EMPLOYMENT TRIBUNALS

Claimant: Mr I Hines

Respondent: Mick George Limited

Heard at: Bury St Edmunds (CVP) **On:** 6 & 7 April 2021

Before: Employment Judge S Moore
Mrs M Prettyman
Ms H Gunnell

Appearances
For the Claimant: In person
For the Respondent: Mr Hignell, Counsel

This was a remote hearing, consented to by the parties. The form of remote hearing was audio (CVP). A face-to-face hearing was not held because it was not practicable and all the issues could be determined in a remote hearing

JUDGMENT

(1) **The claim for constructive unfair dismissal is dismissed.**

(2) **The claim for disability discrimination under s. 20 Equality Act 2010 (failure to make reasonable adjustments) is dismissed.**

(3) **The claim for disability discrimination under s. 19 Equality Act 2010 (indirect discrimination) is dismissed.**

REASONS

INTRODUCTION

1. This was a claim of constructive unfair dismissal and disability discrimination (indirect discrimination and failure to make reasonable adjustments). We heard evidence from the Claimant and from the Respondent we heard evidence from Mr Geoff Craven (GC), Logistics Director, Mr Stuart Powell (SP), weighbridge operator, and Mr Anthony McCann, at the relevant time Head of Health and Safety. We were also referred to an agreed bundle of documents from which we make the following findings of fact.

FACTS

2. The Claimant was initially employed by the Respondent from 2012 as a driver and then as a weighbridge operator. On 28 November 2014 he left the Respondent's employment to have a triple heart bypass. GC promised the Claimant that he would offer the Claimant any vacant role he had if and when the Claimant felt well enough to return to work. Subsequently GC offered, and the Claimant accepted, the role of temporary weighbridge operator on a fixed term contract with effect from 30 March 2015 until 30 May 2015. Under the contract the Claimant had no fixed place of work but was assigned to a site in Ringstead, a village in Northamptonshire. The contract specified that the Claimant's hours of work were variable, depending on the work available and that he would work Monday to Friday. In fact, the role of a weighbridge operator involves long hours from Monday to Saturday (although there are significant periods in the day when no work is required) and the Claimant was sometimes required to work Saturdays and did so without complaint.

3. Since both parties were happy to continue with the arrangement the Claimant stayed in position after 30 May 2015, although a further contract was not issued.

4. At first the Claimant worked alongside Mr Peter Kozsuch (PK). However, when PK was promoted, SP became the second weighbridge operator and on 1 March 2017 SP was promoted to supervisor. With that promotion SP became both the Claimant's supervisor and line manager. SP and the Claimant did not get on well together. As supervisor, it was part of SP's role to hold the Claimant to account for his performance and the Claimant considered that SP blamed him unfairly for any mistakes that were made.

5. On 26 July 2017 SP sent an email to Sharon Dace of the Respondent stating that he "was getting to the end of his tether" with the Claimant and that there was "an ongoing issue with the Claimant who will not listen to instructions or take on board information". The Claimant discovered this email and was very angry. He considered SP was telling lies about him. He had agreed to cover SP's shift for the coming Saturday as SP was moving house, but on seeing the email he called the office and cancelled his offer and the relationship between the two men deteriorated further.

6. On 14 August 2017, the Claimant emailed Kate Cavanagh (KC) of HR stating he had a grievance against SP (110). He said SP had been blaming him when things went wrong, and that he considered the email SP had sent to Sharon Dace to be malicious and workplace bullying, bordering on age discrimination. He said the matter was affecting his health and the stress he was under was enormous.

7. Later that day the Claimant challenged SP when he was in the process of leaving the office slightly early and said SP seemed to be leaving "earlier and earlier". SP snapped and swore at the Claimant, asking him if he had "had a problem with that" and calling him a "fucking cunt'.

8. The Claimant subsequently emailed GC complaining about this to SP. GC considered that the language was normal in the construction industry and that the Claimant, who was 67 years, would have been exposed to similar language on a daily basis, however he was concerned that the two men were getting increasingly bad tempered with each other. Having spoken to the site manager and area manager GC told SP that he needed to be more professional as he was the Claimant's supervisor. He also told the Claimant that his behaviour had contributed to the matter. A reconciliation meeting was held at which SP apologised to the Claimant for swearing at him.

9. This process was consistent with the Respondent's approach for dealing with an informal grievance as set out in its policy documents.

10. In his grievance the Claimant had asked to move sites and by coincidence work at Ringstead had been slowing down and a temporary position had become available at another site called Cook's Hole, which was a smaller site and closer to the Claimant's home. The Claimant was therefore moved to Cook's Hole "as a temporary measure".

11. The outcome of the Claimant's grievance and investigation was confirmed to the Claimant in an email to him of 15 August 2017 from KC. The Claimant responded by email of the same day thanking KC for her assistance and stating that he looked forward "to resolving the problem, and hopefully returning to Ringstead."

12. No further action was taken, and the Claimant did not pursue a formal grievance against SP.

13. The Claimant moved to Cook's Hole for the week commencing 19 August 2017. He thereafter spent a few weeks covering different sites before returning to Cook's Hole from 23 September 2017.

14. From 23 December 2017 until April 2018, he worked solely at Cook's Hole, save for one week in December 2017 when he worked at a new site at Stibbington.

15. Between April and June 2018 the Claimant worked eight out of nine weeks at Stibbington. In his claim form and evidence the Claimant complained of the working conditions at Stibbington. However, in view of his evidence that these conditions played no part in his decision to resign it is unnecessary to address either the concerns he raised or the Respondent's response to them.

16. From 9 June 2018 the work at Stibbington ended and the Claimant was assigned back to Cook's Hole.

17. In late June or early July 2018 the Claimant asked GC not to be considered for Saturday working as he was getting very tired and felt he was not getting sufficient

time to recover. At this time, the evidence was that the Claimant was having to work approximately one in four Saturdays, which on those occasions means that he was working a six-day week. GC was sympathetic to the Claimant. The two men clearly had a very good relationship and spoke often to each other. Further GC apparently suffers from a similar heart condition to the Claimant and takes some similar medication to that taken by the Claimant.

18. On 1 August 2018 the Claimant asked HR for a copy of his latest works contract. On the same day he went to the doctor and obtained a Fit Note that in the box headed: "If available, and with your employer's agreement, you may benefit from:" ticked the box "altered hours" and under the subheading "Comments" stated "Monday to Friday working only".

19. The Claimant sent this Fit Note to GC on the morning 2 August 2018.

20. GC immediately sent the note to Nabeela Ahmed (NA) at HR and asked where the company stood because "the Claimant is a weighbridge opp and required to work Saturdays".

21. NA replied the same morning stating the Fit Note was not binding, and the company was within its rights to obtain advice from occupational health. She further said that as the Claimant had a heart disease he was likely to be regarded as disabled under the Equality Act 2010 and that the Respondent had to make reasonable adjustments for him. She also stated "I would be interested to know why he thinks working on a Saturday would be detrimental to his health? If he's wanting to work 5 days we may be able to accommodate that. Are we able to agree that he works every other Saturday and then takes a day off in the week?'

22. From emails in the bundle it is apparent that NA also realised the Claimant didn't have a current written contract. There is an email in the bundle dated 3 August 2018 from NA asking someone called Maea to draft a contact for the Claimant with a continuous service date of 30 March 2015.

23. At 8.34 on Monday 6 August 2018 GC sent the Claimant a copy of a new contract which stated as regards his working hours, "Working hours, including Saturdays as and when required, are dependent on the individual operational hours of each site." At 8.44 the Claimant replied stating the wording was different to his other contracts and "Due to health and medical certificate provided, I'm not agreeing to work Saturdays".

24. Around this time there was clearly a discussion between GC and Claimant, (though memories were vague because, GC says, he was talking to the Claimant at lot) because at 9.31 GC sent the Claimant an email which stated:

> "As discussed, we are unable to accommodate you not working a Saturday, for operational reasons. I have taken into consideration your points and can make one of the below adjustments:
>
> 1. Remain at Cook's Hole site, where you will work 10 hours a day over 4 days (including Saturday). You will have Tuesdays, Thursdays and Sundays off.

2. Move to Ringstead site, where you will work 5 days, including Saturday and have a day off in the week.

   In the meantime, you are required to work Saturdays as normal…"

25. At 09.53 the Claimant replied by email stating: "Many thanks for being very reasonable in this matter. I am happy to accept option 1."

26. Also on 6 August 2018 NA prepared a letter to the Claimant asking for consent to apply to his GP or consultant for a report on the Claimant's state of health.

27. Despite the offer by GC to the Claimant regarding a new working pattern for Cook's Hole, there was concern at management level as to whether it was worth keeping a weighbridge operator at Cook's Hole at all. Further, it appears from the emails that it is likely the fragility of the situation was communicated to the Claimant. An email of 7 August 2018 from the Claimant to GC at 16.41 says "I've had a think, and I'll stay where I am." And this is followed by an email from GC to NA on 8 August at 08.15 stating "As you can see Ian has decided to stay at Cooks Hole. The redundancy is still the plan going forward." However, unfortunately neither the Claimant nor GC could remember enough to shed any light on the relevance of these emails.

28. By 10 August 2018 Mick George decided that the site of Cooks Hole would be largely closed down with the weighbridge opening only as and when needed. GC therefore telephoned the Claimant to tell him that Cooks Hole was no longer an option and he would have to return to Ringstead.

29. The evidence as regards the precise details of this conversation is confused.

30. In paragraph 76 of GC's witness statement he states he told the Claimant that he could be more flexible as regards the Claimant's working hours than were set out in his email of 6 August, with a day off in the week and taking it in turns to cover Saturdays with SP. In cross-examination he stated he could not remember precisely what he had said in the conversation on 10 August. However, he spoke to the Claimant a lot and had definitely told him that he would reduce his hours, but in the conversation on 10 August the Claimant was adamant he would not return to Ringstead.

31. At paragraph 41 of his witness statement the Claimant states "I received a call from Geoff to say Mick George was closing Cooks Hole and I had to go back to Ringstead and work the 6 days that were in the other offer I had been sent." In fact, the other offer refers to 5 days (including Saturdays which was effectively a half day). In cross-examination the Claimant denied that GC had made an improved offer during the conversation on 10 August but he did accept that GC had always sorted things out for him and that he and GC probably did have a conversation at some point in which GC said he would be flexible and agreed to reduce the Claimant's hours.

32. In any event, the Claimant was angry and upset at being told that he could no longer stay at Cook's Hole and had to go to Ringstead. He said he did not want to

travel the further distance to Ringstead and he did not want to work with SP again. When GC said that since Cook's Hole was closing there was no alternative to Ringstead, the Claimant said there was an alternative and that that he would resign.

33. Immediately after the telephone call the Claimant sent an email confirming his resignation. The email stated:

> "As discussed.
> Please accept my resignation with immediate effect…
> I'm really disappointed it has ended this way. I can't thank you enough for the way you have looked after me these past years, it is really appreciated.
> Hope your health improves soon
> My very best regards
> Ian."

34. In his closing written submissions, the Claimant said he had two reasons for resigning, namely having to work with SP again and because working at Ringstead would involve working 5 days a week with longer travelling times. However, this submission is not consistent with the Claimant's evidence. In evidence the Claimant was adamant that the only reason for his resignation was having to work with SP again. Both in cross-examination and in response to further questions from the Tribunal he explicitly stated that he resigned solely because of having to work with SP again and there was no other reason apart from that. He further explicitly stated that it would not have made any difference what hours he was offered at Ringstead, he would not have worked with SP again under any conditions. In these circumstances we find as a fact that the Claimant resigned for the sole reason that he was told he would have to work with SP again (at Ringstead).

CONCLUSIONS

Disability discrimination

35. The first question is whether the Claimant is a disabled person within the meaning of section 6 of the Equality Act 2010. Unfortunately, there is no medical evidence before the Tribunal except the Fit Note dated 1 August 2018 and the Claimant's own impact statement. The Respondent had previously made an application for disclosure of medical records, but this was refused by an Employment Judge and the Claimant, who is unrepresented, did not think it necessary to include any medical evidence in the bundle. Although that lack of medical evidence has not helped either party, and has made it difficult for us to assess the Claimant's claim for disability discrimination fairly, for reasons which will become apparent it has not affected the actual outcome of the claim.

36. Turning to the issue of disability, it is uncontested that the Claimant had a triple heart bypass in 2014 and his evidence in his impact statement so far as regards his current diagnosis and the significant amount of medication he now takes was not challenged. He records his diagnosis as being:

    i. Severe Left Ventricular Systolic Dysfunction;

ii. Ischaemic Cardiomyopathy weakened heart muscle due to heart attack.
iii. Arterial Fibrillation – abnormal irregular heartbeat.
iv. Type 2 Diabetes

37. In his impact statement the Claimant states that he suffers from breathlessness and constant tiredness. He says that when shopping or cutting the grass he sometimes has to stop and sit down to get his breath back; he cannot do the jobs he used to do around the house and frequently falls asleep at home or when out with friends. He further says that his tiredness has affected his family relationships, including sexual relations with his wife and playing with his grandchildren.

38. We have to assess the impact of the Claimant's physical impairment in the absence of measures taken to treat or correct it (EqA, schedule 1, para 5) and we have no evidence as regards the medical purpose of the various medications taken by the Claimant or what the effects would be on the Claimant's heart condition if he didn't take them. However, given the evident seriousness of a triple heart by-pass operation and the number of different medications taken by the Claimant on a daily basis, we find, on the balance of probabilities, that without that medication the impact of the Claimant's heart condition had, at the material time, a substantial and long-term adverse effect on his ability to carry out day to day activities, and that therefore he was a disabled person within the meaning of the EqA.

39. The next question is whether the Respondent had actual or constructive knowledge of the Claimant's disability. The Respondent relies on *Gallop v Newport City Council* [2013] EWCA Civ 1583 as authority for the proposition that a respondent must have knowledge of all the separate elements that make up the definition of disability. That is to say, the employer must have knowledge – actual or constructive - of (a) a physical or mental impairment which has (b) a substantial and long-term adverse effect on (c) the ability to carry out normal day to day activities. The Respondent says that while it knew the Claimant had a heart condition, had had a bypass operation and experienced tiredness, that was the limit of its knowledge. In particular the Respondent lacked knowledge of the effects of the Claimant's heart condition and the effects being substantially adverse.

40. After careful deliberation we accept this submission. The Claimant accepted that he did not gone into any detail with GC (or anyone else) about the impact of his heart condition on his ability to carry out normal day to day activities, and in particular accepted that he had not spoken to GC about the matters referred to in his impact statement. Further the Fitness for Work Note simply states "Monday to Friday working only" and makes no mention of any adverse effects on the Claimant's ability to carry out normal day to day activities. While GC was aware the Claimant suffered from tiredness, he was also aware of the fact that the Claimant was working consistently long hours. In this latter respect, in his last year of employment the Claimant's average working day was 10.93 hrs, his average working week was 54.66 hrs and his average weekly overtime was 15.07 hrs. The fact the Claimant reported tiredness at coping with such long hours would not have put GC on notice that the Claimant might also have difficulty coping with normal day to day activities. Accordingly, we find that neither GC nor anyone else in the Respondent company had actual or constructive knowledge that the Claimant's

heart condition had a substantial adverse effect on his ability to carry out normal day to day activities. We would add that in reaching this conclusion we considered the relevance of the fact that GC apparently suffers from a similar heart condition to the Claimant and takes medication which is similar to some of the medication taken by the Claimant. However, to reason from this that GC could therefore be reasonably expected to know of the effect of the Claimant's heart condition on his ability to carry out day to day activities would be to assume that GC's own heart condition must itself have a substantial adverse effect on *his* ability to carry out day to day activities, and we have no evidence at all on which to base such an assumption.

41. Since we have found that the Respondent did not know and could not reasonably be expected to know of the Claimant's disability (within the meaning of schedule 8, para 20, EqA) it was not subject to a duty to make reasonable adjustments. Nevertheless, in case we are wrong about that, we have gone on to consider whether the reasonable adjustments relied upon by the Claimant put him at a substantial disadvantage compared to persons who are not disabled.

42. There is no general duty to make adjustments for a disabled person. The duty to make reasonable adjustments arises where (amongst other things) a provision, criterion or practice (PCP) of a respondent puts a claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. In his claim form the Claimant relies on two PCPs: (1) not allowing employees to have Saturdays off and (2) not to allow reduced hours.

43. The Respondent denies that employees were not allowed to have Saturdays off and clearly employees including the Claimant did have some, indeed most, Saturdays off. It therefore appears that the Claimant is relying on a PCP that employees were not allowed to *always* have Saturdays off and only work Monday – Friday. Accordingly, the PCP is better articulated as being one that required employees to work *some* Saturdays ("the Saturday PCP").

44. If so, did this Saturday PCP put persons with a heart condition like Claimant's at a substantial disadvantage compared to persons who do not have that heart condition? There is insufficient evidence to show that it does. The Fit Note does not contain enough information to understand why the doctor advised that the Claimant should stick to Monday to Friday working, and it is difficult to see why there might be a medical reason for not working Saturdays as opposed to working on days of the week. Further, while the Claimant said in evidence he needed two days off consecutively, he accepted those days could have been any two days of the week and readily accepted the offer of adjusted hours at Cook's Hole which included Saturday working.

45. The PCP might be understood as being that the Respondent didn't allow employees to take off any two consecutive days during the week. However, this is not how Claimant put his case in his claim form or at the hearing. In any case the evidence was that the Claimant asked the Respondent for Saturdays off (not any two consecutive days) and accordingly, there is no evidence that the Respondent actually had a PCP of not allowing employees to take off two consecutive days. Further, again there is no medical evidence (other than the very limited Fit Note)

that two consecutive days was better for the Claimant's health than splitting up his working week by taking two non-consecutive days off. And again, the Claimant readily accepted the offer of adjusted hours at Cook's Hole which didn't allow for two consecutive days off.

46. As regards the second PCP of not allowing employees to work reduced hours, there is no evidence the Respondent had such a PCP. Further the evidence was that the Respondent was prepared to reduce the Claimant's hours and the Claimant accepted that after July 2018, when he told GC he wanted to reduce his his hours, that GC had assured him he would do so and had always looked after his interests in the past.

47. Accordingly, for all the above reasons the claim that the Respondent failed in its duty to make reasonable adjustments pursuant to s. 20 Equality Act 2010, is dismissed.

48. Although in his claim form the Claimant brought a claim of indirect disability discrimination under s.19 EqA, this was not pursued at the hearing and is accordingly dismissed.

<u>Constructive Unfair dismissal</u>

49. To succeed in a claim of constructive unfair dismissal the Claimant must establish that he resigned in response to a fundamental breach of contract by the Respondent.

50. As stated above, in evidence the Claimant stated unequivocally that he resigned on 10 August 2018 solely because he was told he would have to go back and work with SP and that he had no other reason in his head apart from having to work with SP again.

51. It follows that the issue we have to decide is whether requiring the Claimant to work at Ringstead with SP again amounted to a fundamental breach of his contract. In this respect the Claimant's fixed-term contract required him to work at any of the Respondent's sites and while this fixed-term had expired the Claimant had continued to work for the Respondent and had been moved to different sites on different locations. Moreover, the Claimant's original base had been the Ringstead site. Accordingly requiring the Claimant to move to Ringstead was not a breach of any express term in his employment contract and the Claimant must put his case on the basis that requiring him to move to Ringstead and work with SP was a breach of the implied term of mutual trust and confidence.

52. The Respondent submits that it would only be in exceptional circumstances that an employee could ever contend that being required to work with someone they had previously complained about breached the implied term of trust and confidence. Broadly speaking, we agree with this submission. On the one hand it cannot be a breach of the implied term for an employer to require an employee to work alongside another employee with whom they don't get along. On the other hand, we can envisage circumstances in which requiring an employee to work alongside

another employee who has been found to be a bully and/or to have bullied them, could be a breach of that term.

53. In this case, whilst the Claimant clearly regarded SP to be a bully and considered that he had been the victim of bullying by SP, this was not, objectively, the information before the Respondent. There had been an incident twelve months previously in which SP had sworn at the Claimant and the Claimant had raised an informal grievance about that and also the fact he felt he was being blamed for errors that were not his fault. The Respondent had investigated the matter and found fault on both sides for the poor relationship between the two men, SP had been reprimanded and had apologised to the Claimant, and the Claimant had been moved "as a temporary measure" from Ringstead. Although in the hearing, the Claimant indicated he thought it was wrong that he, rather than SP, had been moved, he had not expressed that view at the time. Rather, at the time, he indicated that he was content with that outcome and he did not pursue matters further by making a formal grievance.

54. Furthermore, the Claimant resigned before he had articulated with any clarity, or possibly at all, the strength of his continuing feelings of animosity towards SP or the level of stress and risk to his health he now says that returning to work with SP would have caused him. Although the details of the telephone conversation between the Claimant and GC on 10 August 2018 are confused, it is clear it was no more than about 10 minutes long and also that it was the first time since the possibility of the Claimant returning to Ringstead was raised in GC's email of 6 August 2018 that the Claimant said anything about not wanting to work with SP again. Although the reason for that might be understandable, namely the Claimant believed he could stay at Cook's Hole, the upshot was that the Claimant resigned literally within minutes of the Respondent first becoming aware of the problem. The Respondent therefore had no opportunity to discuss matters with the Claimant any further and/or understand the concern the Claimant now says he had about the impact of returning to Ringstead on his health.

55. It follows from the above that we do not consider that the Respondent had breached the implied term of mutual trust and confidence at the time when the Claimant resigned, and accordingly that he was not constructively dismissed from his employment.

56. The claim of constructive unfair dismissal is therefore dismissed.

Employment Judge S Moore

Date: 25 April 21

Sent to the parties on:

6 May 21

For the Tribunal: