EMPLOYMENT TRIBUNALS

Claimant: **Mr A Hussain**

Respondent: **London General Transport Services Limited**

Heard at: **East London Hearing Centre**

On: **26th and 27th November 2020**
1st December 2020 (in chambers)

Before: **Employment Judge Reid**
Members: **Ms Houzer**
Mr Bowman

Representation
Claimant: Ms Sullivan, Solicitor, CAB
Respondent: Mr McDevitt, Counsel (instructed by Howard Kennedy LLP)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was video (V) (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents before the Tribunal are identified below.

RESERVED JUDGMENT

1. **The Claimant was not unfairly dismissed by the Respondent contrary to either s94 Employment Rights Act 1996 or s103A Employment Rights Act 1996 and his claim for unfair dismissal is dismissed.**

2. **The Claimant was not a disabled person under s6 Equality Act 2010. The claims under s15 Equality Act and s20 Equality Act are therefore dismissed.**

3. **By consent the Respondent will pay £785.60 (gross) outstanding sick pay to the Claimant within seven days of being sent this judgment.**

4. **The Claimant's claim under s13 Employment Rights Act 1996 (£100 deduction, travel pass) is dismissed as the Claimant accepted it had been repaid by the Respondent.**

5. The Claimant's claim for holiday pay was never explained or identified despite the order made on 6th July 2020, was not pursued at this hearing but also was not withdrawn (so that Rule 52 of the Tribunal Rules 2013 did not apply – in any event there was no legitimate reason for reserving the right to bring the holiday pay claim, it never having been identified or explained despite opportunities to do so). That claim is also therefore dismissed.

REASONS

Background

1. The Claimant was employed by the Respondent as a driver from 28th September 2015 to 8th April 2019 when he was dismissed following a period of sickness absence starting on 27th January 2019. The Respondent operates bus services under contract to Transport for London.

2. The Claimant brought claims for ordinary unfair dismissal and automatic unfair dismissal on the basis he had made protected disclosures. He claimed disability discrimination under s15 and s20 Equality Act 2010 saying his disability was back pain. He also claimed unpaid wages (sick pay and a deduction regarding a travel pass) and holiday pay. The holiday pay claim was never explained or identified despite an order that the Claimant do so at the preliminary hearing on 6th July 2020.

3. The Respondent resisted the claims saying that the Claimant had been fairly dismissed under its Long-term Sickness Absence Procedure. It did not accept that the Claimant was a disabled person and therefore said that duties under the Equality Act 2010 did not arise. It said that the Claimant had not made any protected disclosures and that the managers who took the decision to dismiss and dealt with the appeal had not been aware that the Claimant had been reporting a defect on his driver's seat. The Respondent did not accept any holiday pay was due (taking into account the Claimant did not identify or explain what this claim was) and said that it had repaid the travel pass deduction.

4. The Claimant was represented and gave oral evidence. The Respondent was represented and Mr Canning (decision to dismiss) and Mr Wood (appeal) gave oral evidence. They all provided witness statements, the Claimant's one being identified as the one numbered up to para 39.There was a one file electronic bundle to page 228. There was a further bundle of 31 pages which had been disputed; however the Respondent withdrew its objection to that bundle and it was accordingly also considered as a supplementary bundle (SB). The Tribunal heard oral submissions on each side and reserved its decision due to lack of time. Given the two days it had been listed for, it had been identified that the hearing would not be

sufficiently long to also cover remedy if the Claimant won any of his claims; the hearing therefore proceeded on the basis that it covered liability issues only, plus issues as to any *Polkey* deduction.

5. It was agreed between the parties at the hearing that outstanding sick pay of £785.60 (gross) was payable. The Claimant accepted he had been repaid the £100 for the travel pass. He did not pursue the unidentified holiday pay claim.

Tribunal findings of fact

Time limit issue (claim under s20 Equality Act – reasonable adjustment regarding seat in bus – ET1 para 19(a))

6. The last claimed failure regarding the seat in the bus was said to be on 17th January 2019 on which date the Claimant reported it. The Claimant's oral evidence was that he would have expected bus defects he reported to be fixed within a day or two from which the Tribunal finds that any failure to repair the seat or to replace it started on 20th January 2019 for which the relevant time limit would expire on 19th April 2019 . The Claimant did not notify ACAS until 20th June 2019 which is beyond the 3 month time limit from the last claimed failure to fix the seat so the Claimant does not benefit from any extension of time from that ACAS certificate. The Claimant made no application for an extension of time to bring this claim nor were any submissions made on that issue despite it being identified in the Respondent's amended grounds of resistance. This particular claim is therefore out of time and the Tribunal does not have jurisdiction to hear it.

7. The issue remained as to whether the Claimant was a disabled person at the time of the other acts complained of (claims under s15 and s20 Equality Act regarding the Claimant's dismissal on 8th April 2019 and a failure to allow a phased return to work as a reasonable adjustment (ET1 para 19 (b) and PHC para 6.9). The Claimant said he was a disabled person from August 2018 (DIS para 2).

Disability

8. In his disability impact statement the Claimant did not give any details of any treatment, investigations which were done (and the outcome) or medication for his back problem save to refer to taking pain relief (unspecified as to what, how often and over what period)(para 5). He said he had been referred for an ultrasound scan on his back but did not say he had attended the March 2019 appointment for that scan. In his witness statement (para 23) he only referred to the appointment having been made, not actually going.

9. Under the orders made at the PHC on 6th July 2020 the Claimant was ordered to produce his GP records from 1st September 2017 to date regarding his back pain. The Claimant did not provide the complete records

back to that date and in particular did not provide the entry showing the first appointment about his back pain on 24th August 2018 (though it is noted as a condition as at that date, in the summary list of conditions at page SB 21). This was a very noticeable omission. The Tribunal therefore had very limited medical evidence about when it started including no medical evidence about what he told his GP at this time, despite this being the date the Claimant said (DIS para 2) his disability started. Although the later notes show that he was referred for an ultrasound at this appointment there is no medical evidence that he was reporting pain or advised about pain relief or any medication was prescribed. There is also no medical evidence about how he was saying he was affected at this time. The Tribunal therefore finds that at this stage the problem was a mild one not causing him particular pain or day to day problems, but he needed to have the scan.

10. The Claimant went back to his GP next about his back on 6th December 2018 (page SB 22). He had not attended the first ultrasound appointment which had been arranged after the August 2018 appointment. He did not explain why in his disability impact statement. Not attending for that appointment was inconsistent with claiming a more than minor back problem and claiming significant pain from August 2018. He however reported significant back pain when sitting at this particular appointment and was re-referred for a second ultrasound. There was no evidence of a discussion about pain relief, whether over the counter or prescribed by the GP.

11. The Claimant did not attend the second ultrasound appointment booked for 19th January 2019 (page SB 26, entry about DNA top of page SB 22), inconsistent with the significant pain previously reported when sitting.

12. The Claimant went to his GP on 31st January 2019 (page SB 22). There is a note that he had chronic back pain which was worse sitting and he was prescribed Naproxen for 7 days (14 tablets at two per day). He was advised he needed to attend the second ultrasound appointment. Spinal tenderness was noted. He was noted to be taking over the counter ibuprofen and paracetamol which he had not mentioned in the December appointment from which the Tribunal finds he only started to take these regularly in January 2019.

13. The Claimant next went to his GP on 4th February 2019 (page SB 22). There was no recorded discussion about pain or whether the Naproxen had helped. The Claimant gives no account of the particular medication he took and when he took it in his disability impact statement and the Tribunal therefore finds that the prescription was not extended beyond the initial 14 tablets. There is a reference to lumbar stiffness. The Claimant did not tell Ms Keane when he met her on 5th February 2019 that he had been prescribed medication (page 66) inconsistent with in fact taking it since the appointment on 31st January 2019 when it was prescribed.

14. The Claimant saw the Respondent's OH adviser Dr Iqbal on 8th February 2019 (page 72) when awaiting the third ultrasound appointment. Dr Iqbal's opinion was that it was likely to be a benign lump under the skin on his back (page 73), he was waiting for a scan and should be back to work within 2 weeks though would need time off for the hospital appointment (page 74). Dr Iqbal records there is no medication (page 73) consistent with what Ms Keane had been told and the Tribunal find it unlikely that this would not have been an issue the doctor would have re- checked. The Tribunal therefore finds, in the absence of any explanation from the Claimant about his medication history in his disability impact statement and in the light of the two occasions he could have mentioned it when the topic was highly relevant, that the Claimant had not taken the Naproxen which had been prescribed the week before. The Tribunal also finds he was not reliant on regular over the counter pain relief either at this point.

15. Although Dr Iqbal answered yes to the final question about long term disability on page 74, the Tribunal finds that in context, that needed explanation firstly because the implication of what was written in the report was that it was a short term problem and secondly because despite knowing the Claimant was a driver saying he had a back problem Dr Iqbal did not suggest any adjustments or a phased return to duties. The form did not make sense because Dr Iqbal answered yes to question 1) ie that the Claimant was expected to return to work within one month; having answered that question yes, Dr Iqbal did not need to answer the following questions (including the final one on disability on page 74) because he had answered yes to the question about return to work within a month. The Tribunal therefore finds that Dr Iqbal made a mistake when he ticked yes to the disability question on page 74, taking into account Mr Canning's oral evidence that in his experience of that OH provider, where disability was ticked there would be an explanation and suggestions as to reasonable adjustments.

16. At the next appointment on 19th February 2019 (page SB 23) the Claimant referred to pain. It was noted that the third ultrasound appointment was booked for 12th March 2019 (page 63).

17. The Tribunal finds on the evidence before it that the Claimant did not attend the third ultrasound appointment either, because he does not refer to attending it in his disability impact statement or in his witness statement and there is no evidence from the GP records provided showing that he had the scan and then discussed it with his GP, despite GP appointments in April and May 2019. The Tribunal therefore finds that the Claimant had not in the around 8 months between when it was first advised and his dismissal gone for that scan despite three opportunities to do so. That repeated and prolonged failure is inconsistent with claiming more than minor back pain because the Claimant's behaviour was inconsistent with having a problem which he claims was having a substantial adverse effect on his normal day to day activities and which was making him worry about his job; it affects his credibility as to his assertion of the extent of his problems. When still at work

prior to going on sick leave he would have to sit for prolonged periods at work and so it would be a problem affecting him regularly and thus in the forefront of his mind. When off work he had no issue with getting time off work for the 12th March 2019 appointment. This affects the Claimant's credibility as regards his assertion that his back problem had a substantial adverse impact on normal day to day activities in the relevant period because he was not behaving like someone with a painful back problem affecting sitting, lying down and sleeping because he was repeatedly not taking the medical steps advised to help resolve the problem.

18. At the next appointment on 10th April 2019 (page SB 24) the Claimant saw his GP about neck pain after an RTA on 26th March 2019. It was claimed at the hearing that the Claimant was prescribed co-codamol for his back pain but it was only prescribed when he attended the GP for the neck pain. He was referred for physio for the neck which he asked for, but which he had never asked for his back pain. At this appointment he obtained a certificate (to cover 26th March 2019 to 25th April 2019) signing him off for the neck problem which, two days after dismissal and around two weeks after the RTA, he was in effect now saying was the reason he could not work as a driver ie due to the neck pain; this was inconsistent with maintaining prior to his dismissal that it was principally the back pain. Whilst the Respondent was not provided with this certificate at the time (and so it is not relevant to his unfair dismissal claim), it affects the Claimant's credibility as to his claim that it was the back affecting his ability to work as a driver and, in turn, his claim that it was the back having a substantial adverse impact because he was swapping reasons for his inability to drive which included the normal day to day activity of sitting which he said was affected. The Claimant had not needed to get that certificate for his neck pain for the Respondent because he already had a certificate referring to his back covering the period to 24th April 2019 (page 82). The fact that he was now getting another certificate for a different condition was presumably for another purpose but it affects his credibility as to what he said was the underlying back condition causing his problems.

19. On 3rd May 2019 (page SB 24, page 114A) the Claimant asked his GP for a certificate to say he was fit to return to work – it was the Claimant asking for it on union advice. It was noted that he was walking and getting on and off a chair with speed and ease. The GP did not suggest any adjustments in the certificate, specifically deleted those sections on the form and expressly said that there were no concerns about a return to full time work from 3rd May 2019 (ie that day). That was consistent with the Claimant now reporting to his GP that his back pain was a minor issue, the GP noting his ease of movements, his not having attended the third ultrasound appointment and his request for this certificate. The Tribunal finds that what was written on the certificate about full time hours was based on the discussion the GP had with the Claimant ie some sort of discussion as to the number of hours which was appropriate because there was otherwise no need to refer to the hours specifically. It follows from that that the

Claimant did not tell the GP that he wanted a phased return, inconsistent with now claiming that the Respondent should have offered it.

20. The Tribunal finds in the absence of details of his types of medication in his disability impact statement and the periods he took them, that the only medication the Claimant was taking for his back was the over counter ibuprofen and paracetamol referred to in the GP notes, and only regularly in January 2019 and on one occasion in around November 2018 (page 59 refers to a particular day he took them in around November 2018). The Tribunal finds from this that there was no regular pain relief on which the Claimant was reliant (or any other medication for the back) taken in the relevant period apart from in January 2019. The Tribunal therefore finds that for the majority of the claimed period of disability the Claimant was taking no regular medication at all (except for that brief period of more regular over the counter pain relief). Given the acts complained of are at the time of the dismissal and the appeal, there was therefore no need to consider how he would be without medication at that time, because he wasn't taking anything for his back at this time. Not taking medication for pain throughout the period of claimed disability was however inconsistent with claiming he was in pain doing normal day to day activities (including severe pain sitting at work, page 59) and with not taking medical advice about what he could take and still drive. The absence of medication was also consistent with the majority of his defect reports only referring to the problem with the seat as being that it was not comfortable and not that it was causing pain – see findings below.

Conclusion – substantial adverse effect on normal day to day activities

21. Taking into account the above findings of fact (and taking into account the absence of a disability impact statement which fully explained his treatment and how he was affected throughout the relevant period, relevant to the extent of his back problem) the Tribunal concludes that the Claimant has not shown that his physical impairment (the back problem) had a substantial adverse impact on his normal day to day activities. This is because the medical input was inconsistent with the degree of impairment claimed (for someone who worked as a driver) and the Claimant was not behaving like someone with more than a mild back problem because he was not following medical advice despite claiming significant back pain and that being a particular issue because he was a driver . When he wanted to, he was rather suddenly able to attend his GP and ask for a fit to work certificate with immediate effect with no adjustments and specifically referring to full time work, rather than any sort of phased return or adjustments despite his job being one involving prolonged periods of sitting, one of the normal day to day activities he said was affected.

Conclusion – long term

22. Taking into account the above findings of fact the Claimant's impairment said to start in August 2018 (taken at its highest) was no longer present by the beginning of May 2019. Although returning to work under the 3rd May

2019 certificate (which the Claimant produced at the appeal stage) did not mean he did not have a disability, the absence of any adjustments in the certificate, the specific reference to full time work and the record of the appointment are consistent with no disability due to his back by this point.

23. Taking into account the above findings of fact it was not likely at April-May 2019 (the date of the acts complained of, namely the dismissal and the appeal) that the effect of the Claimant's back problem would be likely to last at least 12 months. Assessing it at February 2019 when he saw Dr Iqbal the likelihood was that the scan would identify what needed to be done; the Claimant has provided no medical evidence that the lump was significant enough to amount to a long-term problem or that he was diagnosed with any other long-term back condition. At the time of the dismissal and the appeal the Claimant had provided a fit to work certificate with no adjustments requested which he had sought from his GP on union advice and referring to full time work such from which it was not likely that the effect of his impairment could be expected at that stage to last at least 12 months.

Conclusion – disability

24. The Claimant has not discharged the burden of proof on him to show he was a disabled person at the time of the acts complained of in his claim (ie those acts not excluded by reason of being out of time).

Reporting of seat defect

25. The Claimant made reports of problems in the driver seat of the se226 on vehicle condition report forms between 4th August 2018 and 17th January 2019 (pages 187,143,151,160,191,195,199,203,206,210,214,59). The defects reported was the same throughout namely a problem with the adjustable knob on the seat either not working or being missing. It was confirmed at the hearing on behalf of the Claimant that it was the se226 reports which were relied on.

26. Of these reports, only two mentioned the problem causing the Claimant pain (page 143, 59). The rest referred to uncomfortable, very uncomfortable or really uncomfortable. On three occasions a second driver who worked that day after the Claimant, seconded his report about the seat by writing 'as above' after the Claimant's entry (pages 187,143,195).

27. It was not surprising that the Claimant became frustrated throughout this period even though the Respondent was duly checking the seat when he reported it and replaced the adjustable knob (pages 151, 195).

28. Whilst the Claimant was reporting the problem throughout this period, on his own account the problem with the lack of adjustable knob was not affecting his ability to drive, except when the seat was 'winded' to the front (page 59, January 2019). Three of his reports specifically reported this winding forward/pushing into his back (pages 191,199,59).

29. The Tribunal therefore finds that of the defect reports made by the Claimant, four amounted to giving information to the Respondent to the effect that the seat was causing him pain or he was pushed forward (pages 143,59,191,199). In the context of the overall number of repeated complaints about the seat (even if those other complaints did not amount to disclosures) the Tribunal finds that these four reports amounted to the Claimant giving information about a faulty seat provided by his employer which was causing him pain or meaning he was sitting in the wrong position. Given he was a driver and that involved prolonged sitting the Tribunal finds that that was information potentially showing that the Respondent was failing in its duties as employer and it was affecting the Claimant's health because he was sitting badly and it was painful.

30. The Tribunal finds the rest of the reports to amount to a complaint/report about an uncomfortable seat but not anything to amount to information that that the seat he was being asked to use was causing him pain or was stuck in the wrong position.

31. In his witness statement (para 20) the Claimant referred to being nearly run over by an engineer but did not claim in his witness statement (as he had in his ET1 para 6) that he had reported this incident on 21st December 2018 and that report also amounted to a protected disclosure. At the hearing he said he had talked to Mr Trainor about it having reported it on the portal (as to which there was no documentary evidence) but it is not mentioned in the written complaint he subsequently made on 3rd January 2019 (page 59) which is a very significant incident to miss out given this complaint was an overall summary of what the Claimant was saying had been happening. The Tribunal therefore finds that the Claimant did not report this incident.

32. The Tribunal finds that the Claimant did not however reasonably believe at the time that the four disclosures were being made in the public interest, because he did not in fact hold that belief. In his oral evidence when asked what the public interest was, he referred to disruption in the service, drivers being uncomfortable and the defect causing a hazard and referred to his personal safety and that of other drivers. However in his first full written report (ie a report going beyond the defect cards briefly completed to this point) (page 59) he did not make these points, which would be seen by managers beyond the engineers to whom he had reported defects; not saying anything in his first full written report was inconsistent with holding that belief at the time. That report stated that in the Claimant's opinion the bus was driveable even if the knob was missing provided the seat was not winded forward; that was inconsistent with now saying that the public interest he had in mind at the time was disruption in service and there being an issue about personal safety for him and other drivers - he was saying it was safe to drive. The Claimant also did not mention anything at his appeal about these disclosures, inconsistent with holding that belief regarding the public interest because had that been in his mind he would be likely to have

mentioned it and also told his trade union representative who would also have been unlikely to fail to mention it at all.

33. When he did mention the pain/seat winded forward issue the Tribunal finds that this was an issue personal to him and that it why he was raising it. The Tribunal therefore finds his belief was about his own discomfort and not a wider issue affecting drivers more generally.

34. The Claimant therefore did not make a protected disclosure to the Respondent.

Dismissal

35. The Respondent's procedure for handling long term sickness absence is at page 52 Appendix D. The reason for the policy is explained (page 52) as being to enable the Respondent to balance the employee's interests against the contractual obligation to attend work and the requirement on the Respondent to deliver the service. The procedure makes it clear that communication is key and that there should be review meetings (page 52-53). Contrary to the Claimant's case there is no requirement to give a particular number of warnings. The procedure (page 54) says that the employment may be terminated for capability if there is no prospect of a return to work in good time. The Tribunal finds that the Respondent builds in a degree of expected shorter-term absences into its planning by using spare or agency drivers or overtime (Mr Canning para 29) but that due to the competitive nature of the contract price it cannot accommodate longer absences without undermining the costs premise of the contract it is operating under.

36. The Claimant went off sick on the 27th January 2019, signed off till 11 February 2019 for a sore throat (page 64) on 4th February 2019. That certificate stated that there was no need to reassess him from which the clear impression was that it was a self-limiting short condition caused by a viral infection. The Claimant did not tell his GP that it was his back causing his absence.

37. The Respondent had already invited the Claimant for a review meeting on 29th January 2019 (page 62A) fixed for 5th February 2019.The Claimant was specifically told of the importance of maintaining contact and that the Long-term Sickness Absence Procedure required regular meetings . He was told that if he had a medical appointment that date could be re-arranged. It was therefore clear to the Claimant from the outset that meetings were a necessary part of the process and that he could not solely rely on the provision of certificates from his GP.

38. The Claimant attended the meeting with Ms Keane Operations Manager on 5th February 2019. He raised a new medical issue at the meeting which was not on the certificate (his back) (page 65) so she referred him to the Respondent's OH service, taking into account there was no expected return

date (page 66.) The Claimant did not tell Ms Keane that he had had a back problem since August 2018 and did not tell her that his GP had prescribed medication for it few days previously. When referring the Claimant (page 65) Ms Keane specifically drew to the OH provider's attention that the back was a new condition not on the first certificate.

39. The Claimant attended the OH appointment on 8th February 2020 (page 73). He did not mention the Naproxen prescribed on 31st January 2019 but said the (third) ultrasound was booked. Dr Iqbal had been asked by Ms Keane to consider the back problem in particular and said that the Claimant should be back at work in 2 weeks and that it was likely to be a benign lump. The report was that he would need time of for the scan appointment but not that he should not go back to work until he had had the scan. The report did not record the Claimant as saying it was painful. It was therefore reasonable for the Respondent to conclude at this stage that it was a short term problem, he would be back in 2 weeks and no adjustments were required.

40. The Claimant obtained his second certificate (page 75) on 19th February 2019 which was backdated to 11th February. The second certificate ran until 11th March 2019, around 2 weeks after the OH advice had been the Claimant could be expected to return by.

41. The Claimant had by now been invited to a review meeting on 15th February 2019 (page 69A) which was reasonable given the Claimant's absence was at that point uncertificated until he sent in the second certificate. The Claimant did not attend that meeting or the next meeting on 22nd February 2019 following which Mr Trainor wrote to the Claimant (page 75A) asking him to get in touch by 26th February 2019 and telling him his sick pay had been stopped because he had not attended the meetings. The Claimant does not explain in his witness statement (paras 25-26) why he failed to attend these meetings.

42. The Claimant had however been in touch by email on the morning of 22nd February (page 75B) attaching the second certificate which he said he had already posted. The Tribunal finds that the Claimant was proceeding on the basis that in his view sending in a certificate was enough, even though the importance of meetings had been made clear to him. The Claimant also said that he would call in to the front counter as soon as he was fit to return. This was the Claimant in effect saying that he would be in contact with the counter once he was fit to return and not before, and giving no indication of when that might be. This was an attitude (ie no meeting/discussion till fit to return) he went on to take for a second time in his 1st April 2019 letter to the Respondent. This left the Respondent in the position of an employee off sick who is not in contact in the manner set down in its procedure and saying he will only discuss matters once he is fit to return to work (no date specified), in a context where the OH advice was that he should be back towards the end of February 2019.

43. Mr Trainor replied (page 75B) that the Claimant should get in touch with the counter now and that a review meeting would then be set up for the end of the week. It was therefore again clear to the Claimant that sending in certificates was not enough and that a review meeting was necessary.

44. The Claimant did not get in touch to set up that meeting and Mr Trainor then initiated the Respondent's disciplinary process on 27th February 2019 (page 77) with a meeting fixed for 5th March 2019, the disciplinary issue being that the Claimant had been absent without leave. The accompanying form (page 78) contained an error in that it suggested that the unauthorised leave had started on 27th January 2019 when that was not the correct date. Mr Trainor had given the Claimant 5 days to get in touch but he had not done so. Rather than replying to Mr Trainor, the Claimant emailed Ms Keane within an hour (page 78A) saying he had attended the 5th and 8th February 2019 meetings but not saying anything about the two he had missed more recently. The Claimant mentioned his mental health for the first time and said he felt he was being harassed. His principal concern however from the email was the loss of his sick pay. The Tribunal finds that the Respondent was not harassing the Claimant but was reacting to his failure to attend two meetings.

45. Mr Trainor accepted the Claimant's email to Ms Keane as him being in touch and therefore no longer AWOL and he converted the meeting on 5th March 2019 to a sickness review meeting. His initial email to the Claimant about this (page 79) was however not entirely clear that the disciplinary process had been stopped but it was subsequently clarified that the meeting was no longer a disciplinary one but a sickness review (page 81) at which sick pay could be reviewed. It was therefore now clear to the Claimant that it was no longer a disciplinary matter. The date of that meeting was changed to 7th March 2019.

46. The Tribunal finds from his email at page 81 that Mr Trainor was frustrated and annoyed with the Claimant but was not being aggressive or not taking account of the Claimant's reference to being stressed and unsupported on page 80. It was however rather brusque which was unfortunate. Mr Trainor drew to the Claimant's attention that the review meeting would cover welfare and return to work issues. The Claimant entirely misquotes Mr Trainor at para 31 of his witness statement when states Mr Trainor was saying in this email that he was deemed AWOL – Mr Trainor was now saying the opposite ie he had been in touch so was therefore no longer AWOL.

47. The Claimant attended the review meeting with Ms Keane on 7th March 2019 which the Tribunal finds he was incentivised to do because he was aware his sick pay could not be reinstated unless he did do, which it was on 9th March 2019 (page 90). The Claimant provided a new (third) GP certificate dated 6th March 2019 to run till 24th April 2019 (page 82) (ending some 2 months after the OH advice had been he could return from the back and the virus) now also listing two new conditions (low mood and insomnia) which had not featured on the previous certificates; being new they had also

not been discussed with the OH doctor meaning the Respondent was now even less clear as to what the situation was. It was arranged to meet again on 14th March 2019 after the booked scan (pages 91,92) but the Claimant did not attend that meeting. Ms Keane emailed him the next day (page 92) asking him to get in touch by 10am that day and gave him the number to call. The Claimant did not do so. Ms Keane then wrote to him on 19th March 2019 (page 92) notifying him of an interview with Mr Canning on 26th March 2019 (the letter mistakenly referred to February but the Claimant confirmed in his oral evidence that he was not confused by that error and understood it meant March). The letter made it clear that it was a long-term sickness issue and that it was not possible to ascertain a return date. He was advised his employment could be terminated on medical grounds. The Claimant did not attend the meeting with Mr Canning on 26th March 2019.

48. Mr Canning however gave the Claimant a second chance to attend (page 93). He also called the Claimant on 26th March 2019 but the Claimant did not respond to his message. Mr Canning fixed the next date as 4th April 2019. Page 93 contained an error as it said that the Claimant had not attended on 5th March 2019 but that meeting had been converted to a sickness absence review for 7th March 2019 which the Claimant had attended. By this point the Claimant had failed to attend the meeting with Ms Keane on 14th March 2019 and with Mr Canning on 26th March 2019 , not returned Mr Canning's call of 26th March 2019 and in respect of both meetings he'd been advised about possible termination. Prior to this, the only meetings he had attended since 5th February 2019 (Ms Keane) and 8th February 2019 (OH) was the meeting on 7th March 2019 when he knew the discussion was going to include reinstatement of his sick pay.

49. The Claimant later said that it was intrusive and threatening for the Respondent to take photos (pages 94-98, page 132) when the letter setting up the 4th April 2019 meeting was hand delivered (as well as posted and emailed). The Tribunal finds, taking into account the oral evidence of Mr Canning about why recorded delivery was not used instead (because if something is not delivered the sender will not be notified for 1-2 weeks), that the decision also to hand deliver the letter was reasonable in the light of the pattern of non-attendance at meetings and to avoid a situation where the Claimant said he had not received that letter. Whilst the Tribunal finds that the Claimant may have been upset by this and it appeared threatening to him (even though it is a step often taken by delivery companies making deliveries to show that the delivery had been made), objectively the Respondent was not acting unreasonably.

50. The letter at page 93 made it clear to the Claimant that his absence could not continue indefinitely and that it was important to have the meeting to discuss well-being, progression to fitness and return to work. He was advised that if he did not attend on 4th April 2019 then Mr Canning could hold the meeting in the Claimant's absence and make a decision on the information he had.

51. The Claimant responded to Mr Canning not by attending the meeting to discuss his wellbeing, progress or return to work (where he could have raised any issues including the two new conditions on the GP certificate added in March 2019, a phased return and a second OH referral could have been made if necessary) but by sending the letter at page 99. In the first paragraph he was essentially saying he felt unsupported and that the Respondent had made things worse which had delayed his return. In the second paragraph he said his absence was not indefinite but he gave no indication of when he might return. He said that the Respondent should have relied on medical advice but the medical advice which the Respondent had received was the OH advice on 8th February 2019 which had said he could be expected back to work in two weeks and it was now April 2019; the Respondent could not instead contact the Claimant's GP without his consent (page 53) and the procedure in any event said that would not be done until the Respondent had obtained OH advice – the OH advice it had by now was out of date and the Respondent reasonably wanted to meet with the Claimant before deciding on whether to make a second OH referral. The final paragraph asked for a delay to the meeting until he was back at work, for the second time making it clear that he was not going to attend a meeting until he felt fit enough to work, entirely undermining the purpose of the meeting which was to get him back to work whether that meant a further referral to OH or other steps. Whilst the Claimant was raising issues about lack of support, the Respondent couldn't put in place any extra measures to support him as he wouldn't attend meetings to discuss his situation. The Tribunal finds that the Claimant was again in effect saying that the provision of the GP certificates should be enough to satisfy the Respondent despite the policy being clear that it was not and despite having been told of the importance of attending meetings. The letter ended with the Claimant blaming the Respondent for his absence. The Claimant did not say, as he had to his GP (page SB 24) that he thought things would resolve in the next two weeks which indicates that he was thinking he would be back at work in some capacity to some degree in a further two weeks - he did not tell Mr Canning that in this letter. He also did not say, as was later claimed at the appeal stage (page 123) that the reason he could not attend was that he was unable to leave the house due to depression.

52. The Claimant claimed that this letter amounted to a grievance (ET1 para 17(c)) but he never made the point that a grievance was outstanding after sending this letter, including at the appeal stage when he was advised by his union representative (who would have been likely to pick up on an unresolved grievance if told about it) and was discussing re-engagement on a part-time basis or when he wrote a further letter after his appeal (page 131). The Tribunal find that that the Respondent reasonably did not treat this letter as a grievance in the context of trying to get him to attend a meeting and that being the opportunity for the Claimant to discuss any aspect of his absence he wished to raise. Mr Canning gave the Claimant a third opportunity to attend a review meeting in any event so was not ignoring what the Claimant was saying in this letter but gave him a further opportunity to come and discuss all issues.

53. Mr Canning replied giving the Claimant a third opportunity to attend a review meeting (page 101) on 8th April 2019 making the point that the Claimant's letter had not given any reason why he had not attended on 4th April 2019. Mr Canning told the Claimant that the OH report (considering then the virus and the back) had said he would be back to work in 2 weeks. Whilst Mr Canning did not also refer to the third GP certificate now also referring to low mood and insomnia, the information Mr Canning had about that was the third certificate from the GP by now a month old. The point was made that the absence could not continue indefinitely and again it was stressed that well being (which could have included anything the Claimant wanted to say about his mental health or the stress he had referred to) and progression back to work (which could have included any phased return or other steps) could only be dealt with by having the meeting. Although only 4 days' notice was given when the procedure (page 53-54) says 5 should be given, the Tribunal finds that the notice being a day short in practice resulted in no unfairness to the Claimant because this was the third attempt to hold this meeting so he had in practice been on notice of a meeting and what it was about for much longer than 5 days. Mr Canning had to hand a list of vacancies for that meeting (page 103) which, based on his oral evidence was standard procedure when meeting with an employee who had been off sick for a period in case alternative work needed to be considered. The letter told the Claimant that the meeting could go ahead in his absence if he did not attend and that a possible outcome was termination of employment on medical (capability) grounds.

54. The Claimant did not attend the re-arranged meeting on 8th April 2019 without explanation and knowing that, despite the Claimant's letter dated 1st April 2019, Mr Canning still wanted to meet with him and had explained why.

55. There was nothing in the Claimant's GP notes to suggest that the Claimant was too mentally unwell to attend the meetings with Mr Canning due to his mental health or stress or that he was unable to leave the house due to depression, as was later suggested at the appeal (page 123). The Claimant never suggested that a meeting could be done alternatively on the phone or by asking for a manager to meet him at his home or a neutral location and did not tell Mr Canning that he was unable to go out.

56. Mr Canning then took the decision to dismiss the Claimant (page 104). It was a month since the Claimant had attended the meeting with Ms Keane. The Clamant had not provided any further information about when he might be expected back for him to take into account. The Tribunal finds he acted reasonably in basing his decision on the Claimant's failure to give any information about an expected return date and an unwillingness to attend meetings and being unable to extend his sick leave indefinitely (page 105). Given the repeated pattern of failing to attend meetings (even though he attended some, but not the last three and none for a month) the Tribunal finds that Mr Canning was reasonable in concluding that he had no confidence in the Claimant keeping the Respondent updated which meant

the lack of information about a possible return date would continue. In the absence of the Claimant Mr Canning reasonably concluded that he could not consider alternative roles. It was reasonable to decide that the Respondent could not be expected to wait any longer for the Claimant to return. There was an error on page 104 in that the Claimant had not failed to attend on 5th March but had in fact attended on 7th March 2019; in context however this was a small error because the Claimant had still failed to attend three meetings with Mr Canning. There was also a suggestion on page 105 that the Claimant had failed to co-operate since the very start of his absence on 27th January 2019 which was not correct but again this was a minor error in the bigger picture of non attendance and did not materially affect his overall conclusion that the Claimant had overall failed to attend meetings even if he had attended some meetings at an earlier stage. He was advised of his right of appeal. The Claimant appealed (page 106). At the time of the dismissal the Tribunal finds that Mr Canning was not aware of the various reports the Claimant had made about the seat.

57. The appeal was scheduled for 9th May 2019 (letter dated 23rd April 2019 page 111) and the Claimant was advised (page 112) that he could not if his appeal was upheld return to work without being medically fit to do so. On 3rd May 2019 the Claimant duly went to his GP and asked for and obtained a (fourth) certificate saying he was fit for full-time work with effect from 3rd May 2019, the same day, the previous period to 25th April only now being certified as regards his back condition and not the other two conditions which had been on the third certificate. The appeal hearing with Mr Wood was then rescheduled for 22nd May 2019 (page 116) to accommodate the Claimant's trade union rep, Mr Maflin.

58. Mr Maflin told Mr Wood that the reason the Claimant had not attended the meeting on 8th April 2019 with Mr Canning was due to not being able to leave the house due to depression (page 123) a week after the Claimant had told his GP (but not the Respondent) that he expected to have resolved his work problems (which implicitly means being back to work in some capacity or with an estimated return date) within 2 weeks (page SB 24). Mr Maflin said that the back problem had led to the depression (page 123) but that was inconsistent with the fourth certificate now only referring to back pain (and backdated only for that condition) and authorising a return to work that day. Mr Maflin then raised the possibility of a 2-3 day week, reviewable. That contradicted the certificate the Claimant had requested from his GP which referred to full time work without adjustments. Mr Wood went on to discuss this clarifying whether (page 124) the Claimant was asking for a phased return or not to which the Claimant responded that he wanted permanent part-time. A phased return had been discussed therefore but the Claimant had declined it. The Claimant also clearly did not want to be reinstated into his previous full time role at Silvertown. Mr Wood had asked him what days he wanted to work and where (he wanted a new location, Morden) and the Claimant had specified the days he wanted. Mr Wood clarified that if the dismissal was upheld the Claimant would be a new starter but that his pay grade would be recognised and Mr Maflin accepted that

there had been enough to dismiss the Claimant for (page 125) and recognised that there had been no foreseeable return to work date when Mr Canning made his decision.

59. Mr Wood upheld the decision to dismiss but offered to re-engage the Claimant on the exact terms he had asked for, subject to his making an application which Mr Wood would fast track (which he did, page 128). Mr Wood's conclusion (page 125,126) was the decision to dismiss had been reasonable because of the Claimant's failure to maintain contact and attend meetings (and made the point that he had not asked for any of the meetings to take place at his home). The Tribunal finds that Mr Wood's decision not to overturn the decision to dismiss was reasonable, even if by the appeal the Claimant had come forward saying he was now able to return to work from 3rd May 2019 ie had now provided the information about a return date. It was reasonable for Mr Wood to conclude that Mr Canning's decision still stood based on the information Mr Canning had at the time he made it and in the light of the Claimant's failure to kee the Respondent updated by attending the review meetings, both of which matters were not changed by the Claimant subsequently coming forward saying he was now fit for work several weeks later. At the time of the decision there had been no such expected return date and the Respondent could not reasonably be expected to wait. At the time of the appeal the Tribunal finds that Mr Wood was also not aware of the various reports the Claimant had made about the seat.

60. The Claimant duly applied for the new role but failed the necessary drugs test (page 128A). His application could not therefore proceed and the Respondent could not re-engage him in the new job in Morden. The Claimant did not pursue either of the two options he was notified of namely providing medical evidence of any prescription drugs which might have affected the test or retaking the test at his own cost. From the further letter he wrote at page 131 it was clear that the Claimant wrongly thought that having produced GP certificates and saying that he would attend a meeting when he was fit to return to work should have been sufficient for the Respondent.

Relevant law

Disability discrimination

61. The primary time limit for complaints of discrimination is three months from the date of the act complained of (s123(1)(a) Equality Act 2010).

62. Where an actual decision is made by the employer not to do something and that failure is the act complained of, that it the relevant date for the start of the time limit. Where there is no such actual decision not to do something, in the absence of evidence to the contrary, the employer is taken to have made the decision not to do something when it does something inconsistent with doing the act it has failed to do (s123(4)(a)). If the employer does

nothing at all, it is deemed to have decided to not do a particular act at the end of that period within which it might reasonably have been expected to do it (s123(4)(b)).

63. s6 Equality Act 2010 provides as follows:

> A person (P) has a disability if-
>
> (a) P has a physical or mental impairment
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.

64. The effect of measures taken to treat or correct an impairment should be excluded from consideration where those measures, if not being taken, would be likely to mean that the substantial adverse impact would be present (Equality Act 2010, Sch1 Part 1; Guidance, para B12).

65. There is Guidance (2011) on matters to be taken into account in deciding whether a person is disabled. An adverse effect is substantial if it has more than a minor or trivial effect (para B1). A reasonable coping strategy can be taken into account if it reduces the adverse effect such that is no longer substantial (para B7). The effects of treatment should be taken into account (para B17) where as a consequence of that treatment the impairment would cease to have the substantial adverse effect because there is a permanent improvement which 'cures' the impairment.

66. The burden of proof in establishing disability is on the Claimant.

Protected disclosures

67. Disclosures qualifying as 'qualifying disclosures' are defined in s43B(1) Employment Rights Act 1996. The motivation for making the disclosure (ie whether or not the disclosure was made in good faith) is only relevant to the amount of compensation that can be awarded (s49(6A) Employment Rights Act 1996, reduction of up to 25%).

68. The Claimant contends that his disclosures fell within s43B(1)(d), in that they related to health and safety matters.

69. The word 'disclosure' must be given its ordinary meaning which involves the disclosure of information, that is conveying facts which are sufficiently specific that they show the relevant wrongdoing or concealment of wrongdoing; there is no dichotomy between 'information' and making an allegation *(Kilraine v London Borough of Wandsworth [2016] IRLR 42*2) and something may be both an allegation and disclose information. Asserting that there has been an omission can be 'information' for these purposes (*Millbank Financial Services Ltd v Crawford [2014] IRLR 18*). The information provided must be sufficient to meet the test that it 'tends to show'

one of the relevant failures and the legal obligation said to be being breached must be identified – it is insufficient for the employee to simply say it is 'wrong'.

70. As regards the public interest element, the employee must show both that they genuinely held the belief that they were acting in the public interest at the relevant time and that their belief that their disclosure was in the public interest was a reasonable one.

Unfair dismissal

71. It is automatically unfair to dismiss an employee for making a protected disclosure when the disclosure is the sole reason or the principal reason for dismissal (s103A Employment Rights Act 1996).

72. It is for the employer to show the sole or principal reason for dismissal (s98(1) Employment Rights Act 1996). Capability is a fair reason for dismissal and includes health (s98(2)(a)). The test is then whether the decision to dismiss was overall fair under s98(4) Employment Rights Act 1996.

73. Where an employee has been absent from work for some time, what must be considered is whether the employer can be expected to wait any longer for the employee to return (*Spencer v Paragon Wallpapers Ltd 1977 ICR 301).* The tribunal must expressly address this question, balancing the relevant factors in all the circumstances of the individual case *S v Dundee City Council 2014 IRLR 13)*. Such factors include:

- whether other staff are available to carry out the absent employee's work
- the nature of the employee's illness
- the likely length of his or her absence
- the cost of continuing to employ the employee
- the size of the employing organisation; and
- (balanced against those considerations), the unsatisfactory situation of having an employee on very lengthy sick leave.

Reasons

Disability discrimination claims 15 and s20 Equality Act 2010

74. Taking into account the findings of fact set out above the Claimant's claim under s20 Equality Act 2010 regarding the seat reasonable adjustment was out of time.

75. Taking into account the above findings of fact the Claimant was not a disabled person within s6 Equality Act 2010 for his other claim under s20 Equality Act 2010 (phased return to work). He likewise was not a disabled

person for his other claim under s15 Equality Act 2010 regarding his dismissal.

Reason for dismissal

76. Taking into account the above findings of fact the Claimant did not make a protected disclosure with s43C Employment Rights Act 1996.

77. The Claimant was dismissed for the sole reason that there was no expected return to work date and he had failed to attend meetings with the Respondent as required under its Long-term Sickness Absence Procedure which resulted in a lack of information about when he might be expected to return to work. The Claimant accepted in his oral evidence that the reason he was dismissed was because he had been off work. The Claimant's complaints about the seat did not amount to protected disclosures but in any event those non-protected disclosure complaints were not the reason he was dismissed taking into account neither Mr Canning nor Mr Wood was aware of them and the Respondent was prepared to re-engage him as a driver on another route doing the days he wanted. The dismissal of the Claimant was therefore for a fair reason within s98(2) Employment Rights Act 1996 namely capability (medical) due to the long-term absence with no expected return date.

Unfair dismissal (ordinary)

78. Taking into account the above findings of fact the Tribunal concludes that the Claimant's dismissal under the Long-term Sickness Absence Procedure was overall fair taking into account the balancing act identified as the aim of the policy, which balancing act the Tribunal concludes was undertaken by both Mr Canning and Mr Wood.

79. Although the Claimant had attended some meetings in the earlier stages, the last meeting he attended was on 7th March 2019 and he did not attend four meetings after that despite having being assured that the review meetings were not disciplinary in nature and having been told what the meetings were for ie to discuss wellbeing and a return to work. He was advised several times that his employment was at risk and that a possible outcome was the termination of his employment and given two second chances to attend by Mr Canning. The procedure was clear that sending in GP certificates was not enough and he was reminded of his obligations under the procedure. His approach that he would not attend a meeting until he was fit for work gave the Respondent no information as to when he might be expected to return and without a meeting the Respondent reasonably could not consider another OH referral, for example about the two new conditions, until it had that discussion with the Claimant. Although Mr Trainor's tone was unfortunate in one of the emails, the disciplinary action was halted and it was made clear to the Claimant that the meetings were now sickness review meetings. Any unfairness arising from the starting then halting of the disciplinary process (which was in any event

minimal) was significantly outweighed by the balanced approach taken by both Mr Canning and Mr Woods in following the Long-term Sickness Absence Procedure and their openness to giving the Claimant second chances and did not infect the decision to dismiss for a non-disciplinary issue, capability (medical).

80. Taking into account the above findings of fact the Respondent could not reasonably be expected to wait for the Claimant to say when he was coming back as he had given no indication of when that might be and would not attend a meeting to discuss how that might happen until he said he was fit to return. This left the Respondent in a situation of an information vacuum and its planning being entirely dependent on when the Claimant said he could return but which he said he would not discuss until that date arrived, removing all possibility of the Respondent being able to assist him back to work before that unspecified point in the future.

81. As to the grounds of unfairness raised in the Claimant's claim (page 16):

- The Claimant has not shown that it was the Respondent's fault that he was off sick taking into account he swapped the reason for the inability to work after the RTA in March 2019

- The Respondent did not fail to deal with health and safety breaches, despite the Claimant's evident frustration about the missing knob (which was at times understandable)

- The Respondent acted reasonably in the circumstances at the time by not treating the Claimant's letter dated 1st April 2019 as a grievance because it was still trying to have a meeting with him when the contents of that letter could be discussed in any event

- The Claimant's absence was significant as by the time he was dismissed on 8th April 2019 he had been off since 27th January 2019 and, crucially, when he was dismissed the Respondent had no information as to when he might be back and he would not have a meeting until he was back at some unspecified time in the future

- The Claimant never asked the Respondent before he was dismissed for a phased return to work or part-time work or ever suggested it as an option to the Respondent and did not attend a meeting at which that could have been raised by either side and explored; even when it was raised at the appeal stage only a few weeks later the Claimant rejected a phased return (on re-engagement) in any event; these possibilities were the very areas the Respondent could have discussed had the Claimant attended a meeting and the Respondent was willing to do so (given Mr Canning had the list of vacancies to hand, indicative of other options being up for discussion)

- At the appeal stage the Claimant and the Respondent agreed he could apply for a new part-time role at his request; Mr Wood's decision to uphold the decision to dismiss (and not instead reinstate him on the new part-time basis at Morden or the previous full-time basis at Silvertown) was reasonable given the history of the absence and the fact that it was only now having been dismissed that the Claimant came forward and said he could now return to work; that change of heart by the Claimant did not make the decision to uphold the dismissal unreasonable taking into account the purpose behind the policy and despite the Respondent being a large employer.

82. The Claimant's witness statement raised the following additional points (para 35-36):

- He said the Respondent failed to follow its own procedure but it had followed the Long-term Sickness Absence Procedure save for the minor error of one day's too short notice in respect of a rescheduled meeting which did not affect the overall fairness given he knew what it was about; the Claimant is referring to a different procedure when he refers to getting four warnings

- Although the Claimant asked for further time in his letter dated 1st April 2019 the Respondent reasonably still asked him to attend a meeting on 8th April 2019

- The Respondent told the Claimant that his employment was at risk and termination was a possible outcome and he himself told his GP that this was possible on 1st April 2019 (page SB 24)

- The Respondent was clear that it was following its sickness absence procedure after the disciplinary action had been halted by 7th February 2019 and that procedure could lead to termination, as the Claimant had been advised

- The Claimant refers to an investigation but the Respondent could only go on the information it had and the Claimant was not prepared to attend a meeting to tell the Respondent anything further

- The AWOL allegation at the end of January 2019 was not continued and it was accepted that the Claimant had been in touch and his sickpay was reinstated; that period when the matter briefly became disciplinary did not infect the final outcome because both Mr Canning and Mr Wood were following the Long-term Sickness Absence Procedure and were not treating it as a disciplinary matter;

- The Respondent did not harass the Claimant at home but was reasonably making sure that the Claimant received letters about meetings given the history of non-attendance.

Conclusion

84. The Claimant's claims are therefore dismissed.

Employment Judge Reid
Date 11 December 2020