EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Walne	**v**	Royal Mail Group Limited

Heard at: Cambridge

Heard On: 15, 16, 17 and 18 February 2021
Discussion in Chambers: 17 March 2021

Before: Employment Judge Tynan

Members: Ms S Stones and Mrs S Blunden

Appearances
For the Claimant: Ms Suhayla Bewley, Counsel
For the Respondent: Mr Ian Hartley, Solicitor

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals
This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

RESERVED JUDGMENT

1. The Claimant's complaints that he was constructively unfairly dismissed by the Respondent and that the Respondent breached its duty under Section 20 of the Equality Act 2010, by failing to provide the Claimant with a suitable replacement van on 12 June 2018, succeed.

2. The Claimant's remaining disability discrimination complaints (discrimination arising from disability and failure to make reasonable adjustments) are not well founded and do not succeed.

REASONS

1. The Claimant worked for the Respondent for nearly 31 years as a Operational Postal Grade ("OPG"), more commonly known and referred to

as a postman. He was based in Framlingham, Suffolk. He resigned with immediate effect on 1 July 2018 following a short period of sickness absence. His last active day of duty was 12 June 2018 when he left work in the course of his delivery round in circumstances that are at the heart of this dispute. The Claimant claims that he was constructively unfairly dismissed. He also claims that the Respondent discriminated against him on the grounds of disability. The complaints in this regard are pursued under Sections 15 and 20 of the Equality Act 2010.

2. It is common ground between the parties that the Claimant is a disabled person for the purposes of Section 6 of the 2010 Act by reason of a degenerative back condition. The first (and until 2018, the only) record of a back condition was in 2003 / 2004 when the Claimant consulted his GP and an X-ray revealed that his lumber spine was abnormal.

3. In February 2004 the Claimant was issued with a Stage 1 warning by the Respondent because his attendance at work had fallen below the expected standard. This warning was issued notwithstanding it was accepted by the Respondent that his absences were genuinely the result of his back condition and, indeed, following discussion as to certain adjustments that might be required to his working arrangements.

4. This case came before Employment Judge Postle for Case Management on 18 January 2019. The issues which we have had to determine are set out at pages 2 – 4 of the Case Management Summary.

5. We heard the case over four days commencing on 15 February 2021, well over two years after the Claimant's resignation and the date of the last of the matters about which he makes complaint. The evidence and submissions took longer than scheduled, with the result that the Tribunal met again on 17 March 2021 to discuss its findings and come to a judgment. In doing so, the Tribunal has had further regard to Ms Bewley and Mr Harley's respective written submissions, to which each of them spoke at Tribunal.

6. There was a single agreed Bundle running to 413 pages. As is often the case, the evidence and submissions were focused on a relatively limited number of key documents.

7. The Tribunal heard evidence from the Claimant and, for the Respondent, from John McConnell (the Claimant's Manager at the time of his resignation), Colin England (Delivery Office Manager at Woodbridge Delivery Office and the Claimant's second Line Manager), Marcus Burrell (a Delivery Office Manager based at Clacton-on-Sea who was appointed in June 2018 to deal with the Claimant's Grievance) and James Doyle (an OPG based at the Woodbridge Delivery Office) who accompanied Mr England to Framlingham on 12 June 2018 after the Claimant had left his round in order to complete the Claimant's deliveries. Mr Doyle gave evidence at short notice at the Tribunal's request as it was felt he may have relevant evidence regarding where and how the Claimant had left his

delivery van and any undelivered items of mail on 12 June 2018, including whether Mr England had, as the Claimant alleges, tampered with these.

Findings

The Claimant's back condition

8. As noted already, in 2004 the Claimant was issued with a First Stage Warning by the Respondent in respect of his work attendance. An Interview Summary at pages 55 and 56 of the Hearing Bundle evidences that the Claimant had had 51 days off as a result of a back condition. The Claimant and his then Line Manager, Bryan Davidson, discussed adjustments including *"bag weights, change of OMV* [which refers to his delivery vehicle]*, trolley etc."* The Summary includes the following,

> *"Together we will be looking at new ways to assist and best practices".*

9. However, there is no evidence that the Claimant's situation was thereafter formally addressed by the Respondent, specifically by way of adjustments to his working arrangements. The Claimant was not referred for an occupational health assessment but instead issued with a First Stage Warning. Be that as it may, there is no evidence in the Claimant's GP records of any ongoing issues in relation to his back necessitating any further consultations or medical interventions after January 2004 until 19 June 2018 when his GP records note the following:

> *"History; episode of back pain again, van changed, and cannot adjust seat to make back comfortable, needs time for recovery."*

10. A report prepared for the Claimant's Solicitors dated 7 November 2018 states,

> *"This pain seems to have been caused and made worse by the twisting action required to get in and out of the vehicle… the twisting action incurred whilst doing this exerts a degree of shearing force on the discs in the lower spine and it is likely that this has exacerbated a previous injury and caused this pain to develop".*

11. The Claimant's evidence was that he managed his back condition over the years by not working long shifts and by taking regular breaks and holidays, as well as through the use of over the counter gels and pain killers. Whilst we accept that from 2004 the Claimant learned to be mindful around his back, we are not persuaded that he put in place the structured regime that was suggested in his evidence to the Tribunal. However, we do find that over the years he shared with others, including both his managers and colleagues from time to time, that he had some form of back condition. The Claimant's evidence at Tribunal was that he would find it humiliating to be thought disabled and we find in the circumstances that he did not go

into detail with colleagues, including his managers, about his condition. For the reasons we set out in our conclusions below, nothing turns on this issue; certainly as regards his complaint under Section 20 of the Equality Act 2010, in our judgment it ultimately does not matter to whom the Claimant subsequently disclosed his back condition, or what information he shared with them. We simply note here our finding that following the Claimant's absence in 2004 and the First Stage Warning, information regarding his back condition and any necessary adjustments was not documented or passed on within the Respondent in a structured way or, indeed, at all. Instead, information was shared on an ad hoc relatively limited basis by the Claimant himself with his managers. The Claimant's evidence, which was not challenged by the Respondent, was that he was provided with a suitable delivery van from 2004, the vans in question being suitable for the Claimant by virtue of their driving position. Further, if he had ever been asked to drive an unsuitable vehicle over the years, his needs and concerns in this regard had always been accommodated.

The Claimant's workload

12. In 2017, Kim Ibsen, a Manager at Woodbridge Delivery Office, decided that as part of a Summer Savings Plan, one of the OPGs at Framlingham would be redeployed elsewhere and their duties reallocated amongst the other OPGs. In his evidence at Tribunal Mr McConnell referred to this as employees being required to take 'absorption', an apparently common practice at the Royal Mail which seeks to address fluctuating mail volumes, particularly during the quieter summer months. The Claimant states that he took on extra deliveries under protest and only as a result of pressure from managers. However, he did not raise a formal grievance about the matter at the time or subsequently, even if he continued to express dissatisfaction in emails and other communications over a period of several months. Although the Claimant referred to the Summer Savings Plan in his June 2018 grievance, this was in order to highlight what he claimed were double standards in so far as he believed he was facing an allegation of wilful delay of the mail in circumstances where he considered that Royal Mail managers were indifferent to significant mail delays that had resulted from the Summer Savings Plan. The Claimant's evidence was that the additional deliveries resulting from the Summer Savings Plan had initially added an extra 45 to 60 minutes per day to his round, with a further 50 to 60 minutes per day added in or around August / September 2017 following further changes which appear to have been unrelated to any summer savings. Nevertheless, the Claimant accepted during cross examination that he had continued to work his contracted hours throughout these changes. As an OPG he could not be required by the Respondent to work overtime and he chose not to.

13. In October 2017, the Claimant used the Respondent's 'Just Say It' forum, which is available to Royal Mail staff and customers to share their views and ideas on Royal Mail's services, to express the view that, *"no one cares"*. The trigger was how his Long Service Award had been dealt with, though he went on to refer to the fact that OPGs were given unroadworthy

vehicles (which he did not relate to his back condition) and that managers were indifferent to lapsed deliveries as further evidence that *"no one cares"*. He did not explicitly refer to an increased personal workload, though in March 2018 he emailed Mr England complaining of a further revision to his round, stating that his managers knew he had been unable to finish his rounds since June 2017. He wrote,

> *"I'm not taking on overtime, I don't want it and I don't need it."*

14. There was evidently recognition at the Respondent that the Framlingham team were under pressure, as one of the OPGs was tasked with trying to rewrite their duties and was also authorised to add a part time duty as an initial measure to address the situation. Mr England spoke with the Claimant late evening on 21 March 2018 to discuss his concerns. He was evidently not indifferent to the situation even if he could not implement an immediate solution. By July 2018, additional staff had been recruited, albeit the Claimant had left the organisation by then. We accept Mr McConnell's and Mr England's evidence that other colleagues were drafted in (including from Woodbridge) to assist on those occasions the Claimant and others struggled with their deliveries and that such arrangements were in accordance with well established procedures at the Respondent where an OPG considers that they have an excessive workload on a particular day and anticipate being unable to complete their delivery.

15. Mr McConnell line managed approximately 60 staff during his time at Woodbridge Delivery Office, a heavy responsibility given the inevitable range of issues that arise in a group of employees of that size. He could not recall when he first met the Claimant, though he spoke of having had *"huddles"* with staff at Framlingham on his visits to Framlingham Sorting Office. He had a one-to-one discussion with the Claimant on 15 May 2018 after the Claimant had continued to express dissatisfaction regarding his inability to complete his delivery round. On learning that Mr McConnell would be speaking to him the following day, the Claimant emailed Mr England summarising his concerns. It was evidently a constructive discussion on 15 May 2018 as Mr McConnell texted the Claimant following their discussion stating,

> *"…thank you for being up front and giving me your time this morning. Top man."*

16. There was a further friendly exchange between them on 18 May 2018 when Mr McConnell arranged for the Claimant's outstanding mail to be cleared so that,

> *"…At least a clear frame going into a Saturday if nothing else."*

11 and 12 June 2018

17. On Monday 11 June 2018, the Claimant's van broke down. He messaged Mr McConnell at 10:30am to let him know there would be a significant volume of undelivered mail. He wrote,

> *"I intended to clear it, but this Combo is killing my back so I won't be in it a minute longer than I have to."*

18. The reference to a 'Combo' is to a Vauxhall Combo van that the Claimant had taken out on his delivery round once it became clear that his normal vehicle, a Peugeot Partner, could not be repaired immediately. We find this was the first time the Claimant mentioned his back in any communication with Mr McConnell. Mr McConnell was on a rest day on 11 June 2018 but passed the Claimant's message on to Mr England to deal with. Mr England rang the Claimant 27 minutes after he had messaged Mr McConnell. That further evidences to us that Mr McConnell and Mr England were responsive to work related issues impacting the Claimant even if the primary focus on both sides on 11 June 2018 was on dealing with the outstanding items of mail. As with Mr McConnell, we find that this was the first time Mr England heard mention of a back issue, albeit there was nothing in the message or during his subsequent phone call with the Claimant that day to indicate an underlying, long standing back condition. We find that they did not get into discussion about the Claimant's back issues that morning, rather the focus was on ensuring the mail went out and on sourcing another vehicle for the following day. Mr England arranged a replacement hire vehicle and for a colleague, Mr Adcock, to deliver the vehicle to Framlingham the following morning. The only criteria, if at all, seems to have been that it should not be a Vauxhall Combo. Mr England's evidence was that when requesting replacement hire vehicles, these are assigned by the provider on the basis that the vehicle will be of a similar size to the vehicle under repair so as to ensure operational suitability. However, that indicates to the Tribunal that operational suitability was and is viewed through a narrow lens with no, or insufficient, thought being given to the needs of the OPG.

19. At paragraph 15 of his witness statement, Mr England states that vehicles can be, and are, reallocated as and when needed to reflect individual requirements, though we find this did not happen in the Claimant's case. He was not offered a colleague's vehicle. When Mr Adcock delivered the replacement hire vehicle, a Peugeot Bipper, to Framlingham on 12 June 2018, the Claimant immediately complained that it was unsuitable. However, we find he did not go into any detail with Mr Adcock as to why it was not suitable. He did not know Mr Adcock. We find that he was irritable with Mr Adcock who responded in kind by telling the Claimant that he was stuck with the vehicle.

20. The Claimant alleges that the Peugeot Bipper had no suspension effect. We do not accept his evidence in this regard. It was a new vehicle with a modern, fully functioning suspension system. However, we find that it was

unsuitable for the Claimant to drive on account of its driving position which aggravated the Claimant's back condition and which he perceived as the van's suspension being defective. Within a relatively short time of starting his round the Claimant was experiencing back pain. He messaged Mr McConnell at 9.10am to say,

> *"John, can you call me please."*

21. He gave no further indication in his message as to what it was that he wished to discuss with Mr McConnell or how pressing the matter might be. In the meantime he attempted to continue with his delivery round. At 9:37am, having not heard from Mr McConnell, he sent a further message as follows,

> *"John, Colin, you are both having a laugh at my expense – call me when you find a van that is driveable and I'll finish the round, until then this heap of shit is outside the Post Office."*

22. At this point in time at least, the Claimant envisaged continuing with his round if he was provided with a more suitable vehicle. For reasons that remain unclear, the Claimant did not think to call Mr McConnell or Mr England notwithstanding Mr McConnell had passed on his message the previous day and Mr England had made a point of calling the Claimant immediately and again at the end of the day to let him know that a replacement hire van was being arranged. We consider that the Claimant's communications over this period were not ideal, though perhaps consistent with the slightly emotive tone of certain of his communications over the preceding year available to us in the Hearing Bundle.

23. Due to poor mobile reception at the Woodbridge Delivery Office, which was a well-known issue and which we find the Claimant was fully familiar with, Mr McConnell did not receive the Claimant's 9:10am message immediately. Having not heard from Mr McConnell, the sensible and obvious course would have been for the Claimant to call Mr McConnell either on his mobile number or the office landline. Instead, the Claimant sent what was an ill-tempered message. We find that he was angry, frustrated and slightly demanding, albeit we also find that he was in pain. His second text was also slightly delayed in reaching Mr McConnell who called him at 10:02am on receipt of the messages. The second message had evidently provoked his ire. The Claimant and Mr McConnell spoke for eight minutes. Given his previous efforts to understand and address the Claimant's concerns and his responsiveness the previous day, notwithstanding the Claimant had messaged him on his rest day, we are not entirely surprised that Mr McConnell was annoyed to receive what he reasonably perceived to be a hostile communication from the Claimant and it is understandable that he showed irritation with the Claimant when they then spoke. We accept the Claimant's evidence that Mr McConnell said to him during their conversation,

> *"If you had sent an email like that to a Tesco Manager, you would be out by now".*

24. Whilst there was evidence in the Hearing Bundle that expletives and crude language were a feature of certain communications between colleagues at the Royal Mail, the Claimant himself was not given to such language. We do not accept his assertion that his 9.37am message was not out of the ordinary. It was not the sort of communication that Mr McConnell might have reasonably expected to have received from the Claimant.

25. By the time the Claimant and Mr McConnell spoke on 12 June 2018, the Claimant had abandoned his delivery round. He left his vehicle containing undelivered items of mail outside Framlingham Sorting Office. A significant issue in the proceedings was precisely where and how the Claimant had left the vehicle. There are photographs in this regard at pages 395 – 408 of the Hearing Bundle which Mr England states he took on 12 June 2018 when he arrived in Framlingham with Mr Doyle. The Claimant's evidence is that,

> *"none of the images disclosed has anything to do with me".*

He suggested, amongst other things, that the photographs had been staged and possibly taken some days later. We do not accept the Claimant's evidence at paragraphs 82 – 98 of his witness statement and reject his suggestion that Mr England manufactured evidence to use against him. The allegation is entirely unwarranted and proved an unnecessary and time-consuming distraction in this case. It reflects the Claimant's fundamental lack of trust of the Respondent rather than a well-founded concern that evidence had been manufactured against him. We are entirely satisfied that the photographs in the Hearing Bundle were taken by Mr England on 12 June 2018 within a short time of him arriving in Framlingham with Mr Doyle and that they accurately reflect the position and state of the vehicle as they found it, namely with a volume of mail on the front seat of the vehicle, including Special Delivery items and undelivered parcels in the back of the van.

26. In his statement, Mr England suggests that the condition in which he found the vehicle on 12 June 2018 was potentially in breach of Royal Mail's Conduct Policy, though it is notable that in his evidence to the Tribunal Mr Doyle did not recall anything being particularly amiss when he took over the delivery on 12 June 2018, even if he did recall and corroborate that Mr England had taken pictures of the vehicle on his mobile phone. He described the van as being, *"what I would expect in a van ready for delivery".* He was a credible and reliable witness and there was no suggestion by him that the photographs in the Bundle were at odds with what he saw on 12 June 2018.

27. Mr England made a supplementary witness statement which addresses the position and state of the Peugeot Bipper as he found it on 12 June 2018, including the provenance of the photographs that are included in the

Hearing Bundle. He produced the metadata for the photographs which confirmed the date and time they were taken. However, the Claimant called into question the provenance of the metadata and whether it could be linked to the photographs. During the Hearing Mr England was able to show us one of the photographs on his mobile phone; the date and time were clearly visible on the photograph and corroborated his evidence on this particular issue, including his account of what he observed when he travelled over to Framlingham on 12 June 2018.

28. The Claimant's recollection was that he had left the vehicle directly outside the Post Office in Framlingham. We find, and the photographs support, that he left it instead in front of the adjoining Solicitors' office one or two vehicle widths away. Nothing much turns on the matter except perhaps that it reinforces that the Claimant was mistaken in his recollection. He was angry and in pain on 12 June 2018. His tearful evidence at Tribunal was that he could not get upstairs to bed that evening as he was in so much pain. We find he was not thinking straight on 12 June 2018, that his recollection is impaired as a result of the pain he was in that day, and that when he abandoned his delivery round he left the vehicle as Mr England found it.

29. Given the circumstances in which the Claimant left his delivery round, including his messages to Mr McConnell, we consider that it was reasonable for Mr McConnell and Mr England to conclude that this warranted a management discussion with him. However, it is equally the case that the Claimant's conduct was out of character and warranted follow up action from a welfare perspective, something that did not happen. Mr England essentially left the situation to Mr McConnell to deal with notwithstanding the evident tensions between the two men. Regrettably, poor communication on both sides meant there was a lost opportunity to take some of the heat out of the situation and re-establish more effective communications as well as greater perspective on each side.

<u>Events after 12 June 2018</u>

30. Mr McConnell wrote to the Claimant on 12 June 2018 inviting him to a meeting on Friday 15 June 2018 to discuss the events of 12 June 2018. He confirmed that it was an informal meeting, albeit the Claimant could be accompanied by a Union Representative if he wished. The Claimant was not in fact a member of any Union. Whilst we think a phone call might have been more effective in diffusing the situation, we do not consider that Mr McConnell acted unreasonably or disproportionately in arranging an informal discussion by way of follow up to the day's events. Mr McConnell's letter certainly does not justify the Claimant's description of the proposed meeting as a 'kangaroo court'. The Claimant messaged Mr McConnell at 2:33pm on 14 June 2018 to say he would not be attending. The given reason was that he was taking legal advice rather than because he was in pain and unfit to attend any meeting. He referred to himself and his wife being willing to attend a meeting with Senior Managers at some

future date if so required, although there would have been no obvious reason for his wife to have attended any such meeting. The fact the Claimant was taking legal advice was not a good reason for him not to have attended a meeting with his line manager. His message was ill-advised, indeed we find that he was seeking to dictate the terms on which he was willing to engage with his employer as well as the timing of any discussion.

31. The Claimant called Mr McConnell on receipt of his letter. We accept the Claimant's account of that conversation, including that Mr McConnell accused the Claimant of deliberately withholding mail the previous day and that the Claimant had breached the Respondent's Fitness Absence Policy in arranging for his wife to call Mr England the previous day. We conclude that the existing tensions between the Claimant and Mr McConnell escalated both as a result of the Claimant's refusal, without proper cause, to attend the meeting on 15 June 2018 but also as a result of Mr McConnell's aggression towards the Claimant when they spoke.

32. Although the Claimant self-certified himself unfit to attend work on 13 June 2018, it was not suggested by him in his evidence at Tribunal that he indicated to Mr McConnell or Mr England at this time that he anticipated being absent for an extended period.

33. At 7:01am on 14 June 2018, the Claimant contacted Gary Redmond via the 'Just Say It' forum. He said that he was being accused by his manager of something that did not happen and that he believed neither Mr McConnell nor Mr England would give him a fair hearing. He attached a draft letter to Mr McConnell. This letter was to be the basis of his subsequent grievance. Whilst the Claimant was not intending to be obtuse, he evidently escalated his concerns through the wrong channel with the result that there was potentially a lost opportunity for timely HR intervention. It means that Mr McConnell was unaware at this time that there was a pending grievance or that there was any other explanation for the Claimant's non-attendance at the proposed meeting on 15 June 2018, other than the Claimant's stated desire to take legal advice.

34. On the evening of 14 June 2018, the Claimant was emailed by a colleague Sherie Brinkley who said she had heard he was in a bit of trouble. Her email concluded, *"hope it goes ok tomorrow"*. Whilst her email confirms that it had by then become more widely known (Ms Brinkley subsequently said it was common knowledge) that the Claimant had been invited to attend an informal management discussion, there was no evidence before the Tribunal as to how that information had come to Ms Brinkley's attention. The Claimant has the burden of proving on the balance of probabilities that the Respondent breached confidentiality and on this issue he has failed to discharge it.

35. The Claimant states that he wrote a five-page grievance letter on 14 June 2018. Given that he emailed it to Mr Redmond at 7:01am on 14 June 2018, we think it more likely that he drafted the letter on 13 June 2018

following his conversation with Mr McConnell. Mr McConnell's response to their conversation was to invite the Claimant to attend a more formal fact-finding meeting. The invitation, which is at page 131 of the Hearing Bundle, is undated and refers to an alleged discussion on Thursday 14 June 2018. We find that was a simple drafting error on the part of Mr McConnell who intended to refer their discussion on Wednesday 13 June 2018. It is unclear, however, why Mr McConnell decided to escalate the matter from an informal management discussion to a more formal fact finding meeting and why he did not simply reschedule their planned discussion. It is notable that the Respondent did not adduce any evidence from anyone within its HR function to explain why this escalation was appropriate in the circumstances or in accordance with the Respondent's policies and procedures.

36. Mr McConnell was asked about the Respondent's Conduct Agreement with the CWU and Unite which sets out the Respondent's agreed policy and procedure in relation to conduct issues. Mr McConnell was plainly unaware of the Conduct Agreement, including its provisions in relation to fact finding investigations. The section of the Conduct Agreement dealing with fact finding investigations starts at page 281 of the Bundle. One of the first parts of this section is headed 'Am I the right person to be dealing with the case?' Mr McConnell failed to give consideration to whether he was the right person to deal with the case given that the concerns included his interactions with Mr McConnell on 12 and 13 June 2018.

37. Page 282 of the Hearing Bundle confirms that a conduct case should be created via 'Managing My Team' on the Respondent's systems where concerns are being progressed formally under the fact finding procedure. There were no documents in the Hearing Bundle evidencing any such conduct case. It reflects a dearth of HR evidence in this case.

38. Whilst Mr McConnell's undated letter to the Claimant inviting him to attend a formal fact finding meeting was appropriate in terms of its tone, it contained no details of the matters that were to be the subject of the fact finding investigation. Whilst that was not in breach of the Respondent's documented procedure or the relevant Acas Code and Guidance, it was unsatisfactory none the less.

39. The fact finding meeting was scheduled for 21 June 2018 at 9am. However, on 19 June 2018 the Claimant's GP issued a Fit Note certifying him unfit to work for an initial period of two weeks to 2 July 2018 with *"recurrence of back pain".* We accept the Claimant's evidence that he submitted the Fit Note to Mr England and that he also messaged Mr McConnell to confirm that he had submitted a Fit Note. Notwithstanding the Claimant had been able to draft and submit a five-page draft Grievance to Mr Redmond on 14 June 2018, there was no obvious reason for Mr McConnell to proceed with a fact finding meeting in circumstances where it was not in dispute that the Claimant was unfit to work. There was certainly no evidence before the Tribunal that the Claimant was fit (or that

the Respondent considered him fit) to attend a fact finding meeting notwithstanding he was not fit to work.

40. At 9:07am on 21 June 2018, a few minutes after the fact finding meeting had been due to commence, the Claimant emailed Mr England to request that he pass on a message to Mr McConnell (page 144 of the Hearing Bundle). Given that the Claimant had submitted a Fit Note on 19 June 2018, it would or should not have come as a surprise to Mr England or Mr McConnell that the Claimant would not be attending the meeting. However, the email was unsatisfactory in that the Claimant did not say that he was unfit to attend the meeting, but instead simply noted what he said were several inaccuracies in Mr McConnell's letter.

41. We find that Mr McConnell was provoked by the Claimant's email and non-attendance. He sent a further letter to the Claimant, dated 26 June 2018, inviting him to attend a further fact finding meeting to be held on 2 July 2018. His letter addressed some of the *"inaccuracies"* identified by the Claimant, including the practical arrangements for the meeting. Mr McConnell scheduled the meeting for the last day of the Claimant's scheduled sickness absence. We do not know whether this reflected a misunderstanding on his part as to the date the Claimant was due to return from sickness absence, nevertheless he was unwilling to wait to see whether in fact the Claimant did return to work. Given Mr McConnell's evidence to the Tribunal that the concerns would not have warranted the Claimant's dismissal, there was no obvious urgency to the situation and no evident need to progress any management discussion or fact finding investigation on the first day that the Claimant was expected to return to work. Mr McConnell's letter of 26 June 2018 suggested that the meeting might proceed in the Claimant's absence if he did not attend and that the decision would be based on the available information. At the foot of the letter Mr McConnell set out three questions he wished to explore with the Claimant. This was the first time that Mr McConnell had provided any detail as to the issues which were to be discussed, albeit it still did not go into detail.

42. On 27 June 2018, the Claimant emailed Mr England once again asking that he forward a message to Mr McConnell. In that message he stated he would not be attending the meeting on 2 July 2018. He gave no specific reason for his non-attendance. He referred to Mr McConnell's correspondence as *"further bullying and harassment".* He went on to say that Mr McConnell was aware that *"my full statement was sent to Senior Managers at 7:01am on 14 June 2018".* In fact, Mr McConnell would have been unaware that a statement had been submitted to Mr Redmond via the 'Just Say It' forum, though as set out below he was then aware that a formal grievance had been submitted by the Claimant.

43. Mr Burrell was appointed on or around 22 June 2018 to hear the Claimant's grievance. We find that one of his early actions was to make a copy available to Mr McConnell. There was some confusion on the part of Mr Burrell as to the timing of his involvement. In his statement he said that

he had telephoned the Claimant on 18 June 2018 to advise him that he had been appointed to hear his grievance. In fact, it is clear from the email exchanges at pages 145 and 146 of the Hearing Bundle that Mr Burrell was only appointed to hear the grievance on 22 June 2018, that being the earliest date that he could have spoken with the Claimant. The Claimant's evidence was that he had two phone calls from Mr Burrell, some days apart. We accept Mr Burrell's evidence that during his initial telephone conversation with the Claimant, the Claimant was uncertain as to whether he should be speaking to him and said he wished to get advice from his solicitor before he did so. It was agreed in the circumstances that Mr Burrell would telephone the Claimant in a couple of days to arrange a meeting. When they spoke again the Claimant said that he had not yet spoken with his solicitor and in the circumstances the matter was not progressed further. A few days later, Mr Burrell attempted to contact the Claimant again but could not reach him. On learning that the Claimant had resigned his employment Mr Burrell took no further action on the grievance, albeit without any further reference to the Claimant himself.

44. At 4:22pm on 1 July 2018, the Claimant emailed Mr England and Mr Stone giving notice that he was resigning his employment with immediate effect. He wrote,

> *"The reason for my resignation is based in the way in which I have been treated and as such I will be claiming constructive dismissal. My Solicitor will write to you in due course to explain my claim in greater detail."*

He then proceeded to answer the three questions that had been posed by Mr McConnell in his letter dated 26 June 2018.

<u>Mr McConnell and Mr England's knowledge of the Claimant's disability</u>

45. We find that Mr McConnell and Mr England did not know and could not themselves reasonably have been expected to know, that the Claimant had a disability prior to the events of 11 and 12 June 2018. They were unaware of his back condition or any other physical impairment that had a long term substantial adverse effect on his day-to-day activities and which placed him at a substantial disadvantage. Prior to June 2018, there is no evidence of any events or circumstances that put either of them on further enquiry. For example, we note that when the Claimant raised concerns with Gary Redmond in October 2017 via the 'Just Say It' forum (page 140 of the Hearing Bundle), he complained about vehicles being unroadworthy or being given to covering staff for their personal use and about the pressures which the Framlingham team were under; he did not disclose any personal issues. We do not consider that the Claimant's text message to Mr McConnell sent on the morning of 11 June 2018, which Mr McConnell shared with Mr England, in which the Claimant complained that the Combo vehicle was "killing my back", put either individual on notice of a disability or substantial disadvantage. The Claimant's evidence at paragraph 37 of his witness statement was that he told Mr England on 11

June 2018 that he "was having difficulty with the Combo", not that any difficulty was related to an underlying, long term condition. Nor do we consider that the events of 12 June 2018 put either individual on notice or enquiry. At paragraph 41 of his witness statement the Claimant explains why the replacement Vauxhall Bipper was unsuitable. We accept his evidence in this regard, which was not challenged during cross examination. However, whilst we accept that the Claimant told Mr Adcock on 12 June 2018 that he did not want the Vauxhall Bipper, on his own account, he did not explain to Mr Adcock the reasons why this was. The explanation at paragraph 41 of the Claimant's witness statement was not shared with Mr Adcock and, accordingly, was not relayed to Mr England or Mr McConnell. The Claimant's 12 June 2018 text message timed at 9:37am complained that the Bipper was not driveable, a "heap of shit" as he called it. Again, we find that there was insufficient there to put Mr England or Mr Connell on notice of or enquiry as to the possibility of a disability or substantial disadvantage. We do not consider that the phone call at 10:02am on 12 June 2018 put Mr McConnell on notice or enquiry. The Claimant's texts and the ensuing phone call may have been out of character but in our judgment they did not put Mr McConnell on immediate enquiry as to the possibility of an underlying health condition.

46. At or around 2:14pm on 12 June 2018 the Claimant's wife spoke to Mr England. Mrs Walne did not give evidence to the Tribunal and the conversation is not addressed in Mr England's witness statement. However, given the somewhat unsatisfactory circumstances in which the Claimant left work on the morning of 12 June 2018, we conclude that Mrs Walne contacted the Respondent in order to confirm that the Claimant would be self-certifying his absence that day. We do not consider that they went into detail as to the reasons for the Claimant's absence or how long he might be away from work. It was essentially a holding call. In the absence of more information, we do not consider that Mr England had a responsibility to pursue the matter further with Mrs Walne or to immediately follow up with the Claimant even if, under the Respondent's policy, the Claimant should have notified the absence himself rather than through his wife. Be that as it may, employees often take periods of short-term sickness absence. The EHRC Code states that employers must do all they can reasonably expected to do to find out relevant information. We think it would be unusual for an employer to start making enquiries to establish whether an employee has a disability that puts them at a substantial disadvantage immediately upon an employee self-certifying, in circumstances where there is no other information to indicate that the employee has or may have a long-term impairment. In our judgment, the fact that the Claimant had said his back was killing him, had left his round and self-certified sick, whilst out of character, was not sufficient to put Mr England or Mr McConnell on notice of a disability or immediately call for further enquiry to be made. The position did not change materially on 13 June when Mr McConnell and the Claimant spoke again and the Claimant told Mr McConnell that he had hurt his back driving the Bipper.

47. However, we consider that the position did change following the Claimant's submission to Mr England of a Fit Note on or around 19 June 2018 citing "recurrence of back pain". The Claimant also completed and submitted a SSP statement of sickness stating that his sickness was caused by an accident at work. He sent a text to Mr McConnell as confirmation that they had been submitted. In our judgment the fact the absence was as a result of a "recurrence" of back pain and that the Claimant considered he had been injured in an accident at work would, or should, have put Mr England and McConnell on enquiry. Significantly, as is clear from the 14 June 2018 grievance submitted by the Claimant to Mr Redmond, even if the Claimant would never have described himself as being disabled, he was certainly willing to share with the Respondent the fact that "long term use of [Royal Mail] vehicle caused problems with my lower back and spine resulting in taking 51 days off work in 2003/4" and that " …subsequent managers have all taken this into consideration so that there is a much lowered risk of those problems being aggravated and have found me suitable vehicles ever since." We consider that on receipt of the Fit Note Mr England and Mr McConnell had a responsibility to enquire as to the nature of the Claimant's recurring back condition. Had they done so, we are certain that the Claimant would have informed them of the events of 2003, shared the details of his back condition and the substantial disadvantage that it caused him. In any event, the information within the Respondent's HR records from 2004 would, or ought reasonably to, have been available to them. Furthermore, Mr McConnell's evidence was that occupational health referrals and assessments are routinely arranged and completed within a matter of days. We find that, doing all they could reasonably have been expected to do to find out the position, Mr England and Mr McConnell would have discovered by 26 June 2018 that the Claimant had a disability that caused him a substantial disadvantage.

48. In any event, we find that Mr McConnell had sight of the Claimant's Grievance by 26 June 2018. Of itself, but also in combination with the other facts and circumstances then known to himself and Mr England, the grievance would or should have put them on immediate notice of the Claimant's disability and the disadvantage it caused him, including that he required a vehicle that would help prevent/minimise a recurrence of his back/spine problem.

Law and Conclusions

<u>The Disability Discrimination Complaints</u>

49. Section 15 of the Equality Acy 2010 (EqA) provides:

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

50. An employer's duty to make reasonable adjustments in respect of employees and others who have disabilities arises by virtue of the operation of sections 20 and 21 of EqA. The duty comprises of three requirements. This case concerns the first of those requirements, namely the requirement that where a provision, criterion or practice (PCP) of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage (section 20(3)). In this case the claimed PCPs are: (1) a requirement for the Respondent's employees to drive any vehicle that the Respondent provides when carrying out their duties; and (2) a requirement for employees to attend employer / employee meetings at a time decided by the Respondent.

Knowledge

51. As with section 15(2) EqA, the duty to make adjustments is subject to a 'knowledge' requirement. Under paragraph 20 of Schedule 8 to EqA, an employer is not under a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the individual concerned has a disability and is likely to be placed at a substantial disadvantage by the disability. Knowledge (actual or constructive) of both the disability and substantial disadvantage is required. However, the burden of proof sits with the employer to establish, on the balance of probabilities, that there was no knowledge of the disability and substantial disadvantage.

52. Whilst section 15 EqA and paragraph 20 of Schedule 8 to EqA are framed in essentially identical terms, section 15 is concerned with the acts and omissions of the employer's employees, agents and others who may have treated an individual unfavourably and in respect of whose actions the employer is vicariously liable by virtue of the operation of section 109 of EqA. As such, and as is the case under other provisions of EqA, there is a particular focus on the knowledge and mental processes of the alleged individual discriminator(s) at the time of treatment about which complaint is made. The duty of adjustment is the employer's and the focus therefore is upon the organisational, rather than any individual, response to a disabled worker's situation and needs. Where, as here, the employer is a corporate entity, its knowledge (actual or constructive) of any disability and substantial disadvantage will commonly derive from a number of sources, potentially over a period of time, including from the employee themself, the employee's manager and colleagues, the employer's HR function,

occupational health specialists and others. In our view, once acquired, that knowledge cannot be lost by the employer, otherwise the employer's duty of adjustment would be significantly compromised and employees would have the burden of continually notify their disability and its effects as colleagues leave the employer's organisation and are replaced. The legal duty of adjustment is the employer's. Once an employer is on notice of an employee's disability and any resulting disadvantage, we consider that in order to discharge its duty to make adjustments the employer has a responsibility to embed knowledge and ensure it is shared and handed over as people leave and join the organisation or are promoted into and out of roles that may interact with a disabled individual. In this case the Respondent was on notice of the Claimant's disability from early 2004

53. In terms of section 15 EqA, we have found that Mr McConnell and Mr England did not know and could not themselves reasonably have been expected to know that the Claimant had a disability until 26 June 2018. By contrast, in terms of sections 21 and 22 EqA, even if Mr England and Mr McConnell were initially unaware of the Claimant's disability, the Respondent had known of the disability since at least 2004 and in our judgment it was subject to an ongoing duty from that date to make adjustments to address any relevant substantial disadvantage(s). We return to this.

The section 15 EqA complaints

54. It follows from our findings and conclusions above that the complaints identified at paragraphs 3(a), (b) and (e) of the List of Issues cannot succeed on the basis that Messrs England and McConnell (and, if relevant, Mr Adcock) did not know, and could not reasonably be expected to have known, at the date of the treatment complained of that the Claimant had a disability.

55. Likewise, Mr McConnell lacked the requisite knowledge when he issued written invitations to the Claimant on 12 and 14 June 2018, respectively, to attend a management discussion and fact-finding meeting (two of three complaints at paragraph 3(c) of the List of Issues).

56. However, Mr McConnell ought reasonably to have been aware of the Claimant's disability by 26 June 2018 when he issued a further invitation to the Claimant to attend a rescheduled fact-finding meeting on 2 July 2018. Nevertheless, we do not consider that Mr McConnell treated the Claimant unfavourably on 26 June 2018 because of something arising in consequence of his disability (the third of the three complaints at paragraph 3(c) of the List of Issues). The Claimant's failure to attend the meeting scheduled for 21 June, which gave rise to the meeting invitation of 26 June, was not something that arose from his disability. Notwithstanding the Claimant was on sick leave, in so far as the reasons for the Claimant's non-attendance on 21 June can be discerned, it was that in the context of a developing workplace dispute the Claimant considered there were several inaccuracies in the meeting invitation letter. It seems to the

Tribunal that he was also challenging whether the Respondent's policy and procedure had been adhered to. He did not decline to attend, and certainly Mr McConnell had no reason to believe that he was unable to attend, because he was suffering back pain or other symptoms associated with his back condition.

57. The complaint identified at paragraph 3(d) of the List of Issues also fails as the change in format from an informal management discussion to a more formal fact-finding meeting occurred on 14 June 2018 rather than on 26 June 2018 as the Claimant contends. As at 14 June 2018 Mr McConnell lacked the requisite knowledge of the Claimant's disability. The purpose of the meeting invite on 26 June 2018 was to re-schedule the meeting originally planned for 21 June 2018; the format did not then change.

<u>The section 20/21 EqA complaints</u>

58. We agree with the Claimant that the Respondent had a PCP of requiring its employees to drive any vehicle provided to them when carrying out their duties and that this placed the Claimant at a substantial disadvantage by reason of his back condition since certain vehicles were liable to cause him pain and discomfort, increasing the risk that he would be unable to complete his delivery round or continue working. It was documented in 2004 that the Claimant's back condition necessitated the provision of a suitable vehicle. In our judgment, the Respondent continued to be under a duty in 2018 to make reasonable adjustments for the Claimant, namely by the provision of a vehicle with a height and tilt adjustment mechanism for the driving seat and rake/reach adjustment for the steering wheel seating.

59. We do not consider that providing the Claimant with a lighter workload would have addressed the disadvantage caused by the above PCP. Over the course of 2017 and 2018 the Claimant seems to have struggled to complete his round within his contracted normal hours of work. However, he has not pursued his disability discrimination complaint by reference to any claimed PCP relating to the number of tasks required to be undertaken or volume of mail expected to be delivered each day within the standard contracted hours of work for an OPG.

60. The duty to make adjustments is not an absolute one. In our view the fact that it is a duty to make reasonable adjustments means that an employer will not automatically breach its duty in circumstances where equipment (or in this case, a vehicle) provided in compliance with the duty suffers a malfunction (or in this case, breaks down). Depending upon the nature of the equipment in question, the employer will be afforded a reasonable opportunity to source a replacement, either on a temporary or permanent basis. In this case, it is not the Respondent's case that a suitable replacement vehicle could not be sourced or made available to the Claimant. On the contrary, in their evidence to the Tribunal Mr England and McConnell emphasised that had they known the Claimant was disabled, a suitable replacement vehicle would have been provided to him immediately. Mr England's evidence was that the Woodbridge Delivery

Office has a pool of approximately 43 vehicles immediately available, and that it is "well within my power as Delivery Office Manager to swap/replace vans amongst staff members according to their needs". Replacement vehicles could also be sourced from a third-party provider at short notice (indeed, this is how the Bipper was sourced for the Claimant on 12 June 2018). Mr McConnell also confirmed that he would have been able to swap vehicles between employees. In others words, and in our judgment, it would have been a very simple matter for a replacement Peugeot Partner or other suitable vehicle to have been found for the Claimant. We refer to paragraph 33 of Mr England's witness statement. The only stated reason why a suitable vehicle was not available for the Claimant on 12 June 2018 was that Mr England and Mr McConnell were unaware of the need for adjustments. We allow for the fact that the Claimant's colleagues were out on their rounds on 11 June 2018 by the time the Claimant's vehicle was assessed by the RAC to be incapable of being repaired that day, but consider that with fairly minimal effort a vehicle swap or the provision of a replacement Peugeot Partner or other suitable vehicle could reasonably have been arranged for 12 June 2018, and that the Respondent's failure to do so was in breach of its section 21 duty to make adjustments. The complaint identified at paragraph 9(a) of the List of Issues therefore succeeds.

61. The Claimant contends that the Respondent also had a PCP of requiring employees to attend employer / employee meetings at a time decided by the Respondent. We do not agree that there was such a PCP. As any employer would, the Respondent proposes the date and time of meetings to employees when seeking to set up discipline and grievance meetings and less formal management discussions. However, there is no evidence that the Respondent dictates the date and time of meetings or that it is inflexible in its approach to these even if Mr McConnell sought to schedule a meeting with the Claimant on what he believed would be his first day back in the office. Mr Hartley rightly acknowledged the EAT's decision in Williams v Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19, in which it said that the element of persistence or repetition required for a "practice" may be found "within the four walls" of how the employer treats one particular individual. Nevertheless, we conclude that Mr McConnell's approach reflected his irritation with the Claimant and the escalating tensions between them; it was specific to this situation rather than indicative of a wider practice at the Respondent. We are satisfied that the Respondent seeks to arrange meetings on dates and at times that are convenient to attendees, having regard to their needs and circumstances. To the extent that is a PCP, it did not place the Claimant at a substantial disadvantage in comparison to his work colleagues who were not disabled. The Claimant failed to attend the informal management discussion on 15 June as he wished to take legal advice. He declined to attend the first scheduled fact finding meeting on 21 June without offering a specific reason, other than noting what he said were inaccuracies in the meeting invite letter. On 27 June he said he would not be attending a second scheduled fact finding meeting on 2 July without offering a specific reason, though referred to having submitted a full statement and that the

ongoing correspondence from Mr McConnell was bullying and harassment. Whatever his reasons for not attending the meetings it was not because his back condition placed him at a disadvantage in terms of attending and participating. In the circumstances we do not uphold the Claimant's complaint that the Respondent breached is duty to make adjustments in failing to make the adjustments identified at paragraphs 9(c) and (d) of the List of Issues.

Constructive Unfair Dismissal

62. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer (section 94 of the Employment Rights Act 1996).

63. 'Dismissal' includes "where the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct" (section 95(1)(c) of the Employment Rights Act 1996).

64. The Claimant claims that he resigned by reason the Respondent's conduct.

65. In this respect we must consider the Respondent's conduct as at 1 July 2018 when the Claimant gave notice resigning his employment.

66. It is not every breach of contract that will justify an employee resigning their employment without notice. The breach must be sufficiently fundamental that it goes to the heart of the continued employment relationship. Even then, the employee must actually resign in response to the breach and not delay unduly in relying upon the breach as bringing the employment relationship to an end.

67. It is an implied term of all contracts that the parties will not conduct themselves in a manner calculated or likely to damage or destroy the essential trust and confidence of the employment relationship.

68. We refer to paragraphs 12 to 19 of the List of Issues.

> 12. We do not consider that the Respondent acted in breach of contract in June 2017 by the introduction of the summer savings arrangements in response to an identified reduction in mail volumes in the Framlingham area over the summer months. In our judgment it was a legitimate and proportionate response to the situation, particularly in circumstances where the Claimant was not obliged to (and did not) work overtime.
>
> 13. For the reasons already set out, in breach of its legal duty to make adjustments, the Respondent failed to provide the Claimant with a suitable vehicle on 12 June 2018.

14. We do not consider that by Mr McConnell's actions the Respondent breached trust and confidence in inviting the Claimant to attend meetings to discuss his actions in allegedly abandoning his delivery round on 12 June 2018. The Respondent did not act without reasonable and proper cause. In our judgment, the circumstances in which the Claimant left his round, including his van and the mail that was to be delivered, plainly called for an explanation and the Respondent's actions in requesting that he attend an informal management discussion was not an unreasonable or disproportionate response to the situation. However, in our judgment, Mr McConnell's actions in escalating the proposed meeting from an informal management discussion to a fact finding meeting did breach trust and confidence in that it was an inexplicable and unjustified escalation that reflected Mr McConnell's annoyance with the Claimant.

15, 16 & 17. The complaints are well-founded. Once the process moved from being an informal management discussion to a more formal fact-finding investigation, as the potential precursor to formal disciplinary action, Mr McConnell could not act as the investigating officer in circumstances where he had raised concerns about the Claimant's actions and might provide evidence to any investigation. The Respondent is a large, well-resourced organisation. It could and should have arranged for someone independent of Mr McConnell to carry out any investigation (assuming that it was appropriate to escalate the matter in this way). Equally, there was no reason or justification for scheduling the second fact-finding meeting on a date when the Claimant was covered by a Fit Note or, if Mr McConnell mistakenly believed this to be the case, on the Claimant's anticipated first day back from sick leave, nor was it appropriate for the Respondent to state that a decision might be taken in the Claimant's absence if he failed to attend in circumstances where it was aware that he was certified unfit. In the particular circumstances we conclude that unreasonable pressure was being brought to bear to secure the Claimant's attendance in circumstances where he was perceived to have been obstructive.

18. The Claimant has failed to discharge the burden of proof upon him to satisfy the Tribunal, on the balance of probabilities, that the Respondent breached his confidentiality/privacy.

19. For the reasons already set out, the Tribunal has not upheld the Claimant's section 15 EqA complaints.

69. We are satisfied that the breaches above were fundamental breaches of the implied term of trust and confidence and that they played a part in the Claimant's decision to resign even if he acted in purported reliance upon other matters which we have not upheld. The Claimant did not delay in resigning in response to the breaches and accordingly did not waive any of them. The Respondent did not have reasonable and proper cause for acting as it did. In resisting the complaints, the Respondent has not sought to argue that, for the purposes of section 98(2) of the Employment Rights Act 1996, it had a potentially fair reason for treating the Claimant as

we have found that it did. An employer has the burden of showing that it had a potentially fair reason for the dismissal and the Respondent has failed to discharge that burden. In the circumstances we uphold the Claimant's complaint that he was unfairly dismissed by the Respondent.

70. The case will be listed for a remedy hearing and notice of that hearing will be sent to the parties separately, together with further case management orders.

14 May 2021

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Employment Judge Tynan

17/5/21

Sent to the parties on: .....

J Moossavi

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For the Tribunal Office