of trust and confidence. There is an implied term in all contracts of employment that neither party will, without reasonable and proper cause, act in such a way as to be calculated or likely to cause a breakdown in trust and confidence by the one in the other. "Calculated" implies an act or course of conduct by which the employer intends to cause the breakdown, but intention is not a necessary element. A party may be in breach if he or she acts in such a way as to be likely to have that effect, intended or otherwise. It is an objective test. See **Malik v BCCI 1998 AC page 20.** See also the judgement of Browne-Wilkinson J in **Woods v WM Car Services (Peterborough) Ltd 1981 ICR page 666.**" The tribunal's function is to look at the employers conduct as a whole and determine whether it is such that its affect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it" The employee must resign in response to the breach, but it need not be the sole cause of the resignation. It is sufficient if the employer's conduct played "a part" in the employee's decision: See **Wright v North Ayrshire Council 2014 ICR page 177,Following Meikle v**

Nottinghamshire County Council 2005 ICR page 1 in the Court of Appeal. An employee may lose the right to resign and claim constructive dismissal if he or she affirms the continuation of the contract. Affirmation may be inferred if there is significant delay in resigning after the repudiatory conduct. There is also to consider the last straw doctrine. An employee may elect to resign after a last straw in a series of incidents. In **Omilaju v Waltham Forest LBC 2005 ICR p. 481** the Court of Appeal said that the last straw need not be of the same character as the earlier conduct, nor need it be unreasonable or blameworthy conduct, although in most cases it would do so, but it must add something to the breach of the implied term of trust and confidence.

It is to be noted that the burden of proving a constructive dismissal falls upon the claimant.

52.3. **Direct discrimination – Age.** This is no longer pursued by the claimant.

52.4. **Victimisation.** We have already set out the provisions in Section 27.

Section 39 of the EQA incorporates into the employment field the circumstances in which discrimination/victimisation may occur. Section 39 (2) states that: "An employer (A) must not discriminate against an employee of A's (B) –

… (c) by dismissing B; or

(d) by subjecting B to any other detriment."

Section 39(4) also prohibits such conduct by an employer as an act of victimisation. For these purposes, dismissal includes constructive dismissal, defined in Section 39 (7) as "an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice" . This is a similar definition to constructive dismissal to that in Section 95 of ERA except that in respect of a constructive dismissal claimed to be discriminatory or an act of victimisation, the repudiatory conduct of the employer must be materially or significantly influenced by the relevant protected characteristic or protected act.

The causation test for discrimination on a protected characteristic as well as victimisation is explained in the well-known passage in the judgment of Lord Nicholl's in **Nagarajan v London Regional Transport 1999 ICR 877** HL.

" A variety of phrases with different shades of meaning have been used to explain how the legislation applies in such cases. Discrimination requires (racial grounds) were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor phrase. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions are better avoided so far as possible. If (racial grounds)… had a significant influence on the outcome discrimination is made out. The crucial question in every case was why the complainant received less favourable treatment… Was it on grounds of (race)? Or was it for some other reason …."

The same test applies to conduct by the victimiser claimed to constitute a detriment short of dismissal, as well as constructive dismissal.

Mr Worthley in paragraph 39 of his closing submission reminds us that the detriment must be "because of" the protected act and referred us to the Court of Appeal judgement of Underhill LJ in **Greater Manchester police V Bailey 2017 EWCA CIV 425,** which at paragraph 12, in endorsing the judgement of Lord Nicholls in **Nagarajan**, stated that "it is well established that there is no change in the meaning (from the pre-Equality Act 2010 test) and it remains common to refer to the underlying issue as the "reason why" issue". He also reminded us that the motivation for the discriminatory act of the victimiser may be subconscious. It need not be conscious.

Detriment is not defined in the EQA. For the purposes of these proceedings, we rely upon the definition of the House of Lords in **Shamoon v Chief Constable of RUC, 2003 ICR page 337.** A detriment exists if a reasonable worker would or

might take the view that the treatment was in all the circumstances to his or her detriment. However an unjustified sense of grievance could not amount to a detriment.

52.5. **Burden of Proof.** There are special provisions about the burden of proof in discrimination cases set out in section 136(2) of the EQA: "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."

This has the effect that there is an initial evidential burden on the part of the claimant to prove facts, from his own evidence, or cross examination of the respondent's witnesses or from other documentary evidence, for example, from which a tribunal could reasonably conclude or infer, in the absence of an explanation, that the claimant had been treated as he was because of a protected characteristic, or protected act in the case of victimisation. The burden then shifts to the respondent to prove that the reason for the act had nothing whatsoever to do with the claimant's protected characteristic. In this connection the tribunal took into account the 12 point guidelines within the Court of Appeal's judgement in **Igen Ltd v. Wong 2005 ICR page 931**. Both parties are professionally represented and the Tribunal does not need to set them out specifically here.

51.6. **Time points.** There are time points arising in respect of certain aspects of the claimant's claims of detriment contained in section 123 of the EQA, and potentially, in relation to the claimant's unpaid wages claims, under section 23(1)-(3) of ERA. We deal with these points having made further primary findings of fact

52.6. As to the claimant's claim that he was not provided with a **written statement of terms and conditions**, Sections 1, 4 and 7A of ERA, and Section 38 of Employment Act 2002 are engaged. Further findings of fact are required.

53. **Conclusions.**

The parties agreed to proceed by way of written closing written submissions and replies, which followed a further discussion of the issues at the end of the evidence, on ninth of June 2020. It became clear at that stage that there was an additional fundamental issue not specifically identified in the agreed list of issues: Whether at any stage, and if so when, the claimant was ready, willing and able to return to work as a relief driver?.

The parties' submissions are extremely lengthy and thorough. The respondent's exceed 50 pages including replies and the claimant's 30 pages. We do not intend to set them out in great detail, but will summarise those legal submissions which, based on our findings of disputed facts, seem to us to be the most material.We have carefully considered the submissions with regard to the disputed facts.

Before setting out our conclusions we record two matters of importance. The factual issues which we have to decide are extensive and complex. There was documentary evidence exceeding 500 pages by the end of the hearing. However we have nonetheless been left in the dark about some matters upon which oral or documentary evidence must exist, but which has not been disclosed to us – on both sides. Secondly, in some respects the conduct of both sides both during the events in question in 2018 and 2019, and during the litigation process, has demonstrated an intransigent attitude, and an unwillingness to engage in negotiation to settle a case where there is clear litigation risk - on both sides. We will provide examples in stating our conclusions, but we record here that there was an unwillingness in particular on the part of the claimant at the start of the tribunal hearing, despite the encouragement of the tribunal, and the granting of further time, to engage meaningfully in settlement negotiations.

The order in which we state our conclusions is as follows: –
(1). The 50 hours issue: was there a failure to pay sick pay at the appropriate rate?
(2). When if at all, did the claimant become ready, willing and able to return to work as a relief or local driver?
(3). Whether there were acts or failure to act on the part of the respondent which constituted a repudiatory breach of any express term of the contract or the implied term of trust and confidence?
(4) Were there acts of detriment up to and including a repudiatory breach constituting victimisation?
(5). Did the claimant resign in response to such acts?
(6). If so, what was the reason the principal reason for the dismissal, was it capability or some other substantial reason, and was it fair or unfair? Was it victimisation?.
(7). If yes, was there contributory fault on the claimant's part? What are the chances that, absent any unfairness or any act of victimisation, the claimant's employment would have come to an end in any event and if so when? – the Polkey test.

54. **The 50 hours issue.**

We have already summarised the primary background facts relating to the contract of employment at paragraph 8 to 10 above. We note that there was a change in his job and status from local day driver for a fixed period of one year to a permanent job as a relief driver, and also a consequential change in his working area and the consequential increase in pay rate, in June 2016. We note that these were notified to him in writing by letter of 14 June 2016 which, it is now not in dispute, he signed and returned. We accept the letter contained enclosures, which are not however included in the bundle. This is one example of a failure of evidence. We accept however that the probability is that the enclosures did notify the material changes in contractual terms for the purposes of section 4 of the ERA, including the changes in pay and that the job was permanent. We reject the claimant's claim that there were no documents enclosed with the letter. The claimant was notably vague about the circumstances in which he signed and returned the letter, and, having regard to the thoroughness with which the claimant pursued other complaints, we regarded as significant that he did not record on the reply that he had not received any of the enclosures if that were true. It is a fact that the contract of employment at pages 74 to 83 does not refer to the existence of the 50 hour pay agreement for local drivers in the Southwest, which we are satisfied was in force at the time the contract was issued in 2015. In parenthesis, we note that that fact is not pursued as a breach of Section 1. The complaint is pursued concerning the permanent contract in 2016. We are satisfied that he was notified in writing of the fact of a new contract on the same terms except for the job title, its permanence, and the new rate of pay.

The specific findings we make are that, relevant to all employees, including drivers, in the South West region there was a contractual working week of 39.5 hours although actual working hours could be longer as provided for in the contract of employment and in the PCA. Another omission of evidence is that no written copy of the 50 hour agreement applying to drivers has been produced to the tribunal, but other correspondence, in particular the booking off letter of 16 February 2016, refers to it. None of the witnesses called by the respondent were working for the respondent at the time that it was introduced, but they agreed that there was such an agreement, although its precise terms remain unclear. There must be managers in the South West who were working for the respondent at the time of its introduction and still working. They have not been called. Varying explanations are given as to its purpose. We conclude that the probability is that

the trade union, now Unite, an amalgamation of the TGWU and GMB, was not a party to the agreement nationally. It may be that there was local trade union involvement only. We further conclude that the rationale behind the agreement was that there was was insufficient driver time available to enable all of the required driving duties to be fulfilled within their combined contractual working hours of 39.5 specified during the normal working week which, including Saturdays, amounting to 9.5×5 days Monday to Friday +5 hours on Saturday mornings (52.5 hours). For these reasons, the respondent needed to incentivise the drivers to make themselves available for extra hours over and above the 39.5 hours, even taking into account that the contract provided in paragraph 4 (b) that the normal working hours could be varied on reasonable notice and that "you are expected to cooperate in working such reasonable additional hours as are mutually agreed". It was not compulsory. We interpret the meaning of "normal working hours" as referring to the hours of work between 7 am and 5 pm Monday to Friday, and Saturday mornings, totalling 52.5. In parenthesis, we do not regard it as significant that the internal document at page 91 referred to 40 contracted hours per week. The difference between 39.5 and 40 is de minimis. It supports the respondent's case, not the claimant's. We reject the claimant's argument that the additional 10 hours payment was incorporated into the contract of the drivers either expressly or impliedly so as to make their contractual working week one of 50 hours, although we do accept that the drivers were contractually entitled to receive pay at a minimum of 50 hours per week, but if and only if they (voluntarily) made themselves available to work at least those hours. This explains the content of the letter of 16 February at page 129 where it refers to the relevant passage in the contract as a minimum, and contrasts "contracted minimum hours" with "non-contractual enhancements currently in place". The latter refers to the 50 hours guarantee. The letter was written because certain drivers were booking off early and not making themselves available to work for the requisite 50 hours.

We accept the claimant's point that he habitually worked at least 50 hours per week as shown on his pay slips from April 2018 to November 2018. We accept also that the claimant was paid holiday pay based on his weeks actual pay rather than his contracted hours but those facts do not prove that his contracted hours changed from 39.5 to 50 hours.The calculation of holiday pay under the APC was clearly based on a different method as set out in paragraph 6 (f) (1) of the APC at page 83C, namely by dividing the employee's total earnings for the previous holiday year by 260 to obtain the figure for each days holiday pay. That accords with the provisions in the Working time Time regulations and the Working Time Directive, which do not apply to the calculation of sick pay. The sick pay method of calculation is clearly set out in a different paragraph, paragraph 12 on page 83F to G, which provided for contractual sick pay for the claimant with his years of service as being for 11 weeks under subparagraph (d) and, under subparagraph (e): " for a full week employee shall be entitled to receive payment equal in a month to the appropriate standard hourly rate multiplied by the 39.5 hours subject to the following: – where SSP is payable for the same period, the payment shall include any SSP entitlement, where DSS sickness benefit is payable the payment shall be reduced by the weekly amount of benefit payable".

Mr Worthley relies upon **Beattie v Age Concern UKEAT/0580/06** as authority for the proposition that sick pay should be calculated pursuant to the average weekly hours actually worked. Ms Davis claims that it has no relevance to the facts of the present case. We agree. We do not regard that judgement to be of relevance in interpreting this contract of employment and the PCA. In Beattie, the claimant was employed as a care worker on a contract which provided for a guaranteed minimum working week of 15 hours, but in practice she worked, by agreement with

her employers over a significant period of time, considerably greater hours. When she went off on an extended period of sick leave, Age UK paid her sick pay at the minimum hours rate. The ET agreed that the respondent was only contractually obliged to pay sick pay at the minimum hours rate rather than her actual contracted hours. This was overturned by the EAT on the basis that "normal working hours" were not defined and could be amplified by oral agreement between the parties, which had occurred. There was no provision specifying normal contractual hours.There is a clear distinction between the facts in that case and those in the present case . In the present case, there was a clear contractual provision incorporated into the contract from the PCA that sick pay should be paid at the contractual hours rate of 39.5 hours per week, not for "normal working hours" as was identified as being the case in Beattie. Beattie does not establish a general principle that an employee will be paid sick pay based on actual hours worked in every case regardless of other relevant express terms of the contract.

There is no evidence whatsoever that the PCA, which has general effect throughout the respondent's business, was amended in respect of sick pay for the driver employees based only in the South-West of England. We so conclude even although the PCA dates from January 2004. There is no evidence whatsoever that the PCA, which has general effect throughout the respondent's business, was amended in respect of sick pay for the driver employees based only on the south-west of England. No other agreement has been put before us. There is no evidence of any local agreement varying the PCA in respect of sick pay.

There is no basis for implying a term in circumstances where there is an express term dealing with the matter. Ms Davis referred us to the Privy Council authority of **Reda v Flag Ltd 2002 IRLR page 747** in that respect. As to the argument that there had been an implied variation of the contract (in respect of the drivers,)we were referred to **North Lanarkshire Council v MacDonald and another UKEAT (S)** 0036/06 for the proposition that the test is a stringent one. This led us to consider whether or not there was an established practice of paying sick pay to drivers on the basis of a 50 hour week. The claimant is not able to identify any one who was paid sick pay at that rate except that he says his daughter was, when she went off sick with stress. Sarah Luck agrees with that proposition and asserts in her witness statement that there were two others who were also paid at that rate, but did not identify them. The respondent did not challenge her evidence in cross-examination. The claimant agreed in cross-examination that he had not complained when paid sick pay at the 39.5 hours rate on an earlier occasion of absence prior to November 2018. That is of some significance because it negates a case that it was established practice, or "reasonable, notorious and certain". See **Devonald V Rosser and Sons 1906 2KB page 728.** Prior to the second tranche of Tribunal hearings additional documents were disclosed by the claimant to be found at pages 482 to 485 and 489. The documents at page 482 and 485 (the latter a circular from Clare Soper), indicate that there was an intention in February 2019 to negotiate an end to the 50 hour per week agreement which CS explains was part of an overall review of drivers' pay and to bring the South West drivers into line with drivers in other areas who did not have the benefit of the 50 hours agreement. It does not have any relevance to the construction of the sick pay provisions; and we reject the claimant's contention it was motivated by the claimant's present claim. Page 482 is text from the driver, Martin, to "all" referring to CS's communication. Page 484 is an incomplete text from an unidentified driver referring inter alia to the proposal to reduce the drivers' hours from 50 to 40. Page 489 is a text from Sarah Luck appealing for evidence of drivers being paid sick pay at the rate of 50 hours per week. Page 484 may be a response from an unidentified driver, but it is incomplete and does not support the claimant's sick pay

claim. If it be the case that SL was paid enhanced sick pay, it may be because she was medically suspended, or simply as a one-off, but the evidence remains unclear on this point. It does not establish that the claimant was entitled to be medically suspended, and as we understand the foot note on page 6 of Mr Worthley's submissions, he accepts that there was no statutory basis for medically suspending the claimant, and there were no such contractual provisions either.
In all of these circumstances we reject the claimant's claim that he was underpaid contractual sick pay from 12th of November 2018 to 28th of January 2019, when the 11 week entitlement came to an end. Thereafter the claimant's entitlement to SSP took effect for 28 weeks, beginning in November 2018. The claimant then raised a whole series of issues by way of grievance, including the sick pay issue, which were dealt with by Mr Elliott. His decision on this aspect of the grievance , given on 23 May 2019, was to reinstate contractual sick pay from 4 February , on the basis that it had not been determined whether the claimant was fit to drive an HGV. In these circumstances, the claimant received back sick pay of £3355.79 for the period from 4 February to 31 May. Indeed, it did not stop then, because the claimant continued to receive contractual sick pay until 19 September. This was, in the view of the Tribunal, a generous interpretation of the sick pay provisions because it exceeded the claimant's 11 weeks entitlement, unless the claimant establishes that he was in fact ready, willing and able to return to work from the date that he provided the fit note from his GP on 4 February 2019, which is the fundamental issue which we will deal with next. However, before we do so, we record that the claimant continued to raise the 50 hour week sick issue, which we have comprehensively rejected. In addition, there is a discrete issue whether the respondent wrongly deducted from the lump sum paid on 7 June the holiday pay which he received for the period from 4 to 13 February. In that respect, we accept that it was at the claimant's suggestion that he took holiday for that period while, it was hoped, the return to work issue was sorted out. See page 177. It was not. However, the respondent continued to pay the appropriate rate for contractual sick pay at least until September. The claimant's next complaint is specifically against JD upon the basis that, as the claimant claims, he notified ACAS that he would agree to reinstate the claimant's holiday pay entitlement, but subsequently reneged on the agreement. There is a documentary trail about this issue, starting at page 191, when in an email to EW the claimant demanded the 9 days holiday be reinstated; page 217 where the claimant repeated details of his supposed under payment, including at the 50 hour rate; and page 232, where, in an email to CS the claimant on the 2nd of April 2019 claimed that JD had agreed with ACAS that he would have his nine days holiday reinstated and the company would repay the SSP to HMRC on the basis that he had not been on the sick from 5 February. We find it inherently unlikely that JD would have agreed any such arrangement with ACAS. He denied it when it was put to him in cross-examination by Mr Worthley. On the balance of probabilities we accept his denial and reject the claimant's claim that he agreed to reinstate the holiday pay. We note that the claimant was refusing to communicate with JD except in writing. His evidence is based on double hearsay. There is a real possibility of a misunderstanding in those circumstances.
54. **Ready, willing and able issue.**
We have set out in some detail of the medical and occupational health advice obtained from paragraphs 16 to 42 above. The essential issue is whether the claimant was ready, willing and able to return to his pre-sickness employment as a relief driver; and when, and in those circumstances, whether the respondent acted without reasonable and proper cause in continuing to refuse to allow him to return, in subsequently stopping his pay and threatening to commence disciplinary proceedings against him unless he signed and returned the statement that he had

informed DVLA of the sudden dizziness experienced in November 2018. Having considered carefully the respondent's lengthy submissions at paragraph 29, we have concluded that the respondent did act with reasonable and proper cause at least up to the receipt of Dr Hall Smith's report of the consultation with the claimant on the 8th of August 2019, received on the 19th of August 2019, and the follow-up letter of the 23rd of August 2019, coupled with the DVLA letter of 14 August 2019 about which the respondent was informed by Dr Hall Smith in his follow up letter. There was information from Dr P's earlier reports which indicated some ongoing concerns as to the claimant's fitness to drive even if the claimant had been issued with a new licence by the DVLA on the 17th of March 2019, which was notified to the respondent – see paragraph 24 above. In his third occupational health report of the 15th of April 2019 Dr P had troublingly referred to a clinical suspicion that Mr Luck was experiencing unprovoked episodes of disabling dizziness, and concerns at his compliance with anti-hypertensive medication. However, as we have indicated above, we accept that the claimant did read out to the DVLA the passage from Dr P's report; and did return a completed days DIZ IV report on 24th of April which, as we found, was received and acted upon by the DVLA who then sent a draft DIZ2V statement to Dr Mantle, clearly confirming that episodes of severe dizziness had been reported by the claimant. Dr Mantle's response did indicate that the claimant had been free of disabling dizziness for 4 months plus, and that there had been no episodes of loss of consciousness. Even if the respondent had not seen that document, the claimant was saying that he had reported to the DVLA. It was in those circumstances wholly inappropriate for the respondent to require the claimant to sign a statement to raise an issue which had been properly resolved with the DVLA. If the respondent continued to have doubts about that matter the appropriate course would have been to contact the occupational health advisor Dr Hall Smith for clarification, if it was required. Dr Hall Smith had already been in telephone contact with Dr Prasad at the DVLA. There is no doubt that the Doctor's advice would have confirmed the claimant's position. We understand the claimant's sensitivity about signing a statement which he did not believe represented the truth, and which could be submitted to the DVLA with the possibility of yet further delay after the necessary information had been supplied to DVLA by his GP since early May 2019.

The system of licensing HGV drivers relies in the first instance upon the driver giving full and proper disclosure to the DVLA. We accept that the employer of such a driver has a responsibility for ensuring that proper disclosure has been made if there is reason to doubt it, not least because of the employer's vicarious liability for any accident caused by the driver's negligence, which could have very serious consequences. The respondent had been aware of the contents of Dr P's reports referring to the claimant's spell or spells of dizziness since 15 April 2019. As it turns out the claimant had reported the contents of that report to DVLA. This is confirmed by the format of the DIZ2V form sent to Dr Mantle. The typed contents were those of the DVLA. The GP's entries are handwritten.The typed contents can only have come from the claimant having read out the relevant passage from Dr P's report. Whether the respondent was aware of that is nothing to the point.The respondent's attack on the claimant's bona fide's represents an ex post facto attempt to justify the late imposition of an unjustified condition upon his return. If it was so important, we asked ourselves why had it not been imposed much earlier, rather than 4 months after the true position had been made clear to DVLA. Mr Dyal referred in his email of 1 October to having received "clear and unambiguous advice from our OH provider that we should obtain written confirmation that you have advised the DVLA of your dizzy spells." This was out of date advice because it refers back to Dr P's report of April. That had been superseded by subsequent events as

described above. Furthermore, we note that CS's letter of invitation dated 2 September 2019 at page 299 to attend the return to work meeting on 9 September did not refer to the letter of the same date which required his signature, but which was not produced until the meeting itself. The claimant was to that extent taken by surprise. Based upon the claimant's refusal to sign it, on 19 September CS wrote to the claimant, noted that he had not signed the letter, had not returned to work without a valid medical reason, and was now absent without a valid reason, and stated that he was not eligible for contractual or sick pay. Furthermore, disciplinary action was threatened.

We find that the claimant was ready, willing and able to return to work as of at least 9 September. There was a reference to a clause in paragraph 10(b) of the PCA under the heading "Employees availability" relied upon by the respondent: "The decision of the management regarding fitness of conditions for working shall be final and conclusive". This has no relevance to the believed state of health of the claimant. Even If it is to be interpreted as the respondent asserts, **Braganza**, relied on by the claimant, confirms that such a deeming clause is not conclusive, but, as Lady Hale put it at paragraph 32 of her Judgment:"Any decision-making function entrusted to the employer has to be exercised in accordance with the implied obligation of trust and confidence".

It is to noted that on 11 September the claimant wrote asking for the return to work meeting to be resumed. On 19 September he telephoned Employee Services, having earlier discovered via his bank that his sick pay had been stopped. He was notified that it was on the instructions of JD. Later that day he emailed CS see pages 313-315, setting out in detail his complaints about recent events. He expressly asserted a belief that he had been constructively dismissed. We conclude that CS' email cited above was a response to that email, although it does not deal with its contents. Finally, we note that on 30 September he emailed CS stating an intention to return to work on 2 October. This provoked the exchange between JD and the claimant on 1 October at pages 316-317. We will refer to the contents of the claimant's resignation letter at pages 319-321 below.

55. **Allegations of repudiatory conduct.**

We refer to the list of allegations at paragraph 3 (a) - (g) of the agreed list of issues. Having regard to our detailed findings above we can deal with them shortly.

(a). The claimant was not entitled to be paid at 50 hours per week while he was on sick leave. He was paid appropriately at 39.5 hours and indeed overpaid from the period his contractual entitlement ended in late January 2019 until September 2019, albeit only after he had raised a grievance having been placed on SSP.

(b),(c) and(d). The respondent acted with reasonable and proper cause in the light of the then occupational health advice. We do not accept that the reasonable adjustments provision in the Absence Management policy at page106 required the respondent to offer an alternative job. That only applies where there are medical reasons why the employee should not continue in his current role. That was not the position here. The jury was still out as to whether he was fit to resume his current role.

(e). The respondent did not require the claimant to take paid annual leave.He agreed to do so, not least because it was at a higher rate of pay than SSP. JD did not agree to reinstate it.

(f). This allegation is not factually made out. Although the sick note of 4 February did sign him as fit it was subject to qualification. Thereafter the respondent acted with reasonable and proper cause in treating him as sick and continuing to pay him sick pay, at least until early September 2019.

(g). The respondent wrongfully refused to accept that the claimant was ready, willing and able to return to work at least as a local driver as from the **23 August** when the respondent received the Hall Smith confirmatory letter. Thereafter, the claimant became entitled to be paid, arguably at the rate of 50 hours per week since he was offering to make himself available, although it may have been a phased return, and certainly at the rate of 39.5 hours. To this limited extent, his claim for an unlawful deduction from wages succeeds. The respondent was in breach of an express term of the contract in stopping his pay. The obligation to pay wages is so fundamental that breaches of that duty are likely to be treated as fundamental. See eg **Cantor Fitzgerald v Callaghan 1999 ICR page 639** (CA). Furthermore, that breach, the refusal to allow him to return to work, and the threat of disciplinary action were collectively a breach of the implied term of trust and confidence.

56. **Allegations of victimisation .**

Overview. Miss Davies asserts that it was not made clear by the claimant during the hearing what acts the alleged victimisers believed that the claimant would have done or intended to do to support his daughter's claims. We do not accept that the claimant was obliged to do so because the definition of protected act in section 27 is extremely wide, in particular in sub paragraph (2)©– "Doing anything for the purposes of or in connection with this Act". It would be sufficient for example if an employee was treated badly because it was perceived that the employee would provide any kind of material assistance to support a fellow employee who was bringing a claim of discrimination. More materially Miss Davies also refers to the fact that it was only very late in the day that it was asserted that the acts of detriment identified here were originated by JD and that this was not put to either EW or Mr Elliott during the course of the first hearing. We accept that there has been a change in emphasis as to how the claimant put his case as to victimisation. In this respect it is noteworthy that the claimant did not in his ET1 or in the amended particulars assert that all of the acts said to constitute detriments were influenced by or at the behest of JD, and that JD was consciously or subconsciously motivated to act because of a perception that the claimant would support SL's claim. The essence of the claim that JD lay behind the various acts said to constitute detriments appears to arise from the following: – (1). The claimant asserted that JD had attended a grievance hearing raised by SL attended also by the claimant on an unidentified date in 2017 or 2018 at which JD had allegedly acted aggressively and had been asked by the claimant's Trade Union representative to leave. This was denied by JD in cross examination. (2) There were a series of emails from staff at the Hingston quarry in particular following the wig incident in October 2018 which were critical of both the claimant and SL's actions. These are at pages 132A. One of them, from EW which was copied into other members of the HR department including JD stated "permission to telephone him and ask him to remove Sarah's hardhat and blonde wig from his head and grow up?". another email into which it was claimed JD was copied dated the 21st of December 2018 at page 151 which includes the statement "I cannot understand how the Lucks have so much time to give to their self beneficial cause. And it is quite clear that they are willing to destroy the very things they seem to be fighting for". A series of emails from EW in February 2019 into which JD was copied which expressed frustration at the actions of the claimant. It is also asserted that JD had some input into Mr Elliott's handling of the claimant's grievance, including not allowing it to move to stage 2;

and his authorisation of the sending of the letter of 19 September 2019, having taken legal advice. These are said to demonstrate a motive on JD's part to punish the claimant for his support for SL. We accept that JD was aware of SL's discrimination claim from an early stage, as were other members of the HR Department including EW, Hannah Blayfield, and also CS and Burgers, who dealt with the disciplinary investigation. However, we are satisfied that JD had only limited involvement, not on a day to day basis with the claimant's issues. We do not accept he was required to respond to the emails to which the claimant takes such strong objection. He had some involvement in the discussions around the sick pay issue, and was more heavily involved in the actions from 9 September 2019 onwards. We regard the claimant's assertion of him motivating the actions of others against the claimant for the supposed reason of victimisation as being no more than speculation, as to which we could not reasonably conclude that he victimised the claimant because of some perceived support for SL's claim.

We turn now to the individual acts said to constitute detriments set out at Paragraph 23 of the agreed list of issues.

As to (a), the claim that the claimant was unreasonably disciplined in November 2018, we recognised that Burgers has not been called by the respondent to deny that he was motivated , consciously or subconsciously, to recommend disciplinary proceedings against the claimant in respect of the incident in October 2018.This would mean that if we were satisfied that we could reasonably conclude that the decision was significantly influenced by a perception that the claimant would support SL's claim, the claimant would be entitled to succeed on this part of the claim, if it amounted to a detriment. However, the facts as to what occurred were not seriously in dispute and were not disputed by the claimant at the investigatory interview. He had chosen to turn up at work when she was absent wearing a wig and her hard hat driving her vehicle. In view of the previous history this was bound to be seen as provocative by the workforce, and the claimant must have known and intended that. Interestingly, he said he had done it to express support for his daughter as a trade union rep. The response "tell him to take it off and grow up" was a justifiable response. Although we do not think that it constituted harassment in the narrow sense of being related to a protected characteristic in the Dignity at Work policy, we note that there is a non-exhaustive list of action which could result in action being taken. The list could hardly be expected to include the surprising but childish actions of the claimant. The decision of Burgers, albeit delayed until January, was only that it go forward to a disciplinary hearing which never in fact took place. In addition the fact that someone may have done a protected act does not give them carte blanche to act improperly with impunity. There is a parallel here with the actions of the whistleblower in **Bolton School v Evans**. A recommendation for disciplinary action was a measured response to an obvious act of misconduct independently of the fact that person might support SL's claim. We do not find that we could reasonably conclude that it was an act of victimisation. Even if we are wrong about that, we find that it was an isolated act, unconnected with any of the other acts relied upon, none of which we accept were acts of victimisation. The claim was presented out of time. It was not mentioned in the claimant's resignation letter and played no part in the claimant's decision to resign.

As to the other acts said to be detriments, we reject the claimant's contention that they were done because of any perceived support for SL's claim. There is no evidence from we could reasonably conclude that. The 50 hour claim was entirely without merit. We have accepted that the respondent acted with reasonable and proper cause at least initially in refusing to permit the claimant to return to work. We have considered the actions of the respondent thereafter which were without reasonable and proper cause. We are satisfied from the evidence given by the

respondent's witnesses, including JD, that the decision not to allow him to return him back to work and to stop his pay had nothing whatsoever to do with any perception that the claimant would support his Daughter's claim. The final decision may have been unreasonable, but as the authorities show unreasonableness does not per se equate to discrimination or victimisation.

57. **Did the claimant resign in response?**

There are a whole series of reasons set out in the resignation , some of which have not been identified as repudiatory conduct. We are well satisfied however that the claimant did resign in part at least because of the respondent's failure to allow him to return to work except on terms which they had no reasonable and proper cause to impose, and because his pay was stopped. Although it remains a matter of some doubt whether the claimant would have returned as a relief driver – he had expressed a preference to return as a local driver, and had raised issues about it at the return to work meeting, the respondent had not indicated that that preference would be refused. There is no basis for the submission that the claimant resigned because he did not wish to return to work as a relief driver. The respondent's treatment of him was the principal reason.

58. There is no basis for the submission that the claimant's dismissal was for a reason related to capability or some other substantial reason. The respondent never raised either of these as a possibility during the many exchanges between them. The dismissal was substantially unfair.

59. Polkey issue. We have found this to be a difficult issue. The essential issue is what are the chances that the claimant's employment would have come to an end at any time absent unfairness by the respondent, and when? We accept that in a number of respects the claimant was extremely difficult to manage. He raised a number of matters of complaint about his treatment, for which there was no reasonable basis. We find that Mr Elliott properly dealt with the claimant's many grievances, some of which were entirely unfounded. He persisted with the claim that he was entitled to sick pay at the rate of 50 hours per week, even after Mr Elliott had generously agreed to extend the period of contractual sick pay long after the claimant's entitlement had expired. Although we do not find that the claimant was himself in breach of the implied term of trust and confidence up to the time of his resignation, his persistent conduct was such that it was well on the cards that he would cause such a breakdown in the future on the basis that he was unmanageable. There is also the fact of his request to revert to a local driver, first raised at the time of his fit note of 4 February, and repeated at the return to work meeting. It is note worthy that the claimant raised health and safety issues as a possible obstacle. The respondent was under no obligation to allow him to change jobs, and it is unclear whether there was a vacancy. Indeed the evidence of EW and of Elliott was that there was a queue of people for a local driver's job. The claimant's contractual entitlement was to return to his relief job once he was fit to work, not to another job. In any event the claimant raised health and safety obstacles to a return to work as a local driver. However, we note that the claimant told the Tribunal that if he did not get a local driver's job, he would return as a relief driver, but we have considerable doubts about how long he would have continued in that employment Having regard to these matters, we consider that there was a 25% chance that his employment would have come to an end within 6 months of 9 October 2019, either because of his resignation, without any repudiatory conduct by the respondent, or because of a breakdown of trust and confidence for which the claimant would have been responsible and the respondent would not have been responsible. In that connection we have followed the guidance in **O' Donoghue v Redcar and Cleveland Borough Council 2001 IRLR 615**. We have

specifically not found for how long the employment at the 75% rate would have continued, not least because we have no information about how Covid 19, which led to lockdown from 23 March 2020, 20 weeks after the claimant's resignation, would have affected his work and pay, or whether he would have been furloughed, or, obviously ,what will happen in the future. These are matters which we hope can be resolved by agreement between the parties, for which compromise may well be necessary if the expense of a further hearing is to be avoided.

60. Finally, by way of clarification, we do not uphold the claimant's Section 38 Employment Act claim. Insofar as the claimant complains that he was not notified in writing in a new written contract of the 50 hour week pay issue, we note that he received explanatory pay slips in writing. He was not entitled to sick pay at 50 hours per week. Even if he was not informed in writing that his contract was a permanent contract, about which we were not satisfied, Section 1(4)(g) of ERA, does not require that. Employment is assumed to be permanent, if it is not for a specified fixed term.

61. The parties are required to notify the Tribunal in writing within 28 days of promulgation of this judgment whether a remedies hearing is required, and to apply for a short telephone CM hearing if it is required.

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Employment Judge Hargrove

Date: 8 July 2020

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