EMPLOYMENT TRIBUNALS

Claimant	Mr Ramsden
Respondent	SpaMedica Limited
Hearing Venue	Leeds (via CVP Platform)
Dates	6, 7 and 8 July 2020
Employment Judge	Dr E P Morgan

Appearances:

Claimant:	Ms Brooke-Ward (Counsel)
Respondent	Ms Gould (Counsel)

RESERVED JUDGMENT

1. The Claimant is a person with the protected characteristic of disability by reason of the physical impairment of psoriasis. This protected characteristic was held by the Claimant prior to and throughout the employment relationship formerly extant between the parties.

2. The additional medical conditions and physical impairments relied upon by the Claimant do not constitute disabilities for the purposes of section 6 of the Equality Act 2010, "EqA".

3. The Claimant did not make any form of protected qualifying disclosures for the purposes of sections 43B and/or 43C of the Employment Rights Act 1996, "ERA".

4. The allegations of detriment contrary to section 47B of the ERA are dismissed.

5. The claim of automatic constructive unfair dismissal contrary to section 103A of the ERA is dismissed.

6. The parties shall, by no later than **4.00 pm on 28 August 2020**, lodge with the Tribunal and mutually exchange written submissions concerning:

6.1 whether the Tribunal should determine the time issue concerning the claim of failure to make reasonable adjustments contrary to section 20 and/or section 21 of the EqA on paper or by way of future hearing, and/or

6.2 the future conduct of the residual claims of alleged failure to make reasonable adjustments contrary to section 20 and/or section 21 of the EqA and unlawful deductions from wages.

REASONS

The Claim

1. By his Claim Form received by the Tribunal on 26 February 2020, the Claimant advances claims of disability discrimination, failure to make reasonable adjustments, protected disclosure detriments and automatic constructive dismissal contrary to section 103A of the ERA. There is also understood to be a claim of unlawful deduction from wages. The claims are resisted in their entirety. The Grounds of Resistance raise factual and jurisdictional issues. In particular, it is averred that the claims have been lodged out of time. The protected characteristic of disability is disputed.

Procedural History

2. On 16 April 2020, a preliminary hearing was conducted by Employment Judge Bright. Both parties were legally represented at that hearing. As the note of the hearing confirms, a number of matters were clarified, including the physical impairments upon which the Claimant relies for the purposes of section 6 of the EqA. These were identified as follows:

2.1 Psoriasis;
2.2 Scoliosis;
2.3 Spondylolisthesis, and
2.4 Psoriatic Arthritis.

3. Importantly, Judge Bright recorded that 'other complaints' cited in the Claim Form were no longer proceeded with. During the course of the present hearing, both Counsel acknowledged this to be a reference to allegations of breach of privacy and GDPR. The remaining areas of dispute have been identified within an Agreed List [pp.81-88]. Equipped with that Schedule and with the agreement of the advocates on that occasion, Judge Bright directed that there was to be an open preliminary hearing to consider and determine three questions. The detail of the questions is addressed below. At this juncture, it is to be noted that directions were given for the Claimant to provide further and better particulars of his protected disclosure claims and a Schedule of Loss. Directions were also given for provision of a Disability Impact Statement and exchange of medical information. The open preliminary hearing was listed with an estimated length of hearing of one day.

4. In advance of the hearing, the parties lodged a bundle of documents comprising two files. The first is a general file and extends to over 269 pages. The second is a file of documents directed to the issue of disability. It extends to 404 pages. References in this judgment to page numbers with the prefix 'p.' are references to the general file, and references with the prefix 'D' are references to the disability file.

Conduct of the Hearing

5. By notice dated 13 May 2020, the parties were informed that this hearing was to be conducted by means of the CVP platform. The scale of the material and the range of the issues requiring preliminary determination was the subject of discussion with Counsel at the commencement of the hearing. By the short adjournment it was recognised that the hearing could not be concluded in the allotted time. However, given the value of the claim, and after discussions with the parties as to their availability, it was considered to be consistent with the overriding objective for the hearing to continue. In the event, the use of the CVP platform enabled the evidence to be concluded late on the second day, with legal submissions being received on the afternoon of the following day.

6. The Tribunal expresses its gratitude to the parties for their collaboration in the conduct of the listing and the assistance given by Counsel through the quality of their oral and written submissions.

Evidence

7. In addition to the documentary material, the Tribunal received oral evidence from the Claimant and Ms King (Referrals Manager) on behalf of the Respondent.

General matters

8. The resolution of the preliminary issues requires the Tribunal to make certain findings of fact. In the interests of proportionality, the Tribunal has done so only insofar as such findings are necessary to determine the preliminary issues themselves. For this purpose, it is necessary to record a number of matters which have a bearing upon the Tribunal's assessment of the evidence submitted by the Claimant. In doing so, the Tribunal bears in mind that the Claimant has been legally represented throughout the present proceedings, and has himself demonstrated an understanding of the nature of the claims pursued before the Tribunal and the legal principles upon which they were based. The Claimant had also been made aware of the Tribunal's previous directions concerning provision of a Disability Impact Statement, production of medical evidence and the need to provide full details of the protected disclosures upon which he relies in support of this claim.

9. The Disability Impact Statement is dated 24 June 2020 and extends to some 29 paragraphs. The Claimant also provided medical records; with related correspondence and material extending to over 400 pages. It is the Claimant's position that the medical documentation provided was in fact incomplete. In fact, the Disability Impact Statement anticipated a further statement might be required

once the full material was to hand. However, both the Claimant and his Counsel made clear that the Tribunal was being invited to proceed to determine the disability issue upon the material presently available. The Tribunal has proceeded upon this basis.

10. The second aspect of the Claimant's case relates to the public interest disclosure detriment and unfair dismissal claims. Pursuant to the Order of Judge Bright, a table was provided: [pp.52-74]. It details in excess of 24 putative disclosures. The second column of the table has been annotated "what was said". However, save for some limited exceptions, the completion of the document makes no attempt to provide the detail of what was communicated by the Claimant. Further, in respect of how the putative disclosures were communicated, the table has been completed so as to refer to 'face to face' or 'email'. In the compilation of this document, there has been no attempt to detail the words used, or, identify the email in question. This difficulty is compounded by the form of the Claimant's principal witness statement. Dated 1 July 2020, and comprising 29 paragraphs, the statement cross-refers to certain of the disclosures detailed within the Table to which reference has been made. It is, however, evident that when drafting the statement, a decision has been made by the author and the Claimant to engage with a limited number of the disclosures within the Table and omit any reference to others. Further, where the statement does engage with a specific disclosure, it cites the entirety of the email correspondence as evidence of the making complaints. There is no attempt to identify the aspect of the email which is said to constitute the disclosure or evidence the belief upon which the Claimant relies in these proceedings.

11. During submissions, both Counsel were invited to address the Tribunal as to how this material was to be considered and any potential evidential difficulty resolved. Ms Brooke-Ward submitted that the Tribunal ought to read across the various documents and, where possible, itself deduce the detail of the disclosure said to have been made. By contrast, Ms Gould submitted that this was an impermissible approach and that it was and remained for the Claimant to lay evidence before the Tribunal and, insofar as he had failed to do so, it was not open for the Tribunal to interrogate the documentation in order to repair any deficiency (e.g. by means of aggregation). In addition, both Counsel accepted that these were matters which had the potential to impact upon wider issues of credibility. In this respect, Ms Brooke-Ward pointed to the Claimant's suggestion that he was unaware of the detail required of him in compiling the Table or his witness statement. Ms Gould submitted that the matter was the product of a wider difficulty, inviting the Tribunal to conclude that Claimant had been selective in his presentation and, as such, could not be considered as a reliable or consistent historian. These submissions and their implications are addressed in further detail later in the course of this judgment.

Findings of Fact (General)

12. On the balance of probabilities, the Tribunal has found the principal facts on general matters to be as follows:

The Respondent

12.1 The Respondent is concerned in the provision of specialist ophthalmic appointment services for the benefit of NHS patients. Its services are commissioned by the local Core Commissioning Group (CCG) and are delivered at two venues, one of which is in Bradford.

Recruitment

12.2 The Claimant commenced employment with the Respondent on 17 September 2018. Thereafter, he held the position of 'driver', principally working at Bradford. At the time of his recruitment, the Claimant was required to participate in a form of induction. The induction was intended to, amongst other things, familiarise recruits with the nature of the business, the detail of the services provided and the means by which duties were allocated.

12.3 Following recruitment, the Claimant was provided with a contract of employment [p,94]. It is a detailed document, containing provisions concerning the installation of tracking devices in company vehicles, opt-outs from the Working Time Regulations 1998, "WTR", and references to disciplinary and grievance procedures. The document is signed by the Claimant and was witnessed by a third party. The address provided by the witness demonstrates that the document was in the possession of the Claimant away from the workplace and that he therefore had ample opportunity to read and consider its contents prior to signing it. Having regard to the evidence and demeanour of the Claimant, the Tribunal rejects the suggestion that this document was signed at a time when the Claimant had not read its contents. In the view of the Tribunal, this would be contrary to the Claimant's character.

Claimant's Duties

12.4 The Claimant's duties were and remained those of a driver. In this role, he was required to collect and convey passengers. The passengers were to be transported from their home environment to the venue of their ophthalmic appointment. This was a free service intended to serve the convenience of the passengers. It was not a requirement that the passengers be transported in this way. Indeed, as will become apparent in what follows, there were occasions when the Respondent or the Claimant were required to advise that they were unable to transport particular passengers.

12.5 The Claimant accepts that the passengers in question enjoyed full legal capacity. It was no part of this transport service that passengers were to be provided with any form of medical care during the course of their journey.

12.6 As might be expected, appointments were scheduled several weeks in advance. Shifts and routes were similarly allocated between drivers. As

part of this process, the Respondent required the prospective passengers to identify any particular needs or requirements which might render them unsuitable for transportation by means of this service. Whilst the majority of passengers gave accurate information, there were occasions when the information proved to be inadequate, or, incomplete. The Respondent attempted to address this issue by a practical requirement upon the drivers. Put simply, the drivers were to make telephone contact with the prospective passengers during the day before the scheduled appointment. The purpose of this contact was to introduce the driver to the passenger and, in addition, verify that there were no reasons why the vehicle would not provide a suitable means of transport for the passenger in question. This telephone contact was to be made prior to 6.00 pm on the eve of the scheduled appointment. In this respect, the Tribunal accepts and prefers the evidence of Ms King. As to the adequacy of this arrangement, it is clear on the material before the Tribunal that each of these passengers enjoyed legal capacity. It was no part of the Claimant's case that they lacked the ability to communicate. Further, as conceded by the Claimant, many of these passengers were elderly; with a good proportion benefiting from supported living arrangements. They were thus well placed and well-able to communicate their needs and/or were able to draw upon others to do so on their behalf.

12.7 In the discharge of his duties, the Claimant was provided with a Renault Traffic minibus. The vehicle had not been subjected to any adaptation for clinical purposes. At the time with which the Tribunal is concerned, the vehicle was - according to the Claimant - 6 months old. He accepts, and the Tribunal finds, that the vehicle is manufactured and marketed as a 9-seater vehicle.

12.8 Once collected, the passengers were transported as a group to the clinical venue for their appointments. The same passengers were then returned home by the Claimant; the return journey commencing on completion of the last medical appointment. By this means, the Claimant was provided with a period of waiting in which to carry out any phone calls necessary for the passengers nominated as requiring transport on the following day and exercise any rest or break periods. Likewise, the passengers themselves were required to wait for the last member of the group to complete their appointment. There is no suggestion that this arrangement generated any criticism or complaint concerning the clinical service provided.

12.9 There were occasions when the Claimant attended to collect a passenger only to identify that the passenger concerned could not be transported in the vehicle allocated to him. The Tribunal is satisfied that on the limited occasions when this occurred, the Claimant was expected to exercise his own judgment as to the suitability of the vehicle conveying the passenger in question. There is no evidence to suggest that the Claimant was challenged or criticised for doing so. The Tribunal rejects the Claimant's suggestion to the contrary.

12.10 As previously noted, the vehicle provided to the Claimant was new and within its manufacturer's warranty period. It was for the Claimant to satisfy himself of the condition of his vehicle and, in the event of any defect or disrepair being identified, to notify managers in order that it could be addressed. As and when the Claimant encountered problems with the vehicle allocated to him, it was made clear that he should liaise with relevant technicians in order to remedy the concern or defect. He was not prevented from doing so. Nor was there any expectation that the Claimant should operate a vehicle which was - whether by design or condition - unsafe. The Tribunal rejects the Claimant's suggestion to the contrary which is unsupported by the evidence before the Tribunal.

12.11 It was no part of the Claimant's duties to provide clinical care, or, advice to the passengers transported by him. Similarly, there was no requirement upon the Claimant to conduct any form of clinical assessment of passengers; he was not qualified to do so.

Working Hours

12.12 The Respondent operated a shift system. Both the nature of the shifts and varying demand for the service resulted in variable patterns of working. By way of example, there were occasions when the Claimant was required to transport passengers further afield such as Birmingham but was not required to transport the passenger on the return journey. In consequence, working hours were varied, as were the timings and duration of rest periods and intervals between shifts.

12.13 By November 2018, the Claimant had formed the view that he was working excessive hours. It is said that he was at this time unaware of either the tracking devices installed within his vehicle or the terms in his contract of employment regarding the WTR opt-out. The Tribunal is unable to accept that evidence and does not do so. In the view of the Tribunal, the Claimant was well aware of the terms of his contract of employment, having read and signed the document previously. Whether he understood the significance of those terms and conditions is a different matter. The Tribunal is satisfied that he was aware of both the existence of tracking devices within the Respondent's vehicles and the opt-out arrangement concerning working hours.

12.14 During the course of his evidence, the Claimant suggested that he had made a request to revoke the opt-out arrangement detailed in his contract of employment. This was said to have occurred as a result of his becoming aware of the contractual terms, for the first time, in December 2018. It is said that this prompted the Claimant to lodge an opt-out request in January 2019. The Tribunal has already made a finding concerning the Claimant's knowledge of the contractual terms. As to revocation of the opt-out arrangement, it is common ground that this would have required 3 months' written notice to the Respondent. The Tribunal was not provided with, or taken to, any document said to communicate such notice. In the view of the Tribunal, if such a notice had been served in the manner now

suggested, the Claimant would have made it clear in the course of his correspondence. The absence of such a document at a time when the Claimant was already in regular correspondence with his managers, leads the Tribunal to the conclusion that no such notice was given.

Raising Issues

12.15 The Respondent was looking to expand its operation and was eager to collaborate with drivers and others in enhancing its service where possible. In response to a general invitation to staff for provision of feedback and ideas, the Claimant took it upon himself to provide what he considered to be a weekly "report". The first of these reports was provided within one month of the commencement of his employment [p.116]. Its purpose was to keep Ms King 'in the loop'. The document is informative on a number of levels. First, it demonstrates a preparedness on the part of the Claimant to communicate with senior managers. Secondly, it illustrates that matters were being communicated as part of ongoing dialogue, not specific concern. Equally, in the course of her response, Ms King [p.115] encouraged the Claimant to raise patient incidents with line managers and copied managers in concerning changes to driver instructions. The managers, in turn, confirmed their own practices regarding the updating of information given to drivers. This communication was provided to the Claimant [p.115]. Importantly, this chain of emails concludes with the Claimant stating: "…if you would prefer me not to report back weekly, again, just let me know. I will be taking notes anyway for my own records…." [p.114]. No such notes have been disclosed by the Claimant or provided by the Claimant to the Tribunal in preparation for this hearing.

12.16 It is apparent that the Clinical Lead was also raising issues around service inefficiencies and the passing of information between drivers and the passengers scheduled for appointment [p.118].

12.17 On 25 October 2018, the Claimant informed Ms King of a number of difficulties he had encountered that day when attempting to collect passengers [p.125]. In doing so, he referred to a patient scheduled for collection who had a 'broken spine and is in a back brace'. He relayed how a decision had been reached between himself and the passenger to the effect that her needs would be better served by the use of NHS transport. This was nothing more than the Claimant evidencing to Ms King that he was acting in accordance with the protocols adopted and encouraged by the Respondent.

12.18 On 29 October 2018, the Claimant submitted a further 'report' to Ms King [p.119]. The email detailed a number of operational issues around the sharing of information and synchronisation of transport with appointment times. No action was invited or requested on the part of Ms King. The email was copied to senior managers. A further report was submitted to Ms King on 2 November 2018 [p.127]. In addition to detailing traffic delays and inability to collect patients, the Claimant referred to delays in clinic. In

the course of this email, the Claimant recounted his own view that he had identified one potential passenger as a wheelchair user and thus unsuitable for this form of transport. His email indicates that the Claimant considered this had been overlooked or not communicated by colleagues [p.128]. Whatever the position, no action was requested on the part of Ms King. Importantly, Ms King made clear that she only needed to be made aware of concerns and thanked the Claimant for his 'hard work' [p.127].

12.19 It is clear that drivers were provided with advance notice of their rota. On 2 November 2018, the Claimant emailed Zak Hane (Transport Co-Ordinator) and Ms King [p130]. The purpose of the email was to communicate his own view that a journey from Brighouse to Birmingham was not 'practicable'. He requested that 'for patient welfare' the patient should be removed from the bloc allocated to him. Managers responded by indicating that the patient was aware of the duration of the journey and had undertaken the trip previously.

12.20 The Claimant compiled a further 'report' for the week commencing 5 November 2018 [p132]. It is not clear if, or when, this report was submitted since the form in the hearing bundle is not annotated with transmission details in the usual way. In the course of this document, the Claimant details the Brighouse to Birmingham journey, including a suggestion of the passenger being 'overly welcomed' by reception staff. He also indicates that he waited outside the clinic for the duration of the relevant appointment. It is in this same email that the Claimant makes reference to damaging his vehicle. He explains that the incident was due to the 'street being too tight to navigate' [p.133]. He records a conversation with 'Liz' in which he queried rest times. The final page of this document is concerned with the events of 9 November 2018. It includes the suggestion of a conversation between the Claimant and 'Jane' in which - so it is said - the Respondent was "potentially breaking the law by not following the Working Time rules...". The Tribunal does not accept that this document was in fact submitted to the Respondent or its managers. Taken at face value, the document records the fact that management did not require such reports and indicates that the Claimant accepted this position. There is therefore no reason why the Claimant would have submitted this report and he has not offered any reason as to why he would do so.

12.21 On 12 November 2018 [p.135], the Claimant asserted that the Respondent was in breach of various aspects of the WTR, 'Driving Hours Daily Limit" and contended that such breaches were to be repeated in the shifts that had been allocated to him in the coming weeks. Later that same morning, he transmitted further emails addressing the subject of what he termed driver daily hours limits. Specifically, the Claimant was focusing upon the shifts planned for 14 and 16 November 2018. He considered that both would place the Respondent in breach of 'Driving Hours Daily Limit Law" [p.139].

12.22 By 16 November 2018, the Claimant was taking issue with the use to which data collated from vehicle trackers might be applied [p.140]. In the

course of this email the Claimant expressed the view that the use of such data was an invasion of privacy. In doing so, he observed that he was "merely pointing out problems that could lead to further issues down the line should they arise…".

12.23 In late November and early December 2018, the Claimant reported what he considered to be incidents which had arisen with actual or prospective passengers. By 7 December 2018 [p.158] he expressed himself 'perplexed' as to why he had not been notified of patients' conditions.

12.24 On 11 December 2018, the Claimant attended an informal meeting with Christine Leadbetter (Area Manager). The Tribunal has not been provided with the correspondence convening that meeting or the notes of the meeting which preceded it. Management took the opportunity within the meeting of 11 December 2018 [p.160] to encourage the Claimant to adhere to reporting lines. It is also clear that management had received the Claimant's recent email regarding specific passengers and provided the Claimant with guidance as to how such matters should be addressed. There was also discussion around authorisation for vehicle repairs. There was an agreement that the information provided to drivers regarding passengers was 'too basic'. However, it was emphasised that such information was dependent upon the quality of the information provided by passengers. As a result, it was agreed that the driver would be entitled to conduct a 'risk assessment' [p.162] on the day and guidance was given as to who should be contacted for this purpose. During the same meeting the Claimant suggested that a Yorkshire Transport team and a Hull clinic would be 'useful' [p.164]. He also alluded to the possibility that he was being 'too vocal'. He was given assurance that things could not change if matters were not raised. Within the same meeting, the Claimant suggested that he had already spoken to ACAS and DVSA[1] [p.166]. Whatever else might be said, it is clear that at the conclusion of the meeting, the Claimant had been provided with the clearest indication that the Respondent was acting in line with contractual arrangements and legal obligations to which it believed itself to be subject. There was, however, a shared commitment to service enhancement, with proposals and recommendations being offered by management and the Claimant in turn. Importantly, the Claimant indicated that there were no other matters he wished to discuss.

12.25 On 13 December 2018, the Claimant provided detailed additional comments by email [pp.169-171]. Several days later, he transmitted a further email to the Head of Human Resources, Kay Wood Townend. That email was said to be 'private' and 'confidential'. In the course of the email, he complained of the manner in which the meeting of 11 December 2018 had been convened, that ACAS and DVSA were of the opinion that the Respondent was 'potentially mistaken' concerning the regulations governing private patient transport and that 'they both questioned items found within [his] written contract". He was, however, clear that he was

[1] Driver and Vehicle Standards Agency.

not 'raising a complaint and/or concern at this time' [p.174]. He added that his 'initial queries were just that, simple queries'. On a number of occasions, the Claimant stated: 'should I find myself in a situation where I will need to call upon these discussions, I reserve the right to produce these documents, which clearly evidences me raising these queries to management informally…' [p.175]. He added: 'I am very aware that my communications are being passed to HR, and I have been given no reason as to why they are. …Once more this email is strictly confidential and is for your attention only…'.

12.26 On 11 January 2019, the Claimant's vehicle developed an electrical fault. It was repaired at the roadside by the replacement and resetting of fuses. The Claimant emailed Ms King about this issue, and the fact that the vehicle service was due at 13:07 hrs [p.177]. Ms King responded at 15:05 hrs, confirming the potential timing of the service and asking for confirmation that the fault had been repaired. At 15:30 hrs the same day, the Claimant confirmed that it had been remedied [p.177]. There was no suggestion of delay or resistance on the part of management.

12.27 At 11:30 hrs on 14 January 2019 the Claimant reported damage had been caused to the vehicle door handle by a passenger's relative. The Claimant indicated he had attempted a repair, but the door mechanism would not lock. It is clear that the Claimant had been instructed to contact the AA and he was awaiting their arrival. Within 30 minutes, Ash Shah (Business Manager) replied with the request that the Claimant contact Renault for a repair cost. The communication was pragmatic and practical. By 2.00 pm the same day, the Claimant had attended the local Renault dealership, the repair had been carried out and the vehicle was according to the Claimant 'back on the road' [p.179].

12.28 During February 2019, the Claimant was required to participate in a probation review. During the course of the meeting, he showed signs of distress and disclosed historical difficulties, the effect of which continued to weigh upon him. These included what he described as mistreatment during civilian employment with the police and a recent bereavement.

12.29 By 19 February 2019, the vehicle allocated to the Claimant had been the subject of further repair and maintenance. By email of 13:06 hrs that day, the Claimant was expressing criticism of the Renault garage, the records provided by them, and the inadequacy of the dealership's response to what is termed the 'electrical fault'. The email does not detail the fault in question. However, it does record the Claimant's understanding that 'a part' had been ordered. The email ends with a reference to driving the vehicle in its 'current state' and the Claimant recording advice which he says he received from 'Christine'. During the course of evidence, the Claimant acknowledged that 'Christine' was not mechanically trained and thus could not comment upon issues around the vehicle but that instead this would depend upon the information imparted to the Claimant by Renault. The Claimant also conceded that the reference to the vehicle's 'current state' was intended to refer to the potential for the electrical fault

to recur. There is nothing within that email to indicate that the Claimant had suggested to Renault or his managers that the vehicle was in fact not roadworthy. The email correspondence provided to the Tribunal confirms that other maintenance issues raised by the Claimant in relation to vehicles provided to him were swiftly responded to in a supportive and collaborative manner, with some email responses being provided within minutes of requests from the Claimant. Equally, the response from Ms King confirms that the management view was to prioritise repairs.

12.30 On 15 March 2019 the Claimant made anecdotal reference to what he considered to be his disabilities. He did so in a conversation with Jane Bousfield (Claimant's Line Manager).

12.31 By 1 April 2019, the Claimant had received his schedule for the coming month. He reviewed it and emailed management [p.189]. He observed: 'I have a 5 patient, 8-person van starting in Huddersfield...' He added: 'I feel it is too dangerous to have 8 passengers on our vehicles…'. He asked that the bloc of passengers be reconsidered for the safety of passengers and driver. Ms King responded by indicating that the Respondent would try and limit the passengers to 7.

12.32 By further email of 4 April 2019 [p.190], the Claimant raised the issue of occupancy. On this occasion, the focus of his concern was what was termed a 'mixed van'. In the course of the email he complained that management had 'refused to alter anything'. This was incorrect. When read as a whole, the burden of the email was the dissatisfaction caused by traffic delays and configuration of patient groups; the result, in the Claimant's view, being that of prolonged journeys. The email concludes with an expression of frustration at what the Claimant stated to be 'a lack of a duty of care to both the driver and patients…'. Further emails were transmitted by the Claimant between 8 and 14 April 2019. The matters covered ranged from queries concerning private use of vehicles [p.197] to more general correspondence with the newly appointed Mr Clarke (Fleet Manager). By email of 10 April 2019 [p.195], he sought to give assurance to the Claimant and indicated he was happy to receive any grievances. The Claimant responded the same day, annotating Mr Clarke's email. On 14 April 2019, he transmitted a further email to Mr Clarke [p.191]. The text of this email suggests that there was an attached document. However, the document within the bundle has been annotated as having been created the following day. It comprises multiple pages [pp.199-211] of closely typed script. The detail of the document is relevant to the protected disclosure aspect of the claim. For present purposes, it is to be noted that the content spans an extensive range of subjects, including aspects of the Respondent's business which the Claimant considered to be capable of improvement. In the view of the Tribunal, the content of the document was fundamentally misleading in a number of key respects; not least in its depiction of the Respondent's managers and the manner in which they had historically engaged with communications from the Claimant.

12.33 The lengthy document submitted to Mr Clarke also made reference to the Claimant having four disabilities and what he considered to be the Respondent's failure to conduct a risk assessment in respect of them.

12.34 The Claimant was given assurance from James Clarke (Fleet Manager) that the matters raised would be considered and acted upon: [p.192].

12.35 By 25 April 2019, the Claimant was due to participate in his first appraisal. In the course of the record of the appraisal [p.214A], the Claimant presented himself as a consistently inspirational character and a real asset to the Respondent. He also stated that he had 'taken the initiative to identify potentially serious health and safety risks' associated with his role [p.214B]. These included his own proposal for the 'regionalisation' of the transport arrangements [p.214D]. He added: 'I identify situations that even those with the highest seniority fail to consider…' [p.214E]. The document was signed by the Claimant as accurate on 2 May 2019.

12.36 The Claimant lodged a grievance on 13 May 2019 [p.217]. In the course of the document, he described how he had exhausted every informal process available, only for all of his efforts to be 'disregarded'. In the course of his grievance, he implicated all of the managers with whom he was required to have day to day contact. The Claimant confirmed that he had access to advice from his trade union [p.219]. The penultimate paragraph of the cover letter reads:

> 'I am sincerely unhappy that I now find myself placed in such a poor position, that my only option is to now submit a formal grievance. I am totally dismayed at the negative treatment I have received by members of management, whom I believed was there to provide a duty of care to me and I feel have instead disregarded me, and attempted to harm and demoralise me and my reputation'.

12.37 Enclosed with the letter of grievance was a detailed document [p.220 et seq], containing complaints of disparity of treatment, invasion of privacy/GDPR, mental health discrimination, management failures, unattainable and contradictory duties, improper conduct, victimisation, disability discrimination, breach of the WTR, improper enforcement of sickness procedures, and negligence.

12.38 A grievance hearing was held on 24 May 2019. The outcome was communicated by letter of 5 August 2019 [p.242 et seq]. Of the complaints raised, that concerning management failings was partially upheld [p.245]. It was acknowledged that there had been changes to transport arrangements but recognised that given the cohort of patients for whom the service was devised, the prospect of a passenger becoming unwell could not be ruled out. The grievance outcome also partially upheld the Claimant's concern of contradictory duties and goals [p.246]. Again, this was on the basis that there had been significant and rapid change within the business. The Claimant exercised his right of appeal [p.252]. He submitted an extremely detailed document in which he was critical of the adequacy of the investigation process. In doing so, he complained that the company had 'damaged the trust between employer and employee by

the actions they took in relation to the faulty vehicle…[the Respondent] had two of my fellow drivers conduct undisclosed examinations of MT18 VKZ, before then secretly sending the vehicle for repairs to an establishment other than the Renault Dealership who originally diagnosed the electrical fault'.

Sickness Absence and OH Assessment

12.39 In advance of his commencing employment, the Claimant completed a medical questionnaire [p.247]. In the course of that document, he indicated that he had a condition which might be classified as a disability. In response to a question concerning problems 'carrying out strenuous physical work, including climbing ladders, working from scaffold, bending lifting and carrying' he answered 'no'. However, no additional details were entered on the form concerning the disability which had been intimated. The form was also completed to indicate that the Claimant had consulted his doctor and consultants by way of 'routine' appointment only [p.248]. That version of the form is signed and dated 8 August 2018.

12.40 The Claimant commenced sickness absence on 13 May 2019. He did not return to work thereafter. The Respondent decided to refer the Claimant for occupational health assessment. This prompted completion of a referral form. Importantly, however, the form was provided to the Claimant for review, prior to submission. The Claimant provided detailed comments upon the terms of the referral [p.207]. In doing so, and by email of 25 June 2019, the Claimant indicated that he had been diagnosed with what he termed a '4th disability' in the form of psoriatic arthritis. In the course of the same email, the Claimant refers to having sustained 'multiple injuries' as a result of poor working practices [p.208]. The Claimant was examined by the OH clinician on 27 July 2019. Part of that examination involved the customary obtaining of a history from the Claimant. The Tribunal rejects the Claimant's suggestion that the Report has failed to properly or accurately record the information which was shared in this process. In reaching this conclusion, the Tribunal bears in mind the fact that the Report [p.210] was provided to the Claimant in advance of it being finalised, and the absence of any challenge to its contents at that time. In the view of the Tribunal, the Claimant would not have tolerated any form of perceived inaccuracy had such been identified. Both the correspondence and the Claimant's testimony before the Tribunal confirm him to be a person who would not only be exceptionally vigilant to any such error but would have shown no hesitation in seeking its correction.

12.41 Within the resultant report, it is recorded that the Claimant relied upon 5 medical conditions, including musculo-skeletal conditions affecting his upper and lower back, and a similar condition (newly diagnosed) 'affecting his joints'. It is recorded that the Claimant continues with his exercise programme, "keeps mobile, Rides Bike, Dog Walks." At that time the only injection medication prescribed to the Claimant related to the management of the psoriasis condition. The Tribunal is satisfied that in his consultation with the OH clinician, the Claimant wrongly stated that he was

in receipt of injection medication to address a musculoskeletal condition [p.212], thereby giving a misleading impression of the severity and impact of that condition. The Claimant's attention to detail - as recorded in the correspondence - and his preparedness to correct statements which he considered erroneous, leads the Tribunal to conclude that this misdescription of his medical treatment was not inadvertent. Any doubt in this respect is, in the view of the Tribunal, removed by the fact that the Claimant entered into correspondence with the practitioner concerned and made no mention or criticism of this aspect of the Report: [D327]. Such a conclusion is also supported by the fact that the Claimant had - in any case - ceased using the medication some 5 months earlier.

12.42 On 8 October 2019, the Claimant completed a further health questionnaire [p.249]. On this occasion, the Claimant provided details of the medication he said he was taking, and identified back trouble as 'current' [p.249]. On this occasion, he also completed section 14 of the form. The section is populated with reference to a number of medical conditions including psoriatic arthritis and an assertion that the condition of scoliosis had been exacerbated by working practices imposed by the Respondent. Section 16 of the form has been completed to indicate that 'Medication is taken to treat the illnesses. My conditions were aggravated by the working conditions of [the Respondent] …'.

12.43 A further OH appointment was attended by the Claimant on 1 November 2019. At that time, the Claimant was assessed as fit to return to work. In the course of the resultant report, it is recorded that the Claimant had received a diagnosis of psoriatic arthritis in 'April 2019' [p.220]. It continues:

> "The condition is managed by self-administered injection of a monthly biologic medication. This acts systemically to reduce the severity of symptoms and can prevent flare ups of this condition".

12.44 As to the condition of scoliosis, it was recorded that the Claimant managed the condition by doing stretching exercises [p.224]. It was reported that the Claimant had 'no issues' with the condition of spondylolistheses [p.227].

Resignation and Time Limits

12.45 The Claimant resigned from his employment with the Respondent. The effective date of termination was 30 November 2019. At the time of tendering his resignation, the Claimant was well aware of the time limits for lodging claims with the Tribunal, having previously been a party to Tribunal proceedings, taken advice from his union and solicitor and researched the matter for himself. There is nothing within the material before the Tribunal to indicate that it would not have been reasonably practicable for the Claimant to lodge a complaint before the Tribunal at any stage prior to 26 February 2020.

12.46 The documentary evidence to which the Tribunal has been referred demonstrates the Claimant to be an articulate and intelligent individual.

However, taken together with his witness statements and testimony, they confirm the Claimant to be a less than reliable historian. In the view of the Tribunal, the Claimant enjoys a high level of confidence which is matched by his lack of preparedness to receive the views of others. In consequence, where he is in receipt of information with which he disagrees, his default position is to reject the information as 'wrong'. In the view of the Tribunal, this reaction is evidenced in the Claimant's dealings with managers and colleagues, but also with those participating in his clinical management. In consequence, he has consistently adopted a position in which the views and opinions of others are routinely rejected, irrespective of the absence of any qualification or expertise on the part of the Claimant to contradict them. These aspects of the Claimant's character are of direct relevance to the Tribunal's assessment of not only the putative disclosures upon which he relies, but also the detail he advances on the issue of disability.

12.47 Before engaging with the medical records provided, it is to be noted that the prior to his employment with the Respondent, the Claimant was employed by a supermarket chain. His role was that of delivery driver, delivering online purchases and grocery orders to residential premises. He accepted that this would have involved elements of driving, lifting and carrying. There is no suggestion that the demands of this employment exacerbated the conditions upon which he now relies in these proceedings. However, it is clear that the Claimant has sustained injuries in previous employment, including a slipping incident when carrying a crate [D36]. The documentation also indicates a biceps tear in March 2018 [D30] which caused difficulty in undertaking lifting [D34]. More recently, there is a record of the Claimant 'slipping downstairs' in December 2019. Whilst mention is made of this to the Claimant's GP [D388], there is no indication that the incident was relayed to other clinicians treating him at that time.

Resolving the Issues

Issue 1 - Disability

Medical Evidence

13. The Grounds of Complaint [§5] read as follows:

'The Claimant is disabled within the meaning of s.6 of the EqA as he suffers from Psoriasis, Scoliosis, Spondylolisthesis and Psoriatic Arthritis. The Claimant informed his employer of all his conditions and disabilities, before joining, in the Health questionnaire, dated 8 August 2018 and later when diagnosed, in April 2019, with Psoriatic Arthritis'.

14. The Disability Impact Statement [D1§1] points to these conditions as discrete disabilities. It is for this reason that the Statement engages with each of the conditions separately. Miss Brooke-Ward has confirmed that the Claimant invites the Tribunal to conclude that the Claimant possesses

the protected characteristic of disability on account of any or all of the conditions which have been cited. It is therefore necessary to consider the conditions identified and make additional findings of fact in respect of each.

15. This is not a case in which either party has sought permission to adduce expert evidence. However, the Claimant relies upon medical records and related correspondence.

Findings of Fact (Disability)

16. On the balance of probabilities, the Tribunal has found the principal facts on matters relating to the disability issues to be as follows:

Psoriasis

16.1. It is said that the Claimant was first diagnosed with this condition over 19 years ago [Grounds of Complaint §9]. The same document refers to the condition as being aggravated by stress and anxiety. It recounts how the condition is managed by injection administered by the Claimant, one side effect of which is said to be a susceptibility to increased risk of infection-related illness. In the Disability Impact Statement [D2 §5 et seq], the Claimant details the nature of the condition as arising from a 'compromised immune system' and confirms that formal diagnosis was made as long ago as 2002. He points to regular interaction with his GP and consultant dermatologist as evidence of the condition and its long-standing character. At paragraph 7 of the Statement, he provides a detailed list of the effects the condition has on his day to day routines. He indicates that they range from the requirement for extended periods for bathing, reduced mobility, debilitating pain, inability to drive in excess of 8 hours per day and an inability to undertake 'heavy or awkward lifting'. In addition to the immediate symptoms, the Claimant refers to a hypersensitivity to sunlight 'for prolonged periods.' He also considers that the condition affects his confidence.

16.2. The medical information confirms that the Claimant has been receiving treatment in relation to this condition since 2002 [D60]. In the ensuing period, there have been regular appointments with dermatologists. By 2015, it was decided that the Claimant would benefit from medication: 'Humira'; a form of immunosuppressor therapy. This resulted in the reduction of symptoms [D178]. The treatment was maintained until March 2019, when a decision was taken to cease the medication for welfare considerations unconnected with the condition itself [D184 and D379].

16.3. But for the administration of this medication, the Claimant was exposed to the potential for extensive skin irritation, requiring significant adjustments in bathing and other daily routines.

Scoliosis

16.4. As detailed in the grounds of complaint [§10] this condition is described as having been diagnosed when the Claimant was still an infant. In the Disability Impact Statement, however, the condition is identified as having been diagnosed in January 2007, it being suggested that the condition may be congenital. The Claimant describes how this condition has the potential to cause lower back pain, numbness, weakness, in his lower back, hips and legs. There is no treatment for the condition beyond exercises and increased mobility. The Claimant considers that the scoliosis impacts upon him in the form of extended fatigue, breathlessness on exertion, inability to drive for more than 8 hours, reduced mobility, and results in the need for increased time to dress, 'to get moving' in the morning and inability to lift heavy and awkward shaped objects, on account of unbalanced posture and core instability [§13].

16.5. The Claimant was referred to the orthopaedic service in January 2007 [D6]. At that stage, he was diagnosed has having 'double scoliosis' [D361A]. There was no pain or discomfort on examination. Neurological signs were recorded as normal. At the same appointment, X rays also revealed 'grade 1 spondylolisthesis L5, on S1' [D361A]. Whilst the Claimant had already been referred to podiatry and issued with insoles for his shoes, the consultant considered that any differential was of no significance.

16.5. Whilst it is far from easy to follow, the documentation suggests that this condition did not generate any persistent symptoms. There are, however, references to non-specific back pain which was addressed by means of physiotherapy. This appears to have occurred in January 2013 [D18-20] and May 2015 [D23].

Spondylolistheses

16.6. This medical condition is said to have been diagnosed from an early age and is managed by the Claimant through what are termed core strength exercises. In contrast, in the course of the Disability Impact Statement, it is suggested that the Claimant was diagnosed with this condition in March 2007. He indicates [§16] that this manifests itself in the form of persistent lower back pain, inability to shower, inability to stand, reduced mobility, increased time to 'get moving on [sic] a morning' and inability to lift heaving and awkward shaped objects. This is said to be due to unbalanced posture and core instability. This condition is said to be managed by means of regular exercise.

16.7. As previously noted, this condition was first identified in 2007. However, save for an anecdotal reference in March 2020 [D401], it does not feature in any significant way in the medical records which have been submitted. In particular, there is no suggestion of any specific symptoms identified as being referable to this condition. Nor is there any express reference to its discrete management.

Psoriatic Arthritis

16.8. The Grounds of Complaint [§6] indicate that the Claimant was diagnosed with this condition in April 2019. It was also stated that the Claimant managed the condition by means of 'injectable medication' [§8]. The Disability Impact Statement [§18] indicates that the Claimant began to experience symptoms which he attributes to this condition in 'late 2018' and that, following extensive tests, a formal diagnosis was received in March 2020. The impact of the condition is said to be reduced mobility, fatigue, 'susceptibility to illnesses', and extended recovery periods following bouts of viral illness. It is said that this condition is managed by a TNF Inhibitor to reduce inflammation, together with an exercise regime.

16.9. In April 2019, the Claimant presented with mechanical joint pain. He reported that he had experienced this pain for in excess of 10 years. At the time of presentation, it was said that he experienced stiffness for 5 to 10 minutes each morning. The suggestion of pain of this kind, or of such duration, is not corroborated by the medical records. The pain recorded is of posture or activity related back pain, not joint pain. The Claimant was referred to the musculoskeletal service (MSK). On attending clinic on 14 September 2018, a query was raised as to whether the symptoms might indicate psoriatic arthritis [D27]. This was in the nature of an investigation, not a diagnosis. A month earlier the Claimant had referred to Achilles pain. The records suggest that it was the Claimant himself who expressed the view that he was suffering from psoriatic arthritis (PA) [D49]. Following referral to rheumatology, the Claimant was examined on 14 December 2019. This was a matter of weeks following an incident in which he had fallen downstairs. There is no mention of that incident in the record of the examination. However, the correspondence indicates that the Claimant presented with pains which he described as having started in May 2019 and resulted in stiffness for several hours each morning [D193]. The other documentation generated around this time confirms that the Claimant was seeking a diagnosis of PA [D387, D391] and was resistant to further physiotherapy [D392]. However, as reported to the consultant dermatologist, the rheumatologists were, at that time, of the opinion that the symptoms were largely 'mechanical' [D393]. This was confirmed in subsequent correspondence [D383]. It was only in March 2020, for the first time, that reference was made to some element of spondyloarthritis. They remained of the view that some of the symptoms were of mechanical origin and made specific reference to discopathy [D401].

16.11. The combined effect of these conditions is far from certain. Still less certain, is the extent to which the conditions themselves impact upon the Claimant's day to day activities. By contrast, it is clear that the Claimant was not diagnosed with PA in April 2019 as was suggested to the Respondent in the completion of the Occupational Health Referral in June 2019 [D208].

16.12. The precise factual position is rendered all the more problematical by the fact that at the time of the occupational health assessment in July 2019, the Claimant made reference to participating in the activities of bike riding,

dog walking, etc [D211-121] and was recorded as having no limitation or restriction of strength, grip, dexterity, twisting, turning or walking [D212].

Submissions on the Disability Issues

17. Ms Brooke-Ward submits that there is not and cannot be any real dispute concerning the long-term nature of the medical conditions upon which the Claimant relies. Whilst conceding that there was no diagnosis of PA prior to March 2020, she invites the Tribunal to conclude that the absence of a diagnosis is not determinative. She further submits that the Tribunal should consider the effect of these medical conditions in their entirety.

18. By contrast, on behalf of the Respondent, Ms Gould invited the Tribunal to conclude that none of the conditions satisfied the requirements of physical impairment under section 6 of the EqA. Whilst acknowledging the fact that the absence of a diagnosis was not determinative, the absence of any diagnosis of PA in this case generated particular evidential difficulties for the Claimant. She further submitted that, in any case, the question of adverse impact must be considered with the definition contained in section 212 of the EqA in mind. This provision, she submitted, finds an echo in the 2010 Guidance.

19. It follows that the parties are in agreement as to the legal principles which fall for consideration. The point of divergence arises in relation to the conclusions the application of the principles should yield in this case.

Discussion and Conclusion

20. Section 6 of the EqA requires the Tribunal to engage with two discrete but sequential matters, namely (a) whether the Claimant has a mental or physical impairment, and (b) if so, whether the impairment in question has a 'substantial' *and* 'long-term' adverse effect on his ability to carry out normal day to day activities. In the resolution of those questions, the Tribunal is required to consider not only the provisions detailed in Section 6 and Schedule 1 to the Act, but also the Guidance issued in 2010.

21. The language of the legislation, therefore, requires the Tribunal to determine whether (i) the Claimant has established the existence of a physical or mental impairment; (ii) the impairment in question (either alone or when considered in conjunction with others) adversely affects the Claimant's ability to carry out normal day to day activities; (iii) the adverse effect identified may be considered to be both substantial and long-term. These are issues for determination by the Tribunal itself: **Abadeh v British Telecommunications plc [2001] IRLR 23**.

22. It is well settled that the existence of a long-term medical condition is not synonymous with the concept of disability for the purposes of section 6 of the EqA. Rather, the primary focus of the legislation is the effect of the *impairment* upon the *ability* of the Claimant to undertake normal day to day activities. It is recognised too that it may not be possible to readily characterise the impairment relied upon: **Guidance A8**. Likewise, there is no definition of the term 'normal day to day activities'. However, the concept is recognised as extending to normal

workplace activities: **Chief Constable of Norfolk v Coffey [2019] EWCA Civ 129 and Guidance D3**. Additionally, in assessing the question of adverse impact, the ameliorating effects of treatment are to be disregarded: **SCA Packaging Ltd v Boyle [2009] UKHL 37**. Further, in considering the issue of adverse impact, the Tribunal may have regard to the cumulative effect of the impairments relied upon: **Guidance B6 and C2**.

23. As section 6 and paragraph 2 of Schedule 1 to the EqA make clear, it is the adverse effect which must be long-term and not merely the condition itself. In many cases, this distinction may be of little consequence. However, there will be others where the medical condition may be consistently asymptomatic, with little or no prospect of impacting upon the Claimant. Equally, there will be cases in which the adverse effect is episodic, or, following medication, is abated but has the potential to recur.

24. Where, as here, the Claimant relies upon discrete impairments, the Tribunal is required to consider the consequence of each of the conditions in question; determining in each case, the two questions identified in paragraph 20 above.

Psoriasis

25. This a long-standing medical condition. But for the reception of medication in the form of Humira injection, the Claimant was exposed to persistent and recurrent outbreaks of skin irritation and related difficulty. The available evidence confirms the existence of the physical impairment. The real question is whether or not this condition affected the Claimant's normal day to day activities in a manner which could be considered substantial and long-term.

26. Disregarding the ameliorating effects of the "Humira" medication, it is clear that the Claimant would otherwise be subject to outbreaks of skin irritation, related pain and discomfort. These in turn would adversely affect his ability to participate in the normal activities of bathing, personal hygiene and self-care. Whilst the Claimant was not precluded from participating in those activities, he required extended periods of time to undertake them. When symptomatic, the condition also had the secondary effect of requiring the Claimant to adopt additional guarding or coping strategies to protect against soft tissue injuries. This adverse effect was - but for the medication - substantial and long-term. In this latter respect, the Tribunal has not overlooked the fact that notwithstanding withdrawal from the medication, the symptoms have not returned. However, in the view of the Tribunal the nature and character of the medical evidence points to the fact that the impairment is long-term and there is a high likelihood of recurrence of those symptoms identified previously.

Scoliosis

27. This physical condition was diagnosed many years ago. However, the diagnosis provides no meaningful indication as to its symptoms or effects. The evidence detailed within the medical records indicates that this condition - whilst known - was for many years asymptomatic. Throughout the period 2007 to 2018 it appears to be mentioned by way of historical record and nothing more. During

that same period, the presentation of back pain is reported as being event-specific or activity-related (e.g. back pain since new chair at work and 'pulled back in the past' [D23]. There is no indication of any recurring symptomology or weakness in between these episodes. Further, the Tribunal is unable to accept as reliable or accurate the suggestion that this condition generates the limitations detailed within the Disability Impact Statement.

28. The Tribunal is satisfied that the Claimant has been diagnosed with a physical impairment in the form of scoliosis. However, it is not satisfied on the evidence available that the impairment has a substantial or long-term adverse effect upon the Claimant's ability to carry out normal day to day activities. The Tribunal has come to this conclusion having scrutinised the medical evidence, adopting the methodology detailed within the Guidance.

Spondylolistheses

29. As with the condition of scoliosis, this diagnosis was made many years ago. There is no suggestion of any consideration of, or need for, surgical intervention. There is no significant reference to this condition or its effects within the medical records. Indeed, aside from the reference at the point of diagnosis [D361A], the condition receives no further detailed mention save as a contributory component of the medical history [D383. D193 and D197]. As with the condition of scoliosis, there is no doubt as to the authenticity of the condition or that the condition is itself long-term in nature. However, the statutory framework requires more. For the reasons previously identified, the Tribunal must also be satisfied that the impairment in question adversely affects the Claimant's normal day to day activities *and* that such impact is both substantial and long-term. In this respect, the Tribunal is unable to accept as reliable or accurate the description detailed in the Claimant's Disability Impact Statement. The Tribunal is not satisfied that this condition has a substantial or long-term adverse effect upon the Claimant's ability to undertake normal day to day activities.

PA

30. The Claimant has on a number of occasions identified that this condition was diagnosed in April 2019. This is incorrect. It is apparent that the Claimant had formed the view that all of his symptoms were attributable to this condition. He disagrees with the treating clinicians and has been critical of their own classification of his symptoms as being - at least in part - musculoskeletal in origin. However, the diagnosis is not the only point of divergence. As previously noted, it had been suggested that the Claimant had been suffering 'multi joint pains' for in excess of 10 years. [D383]. Yet, in the Occupational Health Report approved by the Claimant prior to release to the Respondent, it is stated that the condition affecting his joints was 'new' [D210]. Similarly, in the course of correspondence from the Rheumatology specialist in December 2019, it is suggested that the symptoms commenced in May 2019 [D396]. The Claimant properly points out that the letter of 27 March 2020 [D401] refers to spondyloarthropathy, which is an umbrella term for a number of inflammatory rheumatic diseases. However, there is no suggestion in this case of any form of inflammation. Whilst the absence of such symptom might be referable to the

Humira medication, the Claimant had ceased taking this medication in March 2019 [D379]. More problematical is the inability to identify the effects of this condition on the Claimant. The evidence is far from clear or consistent. Further, for reasons previously expressed concerning the quality of the Claimant's evidence, the Tribunal is unable to accept as accurate or reliable the adverse effects which he attributes to this condition in the course of the Disability impact Statement. Given this position, the Tribunal cannot be satisfied that this condition constitutes a disability for the purposes of section 6 of the EqA. In reaching this conclusion, the Tribunal is mindful that the absence of a diagnosis is not determinative. Similarly, it has made due allowance for the fact that the cause of the disability is not material to the Tribunal's inquiry (i.e. **Guidance A7**). Even allowing for these factors, the Tribunal cannot be satisfied that this condition has a substantial and long-term effect upon the Claimant's ability to carry out normal day to activities.

31. It follows that on the first of the preliminary questions, the Tribunal is satisfied that the Claimant possesses the protected characteristic of disability in relation to psoriasis only. Further, it is the Tribunal's conclusion that this condition was present throughout the Claimant's employment with the Respondent. The assertion of protected characteristic in respect of the other impairments is rejected.

Issue 2 - Protected Disclosures

32. Paragraph 20 of the Particulars of Claim [p19] reads:

"20. The Claimant contends that he made a protected disclosure pursuant to section 43B(1) (b), (d), (f) of the ERA 1996 as the Respondent failed and is failing to comply with legal obligations to which he [sic] is subject and that the health and safety of patients is being or is likely to be endangered by the practices adopted by the Respondent."

33. The following paragraph states that the Claimant 'raised concerns' in relation to health and safety of his passengers throughout the course of his employment; finally lodging formal grievances on 13 and 15 May 2019. Paragraph 25 of the same document refers to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, Schedule 1.

34. As previously noted, there followed Further and Better Particulars of Claim [p.52 et seq]. Within this document, reliance is placed upon a number of matters which have been classified on behalf of the Claimant as 'legal obligations' in support of this aspect of his claim. This document prompted the filing of Amended Grounds of Resistance. Importantly, it has been the Respondent's position throughout that no qualifying protected disclosure had been made by the Claimant [p78 §27].

<u>Submissions on the Protected Disclosure Issues</u>

35. As in the case of the first of the preliminary questions, the parties are in agreement as to the legal principles which fall for consideration on this issue also.

36. At the heart of Ms Brooke-Ward's submissions was an invitation to the Tribunal to aggregate the communications issued by the Claimant [see Claimant Skeleton

argument paras 32 and 40]. By this means, it was submitted, the Tribunal could conclude that the Claimant had made protected qualifying disclosures. These communications, she submitted, were not complaints or allegations, but the provision of information in the manner detailed in the Further and Better Particulars. Further, she submitted that there had been no suggestion on behalf of the Respondent that the communications had not been made, with the result that the Tribunal ought to find that all of the disclosures were made as pleaded [Claimant's skeleton argument at para. 36]. She further submitted that it did not matter that the Claimant may - at the time of making the putative disclosure - have had no direct or specific belief concerning the precise legal obligation which had been breached or had been imperilled. Ms Brooke-Ward also invited the Tribunal to conclude that the information disclosed was manifestly in the public interest and the Claimant reasonably believed it to be so.

37. On behalf of the Respondent, Miss Gould lays emphasis upon the distinction between the provision of information and the mere making of allegations. Drawing upon **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38**, and **Goode v M&S plc [2010] UKEAT/0422/09**, she invites the Tribunal to conclude that, insofar as there were communications from the Claimant, they were to be properly classified as allegations. It is further submitted [Respondent's Skeleton argument at para. 33] the Claimant could not have held a reasonable belief of either the alleged breach of health and safety legislation, or, that the making of the putative disclosures was in the public interest. The communications were 'at their highest', mere complaints.'

Discussion and Conclusions

38. Section 43B(1) of the ERA (ERA) defines a qualifying disclosure as involving the disclosure of '*information'*. On any view, this requires a determination as to whether the communication relied upon was in fact made**.** Further, as section 43B(1) makes clear, a putative disclosure will only qualify for protection where a number of additional conditions are met. The first is a belief on the part of the Claimant that the disclosure (i) is made in the public interest, and (ii) that it tends to show one of the matters identified in section 43B(1)(a) to (f). Further, the Tribunal must also be satisfied that the subjective belief of the Claimant was in fact reasonable. It follows that it matters not whether the belief, whilst reasonable, was erroneous: **Darnton v University of Surrey [2003] IRLR 133**.

39. As will be apparent from paragraph 20 of the Particulars of Claim, in respect of each of the putative disclosures relied upon, the Claimant asserts that he held the reasonable belief that the disclosure was in the public interest and tended to show: (i) that the Respondent was in breach of its legal obligations; (ii) that the health and safety of either himself or others was being imperilled; and/or (iii) that those matters had been or were likely to be deliberately concealed.

40. The authorities to which the Tribunal has been referred confirm that there must be a disclosure of information: **Munro Professional;** even where the information is already known to the employer: section 43L(3) of the ERA. They also attest to the need to differentiate between the making of allegations and the imparting of information. However, as noted, the two may often be intertwined. Similarly, there

are circumstances in which it may be appropriate for the Tribunal to aggregate or consider the cumulative effect of putative disclosures. Whether or not it is permissible or legitimate to do so in the given case, is a question of fact: **Norbrook Laboratories Ltd v Shaw [2014] ICR 540**.

41. In addition, as noted by Ms Brooke-Ward, there is no obvious demarcation line between the public and private interest. As such, the Tribunal is likely to be assisted by consideration of a number of matters, including the nature of the interests in question, the disclosure of the alleged wrongdoing and the identity of the alleged wrongdoer: **Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979**.

42. Despite Ms Brooke-Ward's best efforts, the manner in which this aspect of the case was 'pleaded' was highly problematic. It is, of course, well settled that it is for the Claimant to satisfy the Tribunal of the fact of the putative disclosure. Despite the opportunity to provide both Further and Better Particulars of Claim and a Witness Statement, he has not made any substantive attempt to provide the Tribunal with *direct evidence* of what was said, to whom, and/or upon what basis. In fact, the witness statement filed by the Claimant fails to engage with a number of the putative disclosures, with the result that the Tribunal is left without any direct testimony as to, amongst other things, the terms of the alleged disclosure and/or the belief upon which the Claimant relies in support of it. Judge Bright's directions were expressed in clear terms. Importantly, in relation to each alleged disclosure, it required provision of information as to *how it was said, to whom, when it was said and* to which obligation it related. During cross-examination, the Claimant was not able to offer any explanation as to why these requirements had not been met, or, for that matter, why it was that certain of the putative disclosures had not been included within the relevant witness statement at all.

43. Given the details provided, however, it is necessary to consider and examine each putative disclosure in turn. In the following passage of the judgment, 'PD" followed by a number denotes the putative disclosure relied upon followed by its number, and 'WS' refers to that part of the Claimant's witness statement where the relevant putative disclosure is dealt with (where applicable).

<u>PD1 Duration of patients and welfare of patients [29.9.18]</u>
WS Para. 2

44. In cross-examination, the Claimant accepted that he had not provided any documentation to support the fact of this disclosure. He also conceded that the Further and Better Particulars provide no detail as to what is alleged to have been said. He further acknowledged that this omission is not repaired by the witness statement filed for the hearing. Instead, the statement indicates that the Claimant raised 'concerns' or 'issues' with no other form of narrative as to what was in fact said. By contrast, the Further and Better Particulars refer to the Claimant not raising any concern, or, issue, but rather a 'query' [p.54].

45. The Tribunal does not accept that any such 'query' was raised. Insofar as the issue of journey times was discussed, it was part of a forum in which all

employees were invited to participate. The Tribunal rejects the suggestion that the Claimant held any subjective belief that it was in the public interest to make any such disclosure, or that it tended to show that the Respondent was acting in breach of its legal obligations or had or was likely to deliberately conceal any such breach. Further, if and insofar as any such communication had been raised, it would not have been reasonable for the Claimant to formulate such a belief. The Claimant does not profess any expertise or qualification in health care, health and safety or employment law. Insofar as it is suggested that there was a discussion around working practices, it was one in which the Respondent - through its managers - was encouraging employees to communicate. This is corroborated by the Claimant's own 'Reports' which he voluntarily provided to Ms King thereafter. In the view of the Tribunal, the Respondent had an established practice of scheduling both appointments and drivers over 4-week periods, with passenger cohorts being finalised as the appointment approached. This was a freely provided and a voluntarily adopted service. There was no element of compulsion upon passengers to use it. In advance of being accepted onto a booking, passengers were invited to, and did, provide information concerning their needs and suitability to be transported by the Respondent. As the Claimant conceded, this arrangement was in the nature of a risk assessment. Given these matters, the Tribunal is satisfied that the Claimant did not (and would not) have any reasonable grounds upon which to form any belief of the public interest, or, that any communication tended to show an actual or prospective breach of any legal obligation on the part of the Respondent or of the deliberate concealment of such a breach. Furthermore, the Tribunal is of the view that whilst the Claimant may have had in mind issues of efficient operation, he did not at any time hold the belief that there was any form of non-compliance with any wider statutory duty under the Health and Safety Acts, or the Health and Social Care Act or subordinate legislation.

PD2 Weekly Transport Feedback Reports [17.10.18- 8 November 2018]
WS Para. 3

46. In cross-examination, the Claimant again conceded that the essential detail of the alleged disclosure was not provided. He accepted that this concession extended to both the Further and Better Particulars and the witness statement. As Ms Gould pointed out, and the Claimant himself agreed, there was no attempt in either document to draw to the Tribunal's attention the particular extracts of the documents provided which were said to constitute the protected disclosures. This placed the Claimant in the difficult position of having to place reliance upon 'all of them'. The Further and Better Particulars [p.55] indicate that the Claimant had documented 'issues' which were being 'experienced' by the Claimant and 'patients in his care'.

47. It is clear that the Claimant submitted documents to Ms King which he considered to be in the nature of Reports. The Tribunal rejects the suggestion that in the formulation and submission of those documents, the Claimant was purporting to make protected disclosures, held any subjective belief that the communications were being made in the public interest or that they tended to show that the Respondent had or was likely to act in breach of its legal obligations, would

deliberately conceal any breach of its obligations and/or that he had any reasonable grounds to form such a belief.

48. For reasons which are developed later in this judgment, the Tribunal is satisfied that the Claimant was demonstrating what he considered to be his superior knowledge and assessment of the service which was and/or could be provided. Contrary to the assertion now made, the manner in which the Claimant was expressing himself was to ensure that he came to the notice of management as a person of ability. Given the force of the Claimant's character, had he considered the Respondent was acting in breach of its obligations, or there was any prospect of deliberate concealment of such breach, he would have stated this in unequivocal terms. Whilst the Reports lodged included certain opinions as to how the service might be enhanced, and greater efficiency secured, the Claimant had no reasonable grounds to conclude that the Respondent was acting in breach of its obligations to drivers or passengers, that the health and safety of any person was being endangered, or that the Respondent had deliberately concealed or was likely to deliberately conceal any non-compliance with its legal obligations. Nor, the Tribunal has concluded, did he hold such a belief. In reaching this conclusion, the Tribunal bears in mind that the Claimant did not regard each and every passenger who could access the service as being 'vulnerable' in any legal sense. Nor was it suggested that they lacked capacity. These were individuals who were voluntarily participating in a free service. Whilst conveyed to hospital by means of the Respondent's vehicles, they were not in need of care, clinical or otherwise from the Respondent or its drivers, save in the form of the ophthalmic appointment. Further, as the Claimant well knew and understood, prior to any passenger being permitted to board any of the vehicles, they were required to provide information to the Driver Centre in Bolton. This information was then verified by the relevant driver on the eve of the scheduled appointment. As the Claimant acknowledged, both were in the nature of a risk assessment. Being autonomous and enjoying full capacity, each passenger had an obligation to engage with their own personal needs prior to embarking upon any scheduled journey. The measures introduced by the Respondent were intended to require them to do so.

49. As will be noted later in this judgment, there were isolated occasions when passengers presented for transport and it was realised that their particular needs could not be accommodated by use of the service. It is no part of the Claimant's case that the Respondent's personnel were asking the wrong questions. It is apparent from the system in place that all parties, including passengers and drivers, recognised that there was an obligation upon the passenger to determine their own suitability for transport by this means. Recognising that there were occasions when the full detail of a passenger's position might not be disclosed, drivers were provided with the assurance that they could themselves decline to transport particular passengers and/or seek managerial support for making such a decision. Whilst the Claimant indicated that this would expose the driver to criticism or complaint, the Tribunal rejects this suggestion. As was made clear to the Claimant by Ms King and others, it was in the Respondent's interests that those passengers with particular difficulties were re-assessed on the day of travel. There was no disincentive to the Claimant or other drivers for doing so.

Indeed, the telephone call on the eve of the appointment was intended to serve this very purpose.

50. In the view of the Tribunal, the reasonableness of the Claimant's asserted belief must be considered in the context of the totality of the documented exchanges passing between himself and Ms King at the relevant time. This includes the 'Reports' which the Claimant took upon himself to provide [p.116]. He did so in order to provide 'a small window into the transport'. The email is, in tone and content, a sharing of information for potential operational benefit. It was received by Ms King on the same basis. She declared herself 'happy' for the Claimant to provide any queries which would enable the Respondent to improve on processes [p.115]. Similarly, on 29 October 2018, the Claimant maintained this tone in respect of 'noteworthy events' [p.119]. As with earlier correspondence, the Claimant concluded this email with an invitation for Ms King to approach him in the event that she required anything else. The Further and Better Particulars indicate that the communications continued until 8 November 2018, when it is said: 'Liz King demanded the Claimant to stop creating [the reports] because she had no use for them…' [p.55]. In fact, the email of 8 November 2018 [p.127] contains no such demand. Indeed, Ms King was confirming to the Claimant that she only needed to know of 'patient issues that are a concern…'. Within the same email, Ms King invited the Claimant to check with Jane (which the Tribunal has read as a reference to Jane Bousfield) to see if she would like the information provided in the Report. It concluded with an expression of gratitude for the Claimant's 'continued hard work'. This marked the final Report submitted to Ms King. The Tribunal readily concludes that there was nothing in the email correspondence which provided any reasonable basis for the belief upon which the Claimant now relies. The Tribunal is satisfied that the Claimant did not in fact hold the belief in question.

<u>PD3 Poor Transport Booking [19.10.18]</u>
WS Paras. 4-7

51. As with the previous alleged disclosures, the Claimant conceded that neither the Further and Better Particulars nor his witness statement detailed what is alleged to have been said or to whom. The Claimant considered himself to be making a 'complaint' of being forced to transport patients. In response to the proposition that he was entitled (if not obliged) to indicate if he considered a passenger was unsuitable for transport, he disagreed, suggesting that he was subject to coercion and threat of disciplinary sanction. He resisted Counsel's suggestion that any communication on this issue was a concern about booking arrangements.

52. This putative disclosure is said to have been communicated to Jane Bousfield in a 'face to face meeting'. The Further and Better Particulars of Claim [p.56] refer to what is termed a 'poor transport booking'. It is said to have 'caused direct harm to a patient, prompting the Claimant to 'query over the working system'. It is asserted that the patient could have been hospitalised or 'fatal complications could have occurred'. Despite this, the witness statement refers to the Claimant participating in an 'informal chat' with Jane Bousfield and is said to have been triggered by the fact that the Claimant was 'forced' to transport a patient who was unwell. It is thereafter asserted that it was Ms King who 'demanded' that the

Claimant transport the patient. This allegation was not put to Ms King in cross-examination. Importantly, the Claimant's own witness statement indicates that Ms Bousfield was of the opinion that the passenger should not have been transported for her appointment and had herself escalated the issue to senior management. The patient in question was AB.

53. The Tribunal does not accept that any demand or instruction was given by Ms King in the manner alleged. It was not challenged that there had been an occasion when the Claimant had been required to clean his vehicle following a patient becoming unwell *en route* to her medical appointment. However, the Tribunal does not accept that the Claimant made any disclosure in the manner alleged to Jane Bousfield or anyone else. The Tribunal is equally unable to accept that the Claimant had formed the subjective belief that it was in the public interest or that the alleged disclosure tended to show a breach of obligation, that the health and safety of others had been endangered, or that the Respondent had deliberately concealed or was likely to deliberately conceal any non-compliance with its legal obligations. Importantly, the Claimant's witness statement does not contain any suggestion that the patient came to harm, or that the event could have generated fatal complications. Instead, the Claimant suggests that Ms Bousfield addressed the situation by returning the patient home in a taxi; a decision with which the Claimant appears to have had no difficulty. In rejecting the Claimant's evidence on this issue, the Tribunal has also had regard to the 'Report' provided by the Claimant to Ms King under cover of an email of 29 October 2018. Within the course of that email [pp.120-121], the Claimant records his entry for 19 October 2018. The first entry for that date is a complaint of AB's delay and its impact upon the resumption of the journey. Whilst recording that AB had become unwell during the journey, it is said "Patient AB did not want to stop or turn back". There is a second entry confirming the same decision at a later point in the journey. It is recorded that having been provided with "A Mars bar provided to her by her daughter, and taking some medication, Patient AB stabilised enough to make it to the facility…." Whilst the note refers to a request for alternative transport for AB, it is silent as to the following: (i) any suggestion by the Claimant that AB was unfit to begin her journey; (ii) any contact with Ms King before embarking upon the journey with AB; (iii) any demand from Ms King that AB be transported to her appointment; (iv) the suggestion of AB potentially requiring hospitalisation or suffering direct harm; (v) the prospect of near fatal complications, or (vi) that the issue had arisen as a result of a poor transport booking. There is nothing within the email to suggest that there had been any disclosure of any kind, to Ms Bousfield or anyone else. Further, the Tribunal is satisfied that had the Claimant formed the view that imparting this information was in the public interest and tended to show actual or prospective breaches of legal obligation, that the health and safety of persons had been endangered, or that the Respondent had deliberately concealed or was likely to deliberately conceal any non-compliance with its legal obligations, there would have been no reasonable basis for formulating such a belief.

PD4 Patient Safety Concern [25.10.18]
WS Paras. 5-10

54. The Claimant repeated the earlier concessions concerning the Further and Better Particulars and his witness statement. When asked as to why relevant information had been omitted from his statement, he suggested he was unaware that such detail was required. The Tribunal is unable to accept this explanation.

55. This issue relates to a patient with a 'back brace' (Patient 1), referred to by the Claimant as JB. The Further and Better Particulars [p.57] assert that a patient safety concern was communicated to Ms King. The Claimant's witness statement refers to the Claimant raising 'complaints'; said to have been raised out of concern for the manner in which patients, who 'were vulnerable adults', were being treated. Within his witness statement, the Claimant relays that he telephoned the patient the evening before, asking questions he had himself devised in order to 'assess their medical capability' for transport. The Claimant confirms that it was by this means that he was informed of the patient's back brace. According to the Claimant's statement, this issue was escalated, and he was informed that the patient could not be transported. It is, however, suggested that in cancelling the scheduled transport, the Claimant had a further discussion with the passenger in which she indicated she had previously undertaken a journey with the Respondent. It is said that the Claimant notified Ms King of 'the situation' the following day. Adopting the methodology requested by Ms Brooke-Ward, of reading across the documents provided by the Claimant, it is clear that this communication is said to have occurred by email.

56. The email correspondence provided to the Tribunal has, as far as possible, been included within the Bundle in chronological order. It does not contain any email sent on 25 October 2018. Nor does the Claimant's witness statement suggest otherwise. The only reference to 25 October 2018 appears within the Claimant's Report for the week commencing 22 October 2018 [p.122 et seq]. The relevant extract appears to comprise a number of observations by way of bullet points - over 10 in total [p.123]. Patient JB is expressly referred to. However, the document confirms that the Claimant had conducted an assessment of the passenger, deemed her unsuitable for the proposed journey, made a decision and simply communicated the cancellation of the booking the following day. There is no reference to JB having been transported by this means previously. Nor is there any complaint of breach of any duty, legal or otherwise or, for that matter, any question of concealment. Indeed, there is nothing within the entry to indicate that the Claimant was doing anything more than demonstrating his professional judgment and efficiency. The Tribunal is unable to conclude that the Claimant was raising a concern of the type alleged or that at the time of compiling his email, he held the subjective belief that he was disclosing information in the public interest or that the information provided tended to show that the Respondent was acting or was likely to act in breach of any legal obligation, that the health and safety of any person was being endangered, or that the Respondent had deliberately concealed or was likely to deliberately conceal any non-compliance with its legal obligations. Insofar as the Claimant had formulated and held such a belief, the Tribunal is satisfied that it would not have been reasonable for him to do so.

57. In reaching this conclusion, the Tribunal is mindful that the evidence before it indicates two matters: (i) the passenger acknowledged that it would be

appropriate to travel by other means, and (ii) given the revelation concerning the passenger's medical condition, both the Claimant and the Respondent were in agreement.

PD5 Patient Transport Concern [02.11.18]
WS N/A

58. The Claimant conceded that there was no information to support this alleged disclosure. He further conceded in cross-examination that the evidence did not indicate any actual or prospective breach of any legal duty or obligation on the part of the Respondent. The only email bearing the transmission date of 2 November 2018 is in the form of a "Report" [p.127]. The addressees include Ms King and Mr Hane (Transport Co-ordinator). The Report extends to a little over 2 pages. Its content ranges over traffic congestion and consequential patient delays, the composition of patient cohorts, appointment delays and, in one case, the cancellation of a passenger on grounds of suitability. There is nothing within the document which records any subjective belief on the part of the Claimant of breach of any legal obligation or duty, endangerment of health and safety, or of the Respondent having deliberately concealed or being likely to deliberately conceal any non-compliance with its legal obligations. The Tribunal is satisfied that the Claimant did not hold the belief that the imparting of this information was in the public interest or tended to show any of the matters of which complaint is now made. Indeed, had any such belief been formulated it would not have been objectively reasonable. On closer reading, the document is a further illustration of the Claimant's attempt to demonstrate what he considered to be his exemplary performance and efficiency. For this purpose, he was sharing information within an ongoing process of operational enhancement which the Respondent had invited and encouraged.

PD6 Breach of the WTR leading to Accident [8.11.18]
WS Para. 11

59. In cross-examination, the Claimant provided the same concessions noted earlier in relation to the previous alleged disclosures. When taken to the terms of his contract of employment concerning Working Time, the Claimant suggested that he had signed the document under "duress". He went on to indicate that he had, in January 2019, elected to revoke the consent previously provided for opting out. However, despite the extensive documentation, he was not able to point to a copy of the document said to have been issued to the Respondent to that effect. In essence, the Claimant contends that he held a reasonable belief that he and other drivers were not being provided with their rest breaks and/or intervals between shifts. When referred to vehicle tracker records, the Claimant discounted them as inaccurate. He also refuted the suggestion that drivers were able to organise their work during the course of their working day and exercise rest periods accordingly.

60. In the view of the Tribunal, in engaging with this aspect of the claim, the starting point remains the Further and Better Particulars. The disclosure [p.58] is said to have been more specific than a general concern regarding working hours. It is said that the Claimant raised Working Time in the context of its contribution to

fatigue, resulting in an accident in which the vehicle driven by the Claimant was damaged. It is said that this was communicated to Ms King and Ms Bousfield orally. The Claimant's witness statement describes the context as a 'telephone chat'. Within this conversation, it is alleged that the Claimant expressed concern for patient safety, the safety of drivers, breach of Working Time, excessive shifts and lack of overnight rest between his shifts of 6 and 7 November 2018. Within the witness statement too, the Claimant suggests that he was seeking Ms King's opinion regarding the application of the WTR.

61. In his "Report" for the week commencing 5 November 2018 [p.132], the Claimant raised a number of operational issues. The document details journeys and, amongst other things, shift duration. The entry for 7 November 2018 records that the Claimant was 'asked to complete two shifts in one day, this was due to "Julie" (a driver colleague) not being fit for work'. There is no suggestion that others were similarly affected. It is in the course of the same day's entry that the Claimant reports damage to his vehicle. He does so in the following terms: "due to the street being tight to navigate, I grazed a small wall causing damage to my vehicle". Whilst the Claimant records contacting Ms King in connection with rest periods due to 'Birmingham and Bridlington shifts', it is not recorded that he considered the damage to his vehicle to have been caused by fatigue. In fact, the entry suggests otherwise. The entry for 8 November 2018 contains no mention of any discussion between the Claimant and Ms King or Ms Bousfield. The only mention of Ms King on that day is in relation to her email of 8 November 2018.

62. Whilst the notes made by the Claimant are informative, they do not themselves detail the disclosure alleged to have been made, namely: that because he was working hours 'over and above those stipulated in the WTR this had led to" an accident. The Tribunal is satisfied that had such a communication been issued, the Claimant would not have compiled his note in the terms recorded in the preceding paragraph. The Tribunal concludes that no such disclosure was made. It is fortified in this view by the evidence provided by Ms King and, in particular, the fact that it was not put to her in cross-examination that the Claimant had made the complaint in the terms detailed in the Further and Better Particulars of Claim. Given this conclusion, it is not necessary for the Tribunal to consider the quality of any belief said to have been operating upon the Claimant on 8 November 2018. The wider issue of Working Time compliance is considered later in this judgment.

PD7 Discussing continued concerns over driver and patient welfare [11.11.18]
WS Para. 13

63. At paragraph 13 of his witness statement, the Claimant indicates that the date provided in the Further and Better Particulars of Claim in relation to this putative disclosure is incorrect and that it ought to read 11 December 2018. The Tribunal has approached this item on this basis. As detailed in the pleading [p.59] however, the putative disclosure is said to have been made in a 'face to face meeting', and directed to Ms Leadbetter (Area Manager) and Ms King, in the presence of a senior HR Officer: Kay Wood-Townend. Within the witness statement it is said that the Claimant raised 'concerns' regarding patients who he

considered to be vulnerable and his own welfare arising from his disabilities. He suggests that 'many welfare and safety concerns' were raised, such as risk assessments, working time and other questionable practices'. As Ms Gould pointed out, and the Claimant accepted, no other details are provided.

64. Notes of the informal meeting of 11 December 2018 have been provided [pp.160-168]. The Claimant has made no attempt within the course of his witness statement to identify the aspects of the meeting upon which he relies. In keeping with Ms Brooke-Ward's submission, the Tribunal has considered the entirety of the document.

65. It is clear that by November 2018, the Claimant was communicating his own understanding regarding the statutory framework in which the Respondent and its drivers were required to operate. In the course of the communications between himself and management, he suggested that by reason of the activity being undertaken (i.e. carrying passengers to hospital appointments) more stringent vehicle regulations applied to regulate the working patterns of the drivers. The Respondent disagreed and provided a reasoned explanation as to why the relevant regimes were in fact being complied with. As Ms Brooke-Ward correctly observed, the issue is not whether the Claimant's perception was accurate but rather, whether the Claimant held the subjective belief at the relevant time and it was reasonable for him to do so. It was suggested to him that he was obliged to accept the Respondent's position. He denied that this was the case. He was nonetheless clear in accepting the proposition that this complaint was directed to his own terms and conditions of employment. However, he suggested that he was raising the relevant concern in the public interest.

66. In the view of the Tribunal, the Claimant had not formed the belief that the Respondent was in fact acting in breach of its legal obligations as now alleged in these proceedings and/or had deliberately concealed any such breach and/or or was likely to do so. Nor would it have been reasonable for him to form such a belief. The reality was relatively straightforward. As Ms King and others had made clear, the Respondent believed that it was discharging its obligations and, as the email traffic confirms, invited all members of staff, including drivers, to identify means by which efficiencies might be enhanced. The meeting on 11 December 2018 served as an opportunity for the Claimant, and those managing him, to clarify reporting lines, out of hours communications, the Respondent's wish to establish a Halford's contract, the use of company fuel cards, and liaison around passenger assessment. Aside from these general issues, the Claimant expressed the view that Ms King was questioning his integrity. The notes also indicate that the discussion extended to enhancements which the Claimant had proposed, including the potential for a Transport Team in Yorkshire and the establishment of a clinic in Hull. As with the other issues, the notes evidence a collaborative sharing of perspectives. Contrary to the suggestion made in the Further and Better Particulars of Claim, the Claimant was informed that it was 'not a bad thing' if he was more vocal than others. In fact it was stated to the Claimant: "it helps if someone is new, as they can look at things with a fresh pair of eyes…" [p.165]. Insofar as this meeting was used by the Claimant to raise concerns, they were confined to his own working arrangements and not those of others. Further, whilst he made reference in the meeting to DVSA and ACAS this

was in the context of a concern regarding his own terms of employment. He also expressed his view that 'drivers had no employment rights' [p.166]. This was in the nature of an allegation. Toward the conclusion of the meeting, the Claimant was invited to indicate any other matters he wished to discuss. He declared himself unable to think of any at that time [p.168]. In the view of the Tribunal, nothing said by the Claimant within this meeting was in the nature of a protected disclosure. The Claimant did not hold the subjective belief that he was disclosing information in the public interest, and/or that such information tended to show that the Respondent in breach of its legal obligations, endangering the health and safety of others, or that it had deliberately concealed or was likely to deliberately conceal any non-compliance with its legal obligations. Nor would such a belief have been reasonably held. This meeting was and remained informal in character. In both form and content it was used by the Claimant as a means by which to communicate his own views as to how the service ought to be more efficiently operated. The Claimant was communicating information with a view to demonstrating what he considered to be his superior knowledge of the business operations, and thereby enhance his prospects of advancement within the undertaking.

PD8 Working Hours and Rest Breaks [12.11.18]
WS Paras. 15-16

67. The Further and Better Particulars record this putative disclosure as being made by email. The Claimant conceded that neither the pleading nor his witness statement record what was said. The witness statement does indicate reliance upon an email addressed to Ms Bousfield [pp.135-139]; said to have been written out of concern for patients and for the Claimant's own welfare.

68. The email was transmitted at 11:01 hrs on 12 November 2018. It refers to breaches of laws 'on [sic] the WC 5/11/2018' and 'breaches that are planned to happen'. The body of the email refers to four matters: (a) compulsory overtime and working hours in excess of 48 hours per week; (b) daily rest periods and alleged breaches on 6 and 8 November 2018; (c) breach of driver rest periods, and (d) limits upon driver hours. The anticipated or future breaches were said to be likely to occur on 14 and 16 November 2018. This was said to be due to the Claimant being required to drive in excess of what he declares to be "Drivers Hours Daily Limit Law". He concluded the email by indicating that these two shifts would be 'against the law' and '[he] is not comfortable with doing so…" [p.137]

69. Before considering the nature of this communication, it is of some assistance to look to a further document issued by the Claimant in connection with the issues raised. It comprises an email of 13 December 2018 [p.170] and is said to be in response to the informal meeting held on 11 December 2018 - the same meeting which is said to form the basis of putative disclosure No 7. In the course of the email, the Claimant confirms he was not raising a complaint over average amounts of hours, but the 'hours being worked on single shifts' [p.171]. This statement is informative since it is in direct response to an indication from management that the Claimant's timesheets would be examined.

70. The Tribunal is satisfied that on this occasion, the Claimant had formulated the belief that his terms and conditions of employment, and statutory rights were being infringed. He was also of the view that the Respondent was acting in breach of laws concerning maximum daily driving time. Whether or not the Claimant's view was accurate is immaterial. It is implicit to the communications that he considered these concerns applied equally to others and, thus, that there was a public interest dimension to the matters being raised. The Tribunal accepts that in doing so, he had formed the belief that the information tended to show non-compliance with the WTR. This being so, the Tribunal is obliged to determine whether these beliefs were reasonably held.

71. The evidence provided by Ms King indicates that the working hours of all drivers (including the Claimant) were variable. She rejects the suggestion that the Claimant entertained what might be considered a reasonable view or belief, having examined in some detail the working patterns of the Claimant's duties and those of his colleagues.

72. In considering this disclosure, the Tribunal is satisfied that the Claimant was fully aware of the terms of his contract at the point of signing and returning the document to the Respondent. It has previously indicated its rejection of the Claimant's suggestion that the detail of the contract was something of which he became aware in December 2018. In the view of the Tribunal, on the evidence to hand, it would be wholly out of character for the Claimant, to sign a document of this importance without first reading it and understanding its terms.

73. It is no part of the Claimant's case that he was aware of the detail of hours worked by his colleagues. Indeed, he suggested that he was only able to speak on his own behalf. There is no suggestion in the evidence before the Tribunal that he had canvassed his colleagues, or, via his union, been given access to information to enable him to compare his own perceptions with those of others, or the working practices in which they participated. The Claimant has no specialist qualifications or expertise in the operations of passenger transport, vehicle licensing or health and safety. Nonetheless, the Tribunal is satisfied that the Claimant could reasonably have formed a belief that working practices (and hours) for those participating in a service for patients might be a matter of public interest. However, the language of section 43B(1) of The ERA makes clear that this is but one component. If the putative disclosure is to qualify for protection, it must be established that it was reasonable for the Claimant to conclude that the disclosure tended to show the matters of which complaint is made (ie breach of legal obligation, endangerment of health and safety and/or deliberate concealment). The Tribunal is satisfied that there was no reasonable basis upon which the Claimant could reasonably conclude that the information tended to show any actual or prospective breach on the part of the Respondent, endangerment of health and safety, or any deliberate actual or prospective concealment of such breaches.

74. With regard to rest periods, the Tribunal is unable to accept the evidence of the Claimant. His position distilled to the proposition that he was, in effect, deprived of any rest period during the course of his working shifts. This is manifestly not the case. A cursory examination of the vehicle tracker documentation indicates

that there were opportunities for rest during the course of the day and it was for the individual driver to exercise them. In this respect, the Tribunal also rejects the suggestion that there was any obligation upon the Claimant to work in the evening, following his arrival at home. In this respect, the Tribunal accepts the evidence of Ms King that calls to passengers scheduled for transport the following day, are intended to be made prior to 6 pm.

75. On the issue of 'daily rest periods', the Claimant refers to the WTR. The Tribunal has been provided with the tracker records for the vehicle operated by the Claimant in the period 5 to 19 November 2018. In the course of his evidence, the Claimant indicated that he did not accept the records as accurate. He did not provide any reason for doing so. The records [p.143 et seq] comprise a print-out of time, location, and vehicle operation, with distance travelled. The data demonstrates that both start and finish times are variable. Not surprisingly, the daily rest periods are also variable, ranging from 11 hours 35 minutes on 6 to 7 November 2018 to 2 days, 14 hours and 24 minutes on 12 November 2019. The Claimant has properly drawn attention to the fact that the records indicate a daily rest period of 10 hours 20 minutes on 8 to 9 November 2018 [p.147]. However, it is neither appropriate nor reasonable to view that interval in isolation. It is clear from the tracking records that all other rest periods are considerably in excess of the 11-hour period upon which the Claimant suggests he relied. By way of illustration, as to 5-6 November 2018 and 7-8 November 2018, the rest periods were 16 hours 44 minutes and 17 hours 39 minutes respectively. Further, there is no suggestion that following the Claimant's email, his duties were changed or that he declined to perform the shifts allocated to him. This being so, it is noted that the daily rest period which ended on 14 November 2018 is recorded as being of 16 hours 34 minutes duration. The rest period 14-15 November 2018 is recorded at 18 hours 34 minutes. Further, the shift of 16 November 2018 is recorded as commencing at 17:52 hrs and concluding at 18:45 hrs.

76. Given the variable nature of the duties undertaken by the Claimant both before and after 8 November 2018, the Tribunal is satisfied that the Claimant did not have a reasonable belief that the Respondent was in breach of the daily rest period and/or would breach any relevant statutory regime or legal obligation in the future or that any actual or prospective breach had been or was likely to be deliberately concealed as alleged.

77. The final issue relied upon by the Claimant is that of maximum driver hours. Ms King confirms that the vehicles and operations undertaken by the Respondent were not regulated by EU Directives in the manner asserted by the Claimant. More significantly, she confirms [at paragraph 22 of her witness statement] that the Claimant had been repeatedly informed that this was the case and could readily have verified the position on the internet. The Tribunal does not accept that the Claimant held the belief that EU Driver restrictions were being breached and/or that any such belief would have been reasonable in the circumstances. In coming to this conclusion, the Tribunal bears in mind that the Claimant has presented himself as a person of considerable force of communication. He is a highly confident individual who is prepared to adopt robust forms of communication and undertake research to enable him to do so. The Claimant has indicated that he contacted both ACAS and DVSA. However, he did so in relation to 'drivers' rights'

and the contract with which he had been provided by the Respondent. There was no suggestion that the working practices relative to the duration of the working day were being breached, rather that they were disadvantageous to drivers. It is not part of the Claimant's case that he made a protected disclosure to ACAS or DVSA. Nor is it alleged by the Claimant that DVSA had made a determination regarding the relevant statutory regime. In the view of the Tribunal, having had the opportunity to assess the Claimant's demeanour in evidence, had any statutory agency informed the Claimant that this was the position, it is inconceivable that the Claimant would not have communicated this to the Respondent in clear terms. He did not do so. Any doubt in this respect is removed when the document compiled by the Claimant on 15 April 2019 is taken into account [p.199]. This makes clear that the DVSA had come to a view materially different from the Claimant's own. In the course of the document, he states:

> "I have however, previously spoken to Nick Lloyd, the Acting Head of Road Safety at The Royal Society for the Prevention of Accidents, and to a DVSA Enforcement Officer, whom both unanimously agreed that because of the work we do, and that the vehicles we use so closely resemble minibus operations, albeit agreeable there are some minor differences, that the minibus code of conduct should be closely mirrored, if not almost directly adhered to, as it would be a difficult argument to contest by Spa Medica, if they had no parallels with it at all, given the operations undertaken. Please be assured, no names were provided to either reference when my enquiries were made."

The Claimant continues:

> "But again, only time will tell what is involved when the new driving policy/standard operating procedure is released, I won't eliminate any potential [sic] before it has had time to flourish…"

PD9 Breach of GDPR [16.11.18]
WS Paras. 17-18

78. The Further and Better Particulars [p.61] indicate that this putative disclosure was made on 16 November 2018, by email to Ms Bousfield. In cross-examination the Claimant conceded that neither the pleading nor the witness statement provides any details of what was said or which part of the communication was relied upon as a protected disclosure. Nonetheless, the Claimant accepted that the email was transmitted as an expression of his own personal concern that the Respondent held his personal data. However, he suggested that if the breach of GDPR was applicable to him, it applied to all other drivers in the same way. Despite being taken to the relevant provisions of the contract of employment signed by him [p.103] he did not accept the activity or processing of data was authorised.

79. The email upon which the Claimant relies is in the bundle: [p.140]. It is clear from the terms of the email that the kernel of the complaint is not the gathering of data, but the purposes for which it could be accessed and utilised. In this respect, the email indicates that the Claimant objected to the tracker data being used for monitoring of drivers; it being his own belief that the data would be used for 'emergency' purposes only. The email concludes with a suggestion that the information is provided in response to a request and would not otherwise have been provided.

80. As previously noted, the Tribunal is satisfied that the Claimant was aware of the terms of his contract of employment from the time of signing it. Clause 8.3 (h) of the contract made clear that the employee was providing consent for monitoring and recording. No secret was made of the fact that the vehicles operated by the Respondent were fitted with tracking devices. Nor did the Claimant object to the installation of the devices or their retention. Rather, the complaint was concerning their use.

81. The Tribunal is unable to accept that the Claimant held the belief that the he was raising a matter of public interest or that the information tended to show the matters now complained of. Implicit to his claim is the suggestion that the Respondent was acting contrary to data protection or privacy laws. Furthermore, the Tribunal is satisfied that had the relevant belief been formed by the Claimant at the time, it would not have been reasonable. The terms of the contract of employment are clear. So too is the industry practice of using such devices. The suggestion that the device would only be used in the event of an emergency is rejected. Nor did the Claimant seek to advance any basis for it. There were no reasonable grounds upon which the Claimant could have concluded that the information tended to show that the Respondent had acted or was likely to act in breach of its legal obligations, had endangered health and safety and/or had deliberately concealed or was likely to deliberately conceal any non-compliance with its legal obligations.

PD10 Patient Driver Safety Issues [26.11.18]
WS N/A

82. The Further and Better Particulars of Claim refer to 'issues' communicated to Ms Leadbetter (Area Manager) and Ms Bousfield (Line Manager) by email and in a face to face meeting. No other details of the 'issues' are provided. This difficulty is compounded by the fact that the Claimant's witness statement is silent on this aspect of the claim and does not engage with this putative disclosure at all. In response to questions from Ms Gould, the Claimant confirmed that the email relied upon was transmitted on 26 November 2018 at 10:04 hours. It refers to the inability to convey a patient (AB) on the ground that the patient was a wheelchair user. No other information is provided. There is no indication of any actual or prospective breach of duty on the part of the Respondent. The terms of the document prompted the Claimant to suggest in his evidence that the criticism and breach of legal duty was implied. The Tribunal does not accept this proposition. It is satisfied that the email comprised nothing more than the communication of operational information from a driver to his line manager. It neither required further action on the part of the line manager, nor requested any. The Tribunal is satisfied that the Claimant did not hold the subjective belief that the sharing of the information was in the public interest or that the Respondent was in breach of any legal obligation to which it was subject, was endangering the health and safety of himself or others, or that the Respondent had deliberately concealed or was likely to deliberately conceal any non-compliance with its legal obligations. Nor would it have been reasonable for the Claimant to form such a belief. For reasons already detailed in this judgment, the Respondent was dependent upon passengers providing adequate information regarding suitability for travel. Drivers were required to verify suitability by means of the pre-

appointment telephone call and a further assessment on the day of prospective travel. Read in its proper context, this email is nothing more than confirmation that the procedures adopted by the Respondent, and required of its drivers, were being complied with.

PD11 Patient Safety Concern [07.12.18]
WS Paras. 19-20

83. Within his witness statement, the Claimant refers to having made 'complaints' by email. The email in question was transmitted on 7 December 2018 [pp.157-159]. The Further and Better Particulars of Claim [p.62] describe the event said to have generated the 'disclosure' but do not detail the disclosure itself. The correspondence begins with an email from the Claimant transmitted at 09.45 hrs. It states that the patient 'required oxygen' and had been transported to clinic without a chaperone. The Claimant expresses himself 'perplexed' that he is not made aware of patients' medical conditions. He comments that the first aid training given by the Respondent was inadequate and complains that he has 'no control' over who is permitted to travel in his vehicle. The email ends by recording the safe transport and return of the patient in question. Later that same day, a further email was sent by the Claimant to management regarding the level and detail of information in the Respondent's possession concerning suitability to travel [p.157]. The email chain culminates with an email of 13:30 hrs in which the Claimant provides, for the first time, the suggestion that the patient's oxygen device 'ran out of battery' when she was 5 minutes from home. It is also suggested that the patient required some support when going from the vehicle to her home.

84. As already identified in the course of this judgment, the Respondent is not providing an ambulance or other clinically monitored transport service. Issues of eligibility for travel depend primarily upon the disclosure from the prospective passenger. Recognising that passengers can be selective or imprecise, the Respondent has devised procedures which include telephone calls to passengers on the eve of their medical appointment. This is the subject of further assessment on the day of travel. There could not be any suggestion that the Claimant was compelled to transport all passengers listed. His earlier communications confirm that this was not the case. More fundamentally, it was no part of the Claimant's duties or responsibilities to provide medical care to passengers. The Claimant is not the holder of any clinical or medical qualification. There was not and could not be any reason why the Claimant would need to be informed of the passenger's medical conditions in order to carry out a form of clinical assessment. Equally, as the Claimant acknowledged in evidence, the passenger in this instance was competent and was drawing upon a device which was, by nature and design, intended to be mobile.

85. When questioned by Ms Gould, the Claimant maintained that he considered the Respondent to be in actual or potential breach of *its* health and safety obligations. In response to the suggestion that assessments had been carried out, the expressed the view that the Respondent 'could have done more'. Despite this, he accepted that the incident was not caused by the Respondent.

86. Having regard to these matters and the email chain identified by the Claimant, the Tribunal is satisfied that the email correspondence, when aggregated, points to the provision of information for the purposes of section 43B(1). However, the Tribunal does not accept that the Claimant had formed the belief that the disclosure was in the public interest or otherwise tended to show the matters of which complaint is now made. In the view of the Tribunal, any such belief, would, for the reasons detailed in the preceding paragraphs, have been unreasonable. In reaching this conclusion, the Tribunal bears in mind that the events forming the subject of this putative disclosure have been given a level and importance which the Claimant seemingly did not attach to them at the time. At that time, all parties knew and understood that the service provided by the Respondent was an aid to convenient travel. It was not intended to extend to clinical or medical management. Risk assessments had already been undertaken in the manner described earlier in this judgment. The complaint concerned the return journey. The Claimant made no similar concern regarding the journey to the clinical appointment. The basis of the concern was the adequacy or otherwise of the equipment used exclusively by the passenger. These were not matters over which the Respondent had assumed or exercised any control or duty.

PD12 Multiple Concerns [13.12.18]
WS Para. 21

87. The Further and Better Particulars of Claim [p.63] identify six categories of concern. They are said to have been communicated by email and in meetings on 13 December 2018. At paragraph 21 of his witness statement, the Claimant refers to having made 'complaints' in response to the informal meeting of 11 December 2018. As with each of the previous putative disclosures, the Claimant conceded that neither the pleading nor the witness statement detailed the matters raised or the particular part of the email said to constitute the disclosure.

88. The relevant email [pp.169-170] covers a range of issues and, by the time of its final transmission from the Claimant, had been annotated by a number of managers and the Claimant himself. The Claimant confirmed in evidence that the additions coloured green are his own annotations. There is nothing by way of new information communicated in this document. However, the authorities confirm that information relied upon for purposes of section 43B(1) of the ERA may in fact be already known to the recipient. The fact that the imparting of information is not in the nature of a revelation does not, *per se*, deprive the communication of the status of a qualifying protected disclosure**.** In the view of the Tribunal, this communication may not be considered a protected qualifying disclosure for somewhat more fundamental reasons. As its format might indicate, the communication is in the nature of a record of an ongoing dialogue concerning what has previously been raised and the action the Respondent is proposing to take in response to the matters identified. The issues in question ranged from the patient issue on 7 December 2018, to concerns around patients not being ready at their scheduled collection time. Mention is also made of the 'risk assessment' of patients. The Claimant suggests that he has repeatedly raised queries as to who is responsible for this assessment. The red text annotated from management indicates that there was a clear protocol intended to support the

drivers' own evaluation. In response, the Claimant asserted 'no one risk assesses patients prior to transport' [p170].

89. Whilst it is correct to note that the document includes references to such matters as working hours, personal appointments and annual leave, they are confined to the claimant's own position and are part of the same dialogue and clarification around matters of which the Respondent was already aware. As noted in the preceding paragraph, this factor is not determinative. Taken together, therefore, the annotations may be said to impart information for the purposes of section 43B(1) of The ERA.

90. However, the Tribunal is satisfied that the Claimant had not in fact formed the subjective belief that the disclosure was in the public interest or that the Respondent had or was likely to act in the manner of which complaint is now made for the purposes of section 43B(1)(b), (d) and (f). Nor would it have been reasonable for the Claimant to have formed such a belief. Ultimately, this was and remained a free service. The use of the term 'vulnerable' and 'patient' in the Claimant's Further and Better Particulars and witness statement does not serve to alter the realities which were in play.

91. The term patient was used on account of the fact that the passenger in question was attending a medical appointment provided as part of ophthalmic care. As the Claimant knew and understood, they could not be considered patients for any other purpose. The role of the Claimant was that of Driver. Many of the issues raised by him were attempts to enlarge the scope and responsibility of the Respondent's service and, if acceded to, would have migrated the Claimant and his colleagues from the status of driver to paramedic. The fact that the Claimant wished to extend the Respondent's responsibility in this manner did not alter the fact that the service in which he was being required to participate was no different to that of any other private transport arrangement. Given the terms of correspondence which had passed between the Claimant and his managers and the meetings in which he had participated, there was no reasonable basis upon which the Claimant could have concluded that the information tended to show any actual or prospective breach of any legal obligation operating upon the Respondent, the endangerment of the health and safety of any persons, or actual or prospective deliberate concealment of non-compliance with any legal obligation.

<u>PD13 Conflicting information and Patient Safety [17.12.18]</u>
WS N/A

92. This allegation is not dealt with at all in the Claimant's witness statement. In answers given in cross-examination, the Claimant indicated that the relied upon what he considered to be the conflicting information relating to the application of vehicle and driver regulations. More precisely, the Claimant relied upon the fact that management would not express agreement with him. When pressed, the Claimant indicated that he relied upon an email [p.174] as providing evidence of this disclosure. As with the previous email, this document was generated by the Claimant when he had seen the notes of the meeting of 11 December 2018. In his response, he refers to having discussed matters with 'both DVSA and ACAS',

adding: 'both of their departments unanimously agreed that in their professional opinions, SpaMedica was potentially mistaken about the regulations they felt governed a Private Transport Driver and they both questioned items found within my written contract…'. Importantly, the Claimant also observed that he was not making a complaint or raising a concern 'at this time'.

93. The relevant email is conveying information to managers in clear terms. The communication is not unique, but for reasons noted in the preceding paragraphs of this Judgment, may nonetheless be seen as imparting information. However, the Tribunal rejects the suggestion that the Claimant held the belief that it was imparting information in the public interest or that such information tended to show the matters upon which the Claimant now relies under sections 43B(1)(b), (d) and (f). Nor would it have been reasonable for the Claimant to form such a view. Properly read, the email is more in the nature of a challenge to views expressed by management concerning the legal obligations with which the Respondent was required to comply. Whilst lacking in any relevant expertise himself, the Claimant had already communicated with other agencies. Equipped with their guidance, the Claimant suggested that the Respondent was potentially mistaken. The terms of the advice or guidance received by the Claimant has not been disclosed. However, the Tribunal infers: (a) that in seeking such guidance, the Claimant had access to specialists within the relevant agencies, and (b) that having done so, it was recognised that the Respondent's position (and thus its legal obligations) was somewhat more nuanced than the Claimant had previously contended. On any view, having consulted with those agencies, the Claimant's communication only alluded to 'potential mistake'. This is some considerable distance away from providing a reasonable basis for belief of the kind required by section 43B(1) of the ERA. The language of the email itself thus militates against the suggestion that the Claimant held such belief or that it was reasonable for him to do so.

PD14 Report of Vehicle Electrical Fault [11.01.19]
WS N/A

94. As with the previous allegation, this was not addressed in the Claimant's witness statement. The Further and Better Particulars of Claim simply refer to the reporting of an electrical fault on the vehicle allocated to the Claimant. The Claimant was taken to email of 11 January 2019 [p.177]. In the email, the Claimant simply reported the need for the vehicle to undergo a standard service and the development of an electrical fault which, by the time of his email, had been rectified. There is nothing within the email to suggest that he had brought either matter to the attention of management previously. Within 10 minutes of his own email, the Claimant received an email indicating that a service could be booked and the vehicle removed from use for this purpose. The Claimant responded indicating that the electrical fault had been resolved and seeking clarification as to a suitable date for the service.

95. This correspondence evidences the provision of information. However, it is in the nature of a customary operational exchange between a driver and his employer. The responses provided by Ms King confirm this to be so. There is no suggestion of any failure to maintain the vehicle in question. The Claimant confirmed it was

6 months old at the time. Insofar as there had been an electrical defect, it was not one that could have been pre-empted by the Respondent. The Claimant does not indicate any actual or prospective breach of duty. Nor was there any basis for him to do so. In the view of the Tribunal, the Claimant did not hold the belief that this was in the public interest or was tended to show the matters listed in section 43B(1)(b),(d) and (f) of the ERA. Further, the Tribunal is satisfied there was no reasonable grounds for any such belief.

PD15 Report re Defective Door Handle [14.01.19]
WS N/A

96. The Further and Better Particulars of Claim refer to the fact that a door handle sustained damage which rendered the vehicle unusable. As before, the only details concerning this alleged disclosure were elicited by cross-examination. The Claimant confirmed that he relied upon an email of 14 January 2019. Having considered those documents, it is evident that - as with the previous allegation - the Claimant was doing nothing more than following operational expectations. This prompted the Claimant to report the damage by email on 14 January 2019 at 11:30 hrs [p.179]. Within 35 minutes of that report, he was instructed to liaise with Renault concerning a repair. By 14:02 hrs, the damage had been repaired and the vehicle was back in use.

97. The email traffic can be seen as providing information. However, in the view of the Tribunal, the Claimant did not hold a belief that the information was in the public interest or tended to show the matters now complained of for the purposes of section 43B(1)(b),(d) and (f) of the ERA. Further, in the light of the evidence to hand, the Tribunal is satisfied that there was no objective basis for such a belief.

PD16 Complaint about faulty vehicle [19.01.19]
WS N/A

98. In relation to this issue, the Further and Better Particulars simply refer to the making of a complaint [p.67]. It is said that the complaint tended to show endangerment of patient safety by statutory breaches and practices adopted by the Respondent. In the course of cross-examination, the Claimant made a number of important concessions. These included the fact that the date within the pleading was wrong and should have read 19 February 2019. He also accepted that the email relied upon [p.186] did not contain any indication of complaint against the Respondent. Rather, as the Claimant conceded, the email is directed to the fact that the vehicle had been repaired, but he was concerned that the fault might recur at some point in the future. He also accepted that the only dissatisfaction in the communication was directed toward the vehicle dealership.

99. The email was in the form of the provision of operational information which was being acted upon in the usual manner. In the view of the Tribunal, the Claimant did not hold the belief that he was sharing information in the public interest or that the information in question tended to show actual or prospective breach of legal obligations, endangerment of health and safety, or that the Respondent had deliberately concealed or was likely to deliberately conceal any non-compliance

with its legal obligations. There is nothing within this email to indicate that the Claimant believed the condition of the vehicle was a potential source of endangerment to others, or that he sought to communicate any such sentiment or belief to management. The Tribunal rejects the suggestion that the Claimant held any such belief. There were, in any event, no reasonable grounds for him to do so.

PD17 Report of electrical fault on vehicle [26.02.19]
WS N/A

100. It is the Claimant's case [p.68] that he reported a fault on his vehicle out of concern that it might break down, thereby endangering the Claimant's health and safety or that of his passengers. Whilst the Claimant's witness statement did not address this allegation, the Claimant identified the email upon which he relied as having been transmitted on 26 February 2019 (at 11:10 hrs). The email was addressed to Mr Shah (Business Manager) and sought guidance around what was perceived as potentially a sensor issue on the vehicle allocated to him. The Claimant sought assistance as to whether management considered it appropriate to continue using the vehicle and/or if it was safe for passengers to do so. The advice from management was to contact the dealership. There was nothing within the correspondence to indicate any resistance to the need for the repair or affording it priority. The subsequent emails confirm that management advice was acted upon.

101. Whilst accepting that the email chain evidences the sharing of information, the Tribunal rejects the suggestion that the Claimant held the belief that the information was being shared in the public interest or that it tended to show the matters of which complaint is now made for the purposes of section 43B(1)(b),(d) and (f) of the ERA. Nor would there have been any reasonable basis for the Claimant to form such a belief. Indeed, based on his recent experience, the Claimant had no reason to believe or anticipate that the Respondent would require him to use a vehicle with a defect or that he would be instructed to do so. By the same token, there was nothing within this email exchange to indicate that the Respondent was acting contrary to any duty under the EqA. Properly read, this aspect of the case appears to have been formulated without any consideration of, or engagement with, the documentation upon which the Claimant states he relies.

PD18 Patient and Driver Safety re: Capacity [01.04.19]
WS Para. 22

102. The Claimant asserts that he raised 'complaints' with the entire Transport Department. He asserts that the communication tended to show endangerment of passengers and/or the Claimant. The email [p.189] indicates that the Claimant considered it 'too dangerous to have 8 passengers on our vehicles'. It continues with the Claimant expressing the view that he felt it neither safe nor comfortable driving under 'those conditions'.

103. The email does impart information to the Respondent. However, the Tribunal does not accept that the Claimant had formed the subjective belief that he was

sharing information in the public interest, or that the information tended to show the matters of which complaint is now made. Specifically, in the view of the Tribunal, the Claimant had not formed the view that driving the vehicle with 8 passengers was unsafe, or otherwise dangerous. Nor was there any reasonable basis upon which he could do so. The vehicle in question was manufactured and marketed as a 9 seater vehicle; including the driver. There was nothing about the vehicle or the use to which it was being put which rendered it unsafe or unfit for use. There were no grounds upon which the Claimant could reasonably have formed the belief that the Respondent was acting in breach of its legal obligations and/or was likely to do so and/or that it had, or, was likely to, deliberately conceal any such non-compliance.

PD19 Coercion re Shift [04.04.19]
WS Paras. 23-24

117. The Further and Better Particulars [p.69] assert that the Claimant was being coerced to undertake shifts which were potentially harmful to himself and his patients. It records that disclosure was made by email to Ms Bousfield, Ms Leadbetter and Ms King. As in the case of other putative disclosures, the Claimant's witness statement does not identify the words he used, but lays heavy emphasis upon the concerns which are said to have exercised him at that time. In his witness statement, the Claimant points to an email of 4 April 2019 [p.190]. It is said that the email was transmitted because the Claimant was concerned not only for his own welfare, but also "how his patients…were being treated…" It is alleged that the email encapsulates how poor those conditions were.

118. The email correspondence is imparting information to the Respondent. It is clear that the email demonstrates considerable frustration on the part of the Claimant and, if its terms are taken at face value, some amount of dissatisfaction on the part of passengers. It is equally apparent that difficulties of traffic congestion, lengthening of journey time and periods of waiting in clinic are each the subject of comment. The email concludes with the Claimant declaring himself exhausted 'physically and mentally'. Mention is also made of the lack of a duty of care. Read objectively, two matters are clear: (a) the email is directed to the events and difficulties of the Claimant's working experiences that day, and (b) the Claimant considers those experiences to be unacceptable for both driver and passenger.

119. Whilst the term 'lack of duty of care' is used, the Tribunal is satisfied that the burden of the email is directed to the Claimant's own working conditions. Whilst evidently discontented, in the view of the Tribunal, the Claimant had not formed the belief he was disclosing information in the public interest or that the Respondent was acting in breach of its legal obligations, endangering health and safety or for that matter that it had deliberately concealed or was likely to deliberately conceal any non-compliance with its legal obligations. Nor would it have been reasonable for the Claimant for formulate or adopt such a belief.

120. The issue of traffic congestion and duration of journey was not a matter over which the Respondent could be expected to exercise any form of control. Similarly, the duration of clinical appointments and waiting times. In the view of

the Tribunal, properly classified, the email was confined to the communication of personal frustrations arising from the working experiences of that day. They were personal to the Claimant.

PD20 Concern re: company car legislation [10.04.19]
PD21 Concerns around dangerous shifts and grievance [25.04.19]
PD22 Duty of Care Breaches [26.04.19]
WS N/A

121. According to the Further and Better Particulars of Claim [pp.70-71], the first of these matters was communicated by email on 10 April 2019. It is said to have extended to legislation applicable to company cars, issues of patient and driver safety, the fitness for purpose of vehicles and provision of equipment and what is said to have been the Claimant's 'faulty' vehicle. There is no reference to this alleged disclosure in the Claimant's witness statement. Nor was there any attempt to identify the relevant email and/or the particular elements relied upon in support of the alleged protected disclosure in the Further and Better Particulars.

122. A number of emails were issued by the Claimant to Mr James Clarke (Fleet Manager) on 10 April 2019. There is also an email from the Claimant to Fiona Armer (Quality Assurance Risk Manager) in connection with the private use of company vehicles. They begin with a request from the Claimant for sight of the proposed Vehicle Driver Policy [p.197]. This initiated contact from Mr Clarke. He indicated that he was happy to hear of any concerns. The substantive email from the Claimant [p.192] makes clear that the Claimant has conducted his own research and is seeking clarification on a number of matters. It is clear that the purpose of the email was not to communicate information in the nature of a protected disclosure, but instead to elicit Mr Clarke's own opinions upon aspects of the Respondent's operation and the accuracy of information which the Claimant reports as having been provided to him. It ends with the Claimant expressing the aspiration that he might work closely with Mr Clarke. He makes clear that he is currently working toward "co-supervising transport for Yorkshire…"

123. In the view of the Tribunal, this email can be considered a repetition of the perspectives and opinions previously raised by the Claimant, albeit repeated to a newly appointed manager. For reasons already identified, this does not preclude its classification as a qualifying protected disclosure. If the Claimant held the belief that he was providing information in the public interest and/or which tended to show the matters now relied upon for the purposes of section 43B(1)(b), (d) and (f) it was not communicated by that email. In the view of the Tribunal, the Claimant did not hold such a belief. Nor would it have been reasonable for him to do so. This email was an attempt by the Claimant to raise his own profile and contribution to the Respondent. In the view of the Tribunal, the manner in which the email was written provides an important insight into the Claimant's perspective at that time. Given this was the first communication with the Fleet Manager, if - as has been alleged before the Tribunal - the Claimant considered that he was sharing information in the public interest, and/or which had the potential to show non-compliance with legal obligations, endangerment

of the health and safety of others or himself, or actual or prospective deliberate concealment, one might have expected the Claimant to make this clear. He made no attempt to do so.

124. PD21 is said to have been communicated in a face to face meeting on 25 April 2019, prompting a request that the Claimant reduce his concerns to writing. The impetus for these communications is described in the Further and Better Particulars as 'increasing' dangerous shifts. This serious allegation is not touched upon at all in the witness statement filed on behalf of the Claimant. This required the Claimant to concede in cross-examination that no details had been provided of what was allegedly said or in what terms.

125. There is no evidence before the Tribunal to support the making of this disclosure, its terms or the belief of the Claimant at the time of doing so. Accordingly, the Tribunal is obliged to conclude that, contrary to what is alleged in the Further and Better Particulars of Claim, there was no disclosure on 25 April 2019.

126. The allegation that a further disclosure was made on 26 April 2019 was also omitted from the Claimant's witness statement. This disclosure is said to have been communicated by email. There is within the bundle an email transmitted by the Claimant at 11:35 hrs on that day [p.215]. The email communicates a number of matters which, as is made clear, the Claimant considers to be operational inefficiencies. These are said to be generating 'poor morale'. There is no mention of breach of any legal duty, save for the assertion that "no duty of care shown to either the driver or the patients…". If this email was intended to communicate a belief that the Respondent was acting in breach of its legal obligations, it failed to do so. The Tribunal is satisfied that the Claimant was communicating his own dissatisfaction with certain working practices. He chose to do so by identifying operational inefficiencies, for which he considered 'Bolton Transport' to be responsible. Insofar as it is relied upon as confirming concerns allegedly raised the previous day, it does not support the content of the Further and Better Particulars. By way of example, there is no suggestion of any 'increasingly dangerous' shifts. In the view of the Tribunal, the email confirms that the Claimant was and remained concerned with the impact of working practices upon his welfare. Whilst he was expressing criticism of Bolton colleagues and fellow drivers, it was in the context of their failings impacting upon him personally. In the view of the Tribunal, the Claimant had not formed the belief that he was sharing information in the public interest or that the information tended to show the matters now relied upon for the purposes of section 43B(1),(b), (d) and (f) of the ERA. In the light of the Tribunal's principal findings of fact, it would not have been reasonable for him to do so.

<u>PD23 Report of Worsening Conditions [02.05.19]</u>
WS Paras. 25-27

127. In support of this alleged protected disclosure, the Claimant relies upon the content of the Appraisal Meeting of 2 May 2019. The Further and Better Particulars [p.72] indicate that it was within the meeting that the Claimant referred to previously having raised issues of personal welfare which had gone unanswered. It is also asserted that he indicated he was struggling within the

working environment and "patients were too". No further details are provided. Specifically, no mention is made of what was actually said by the Claimant in the meeting. By contrast, the Claimant's witness statement reports that the Claimant made 'complaints'. The remainder of the witness statement on this issue is taken up with the divergence of opinion between the Claimant and his managers concerning his overall performance. It was during this meeting that the Claimant was informed that he was not eligible for appointment to co-supervisor. According to the witness statement, it was only following this indication that the Claimant "raised various welfare issues which management failed or refused to address…" It is said that in his view, the appraisal was one more item upon a "list of hypocrisies" for which he held management responsible. The witness statement suggests that the Claimant considered that he and his passengers were being placed in "ever worsening dangerous positions".

128. In considering this aspect of the claim, the Tribunal has noted that the Claimant had received negative feedback from his supervisors in the course of probation reviews [p.213]. At the time of his appraisal on 2 May 2019, the Claimant remained in the position of 'Driver'. In the appraisal form [p.214A], he described himself in fulsome and effusive terms. Amongst other things, he suggested that he possessed an innate acumen. He also stated that he had demonstrated the initiative of identifying potentially serious health and safety risks associated with this role. It is clear that the Claimant gave considerable care and attention to the completion of the appraisal form. There is nothing within it to indicate that he was of the belief that the Respondent was or was likely to be in breach of its legal obligations, had endangered health and safety and/or had or was likely to deliberately conceal any breach of its legal obligations.

129. It is clear that the Claimant did communicate information to his line managers within the appraisal process. In the view of the Tribunal, there is no evidence to support the proposition that the Claimant did so in the belief that it was in the public interest and/or that the information in question tended to show the matters upon which he now relies for the purposes of section 43B(1)(b), (d) and (f) of the ERA. The Tribunal is unable to conclude that the Claimant had formed or any such belief. Nor would it have been reasonable for him to have done so. In reality, the views expressed by the Claimant at the conclusion of the meeting were nothing more than expressions of personal dissatisfaction. They arose because the Claimant was obliged to acknowledge that, in his view, his skills, abilities and contribution had not been sufficiently recognised. As with his earlier correspondence with Ms King and Mr Clarke, the Claimant was seeking to enhance his position and profile within the business, securing promotion and enhanced terms in the process. He was disappointed to be informed that the position of co-supervisor was not to be his. In the view of the Tribunal, it is telling that the appraisal from (signed by the Claimant as accurate on 2 May 2019) makes no mention of the previous disclosures which the Claimant asserts he had made or those said to have been made in the course of the appraisal process. The focus of the appraisal was the Claimant's own aspirations. In the same manner, insofar as the views said to have been raised in the appraisal were communicated, they were in the form of personal disappointments. Those disappointments have been recast for the purposes of these proceedings. It is not possible to reconcile their present formulation with the earlier

correspondence with Ms King, or, the more recent correspondence with Mr Clarke. The detail of that correspondence and the endorsements expressed by management have already been identified in the course of this judgment. For present purposes it is sufficient to note that by the time of the appraisal, there had been sustained correspondence from the Claimant which had, almost without exception, generated positive and collaborative responses from managers. There was no reasonable basis upon which the Claimant could have formulated or maintained the beliefs required to migrate these expressions of personal dissatisfaction to matters of qualifying disclosures.

PD24 Formal Grievance [13.05.19]
WS Para. 29

130. The Further and Better Particulars [p.73] make clear that the Claimant relies upon the grievance letter [p.217] as a protected disclosure. It is said that the Claimant raised "these issues" out of concern for patients who were vulnerable and "about his own welfare, mainly that of his disabilities which were being affected by the working conditions…"

131. The grievance letter is dated 13 May 2019. The opening paragraph records that the Claimant considers he has been treated with "misconduct and neglect…" It also complained of physical injury sustained to what he termed his "disability affected areas…" The mistreatment is said to have caused the Claimant to have "serious concerns over my own safety and welfare…" There follows a list of 12 bullet points which the Claimant advances as evidence of his mistreatment, classified by him as (variously) discrimination, gross negligence and misconduct and breach of contract. Having identified the individuals considered responsible for his mistreatment, the Claimant confirmed that the list was not exhaustive and that a detailed list would be provided in due course. At the time of submitting his grievance, the Claimant lodged an additional document in which he detailed acts of less favourable treatment, invasion of privacy and breach of GDPR. He also alleged that he had been subjected to less favourable treatment on the grounds of mental health [p.224]. Additional grounds of complaint were relied upon. The common denominator of each was the suggestion that the Respondent had failed to discharge its contractual obligations to the Claimant as an employee.

132. For the purpose of this hearing, the question for the Tribunal is not whether those assertions were well founded but rather, whether the grievance letter and enclosure are capable of constituting a protected disclosure. In the view of the Tribunal, the grievance letter was - not surprisingly -concerned with the Claimant's perception that he had been singled out for less favourable treatment and, further, that the mistreatment was due to characteristics which were personal to him. The Claimant was not asserting that the Respondent had acted or was likely to act in breach of its obligations towards others. Nor was he asserting that others had been 'victimised', 'bullied', etc, as he considered he had been. It is clear that the document contains allegations against the Respondent and named managers. However, as noted in **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436,** the distinction between information and allegation is not always easy to draw.

133. Read as a whole, the Claimant was complaining of his own perceptions of mistreatment which were specific to him. He had neither the grounds nor the justification to conclude that his own position was representative of the experience of others. Nor did he suggest that this was the case. In the view of the Tribunal, this communication was concerned exclusively with the Claimant's own private interests and, given the complaints, it was right that it should be so. In the view of the Tribunal, the Claimant had not formed the belief that he was sharing information in the public interest which tended to show the matters of which he now makes complaint for the purposes of section 43B(1)(b), (d) and (f) of the ERA. In the event that he had in fact done so, such belief could not be regarded as reasonable. In reaching this conclusion, the Tribunal is mindful of the principal findings of fact detailed elsewhere in this judgment and the sequence of communications between the Claimant and managers in the previous months. Viewed objectively, there can be no doubt that the Claimant expressed frustrations on a number of levels. He displayed no reticence in doing so. Read as a whole, the exchanges betoken a closed mind on the part of the Claimant; a mindset which was unreceptive to the perspectives of others. Explanations from the Respondent's managers were brushed aside without any meaningful consideration or assessment. For whatever reason, the Claimant considered that his own views should hold sway.

134. For the reasons stated above, the Tribunal has concluded that none of the communications relied upon by the Claimant were - insofar as they were made at all - qualifying protecting disclosures for the purposes of section 43B of the ERA.

135. In the circumstances, the claims of detriment contrary to section 47B of the ERA, and of automatic unfair dismissal contrary to section 103A of the ERA must be, and hereby are, dismissed.

Issue 3 - Time Limits

136. The third issue identified for determination upon this hearing was the question of whether the public interest disclosure detriment claims were brought in time. Paragraph 3.4 of the Order issued by Employment Judge Bright on 16 April 2020 explicitly refers to the complaint under section 47B of the ERA. No mention is made of the reasonable adjustments claim.

137. Given the Tribunal's determination on the issue of qualifying disclosures, it is not necessary to make any determination on the time issue and the Tribunal does not do so.

Future Case Management

138. At the hearing of 16 April 2020, Judge Bright recorded that the claims included allegations of failure to make reasonable adjustments contrary to sections 20 and/or 21 of the EqA. In the light of the findings made in the above judgment, the only matters which appear to be "live" concern the disability discrimination claim and a pleaded claim for unlawful deduction from wages [p.24]. The Tribunal has

given case management directions in order that the outstanding claims may be addressed in a proportionate manner.

Employment Judge Dr E P Morgan
Date: 17 August 2020

Sent to the parties on:
Date: 19 August 2020