THE EMPLOYMENT TRIBUNALS

Claimant: **Mr R Heyworth**

Respondent: **Vantec Europe Limited**

Heard at: **Newcastle upon Tyne Hearing Centre**
On: **Tuesday 4th, Wednesday 5th, & Thursday 6th May 2021**

Before: **Employment Judge Speker OBE DL**

Members: **Mr S Hunter**
Mr R Greig

Representation:

Claimant: **In Person**
Respondent: **Mr S Rochester (Solicitor)**

JUDGMENT

The unanimous judgment of the tribunal is as follows:

1. The claim of unfair constructive dismissal is not established and the claim fails.

2. The claim of discrimination arising from disability fails.

3. The claim of failure to make reasonable adjustments fails.

4. The claim of unlawful deduction from wages fails.

REASONS

1. These claims are brought to the tribunal by Mr Richard Heyworth against his former employer Vantec Europe Limited. There are two separate claim forms which have been issued, the first whilst Mr Heyworth was still in employment which alleged disability discrimination and unauthorised deduction of wages and the second

following termination of the employment alleging constructive unfair dismissal as well as disability discrimination and failure to pay wages outstanding.

2. The claimant had been pursuing claims against the respondent for personal injury compensation in relation to two incidents in respect of which the claimant had been off work and had undergone operations. The circumstances of the accidents and the injuries and the claims arising therefrom were not part of these tribunal proceedings although the claims did result in some delay in getting this case to a hearing as did problems caused by the pandemic. We have been informed that the personal injury claims have been settled.

3. The claimant alleges that he was unfairly constructively dismissed by the respondent on the basis that the conduct towards him amounted to a breach of the implied term of trust and confidence which entitled him to resign. He also claims that he suffered discrimination on the grounds of disability. It is accepted that he is 'disabled' within the meaning of the statutory definition in the Equality Act. He claims that the discrimination was direct discrimination, discrimination arising from disability and a failure to make reasonable adjustments. In addition, he claims that he was not paid the wages to which he was entitled.

4. This case has been considered at a number of preliminary hearings before various employment judges. These resulted in orders for the claims to be particularised in more detail and for the respondent to amend its response. On 9th September 2019 Employment Judge Johnson required that the tribunal should be informed as to the position with regard to the personal injury claim proceedings.

5. On 25th October 2019 Employment Judge Aspden discussed the issues in detail and set these out in a format similar to that which has been provided to us as the list of issues and which is agreed between the parties. The case was further considered by Employment Judge Shore in a telephone preliminary hearing on 10th January 2020 when directions were given to prepare the case for hearing which was to take place in September 2020 but which was ultimately relisted for the 4th, 5th, 6th and 12th May this year before a full panel to determine liability only. These being constructive dismissal and discrimination claims, the claimant's case was presented first. Mr Heyworth gave evidence on his own behalf. There were eight witnesses for the respondent, seven of whom gave oral evidence and were available for cross examination. They were Stephanie Donaldson HR Controller, Gary Abdu HR Officer, Noel Foley Senior Supervisor, William Martin Transport Senior Supervisor, Abigail Curry Company Secretary and Senior Corporate Compliance Manager, Richard Bainbridge Transport Supervisor, Michael Kelly Transport Manager. There was also a signed statement produced by Lisa Gardner HR Manager, who did not attend. We were provided with a bundle of documents running to over 320 pages.

6. The issues were set out in the document headed List of Issues.

Findings of facts

7. From the evidence given by the witnesses including cross examination and the documents produced we find the following facts:

7.1 The respondent Vantec Europe Limited is a large transport company based substantially in the North East of England. It has 850 employees and 50 – 60 temporary staff. The most significant part of the business relates to its contract with Nissan to transport vehicles and vehicle parts. The company has two large warehouses as well as a large facility within the Nissan plant. It is part of the responsibility of the respondent to respond to requirements for parts including what are known as "Shouts" when Nissan may be running short of what is required for their production line and these need to elicit a prompt response to avoid fines on the company for breach of their contract terms.

7.2 The claimant has worked as an HGV Class One driver for many years and he commenced employment with the respondent company in this capacity on 12th March 2002. He was appointed to the role of supervisor which he held for approximately five years but then stood down from that role out of choice in 2016, returning to being an HGV driver.

7.3 He was involved in two accidents at work in January and September 2016. He carried on work after the accidents and was engaged in what was called a sequency job.

7.4 From January 2018 the claimant underwent a number of operations on his shoulder and was absent from work as a result. He submitted regular fit notes and was contacted on a monthly basis for absence review meetings in accordance with the respondent's attendance management policies. At a review on 12th September 2018 consent was requested to obtain a GP report and such a report was provided by Mr Heyworth's GP on 8th October with copy medical records and correspondence from the claimant's surgeon. This referred to a possible return to full driving duties within three to six months of that time. The claimant said that he had been told by his surgeon that he would need a total of twelve months to recover from the surgery.

7.5 There was a further absence review meeting on 25th October 2018 when the claimant attended with his union representative. At that meeting he stated that he felt that he was approaching the position of being ready for a return to work. It was noted however that he said that nothing had changed since the previous meeting and that the GP had also made a reference to Mr Heyworth not being fit to return by Christmas. The claimant referred at this meeting to a grievance he had raised in 2016 and that he should have been kept aware of vacancies. It was explained that that grievance was closed off but the claimant could raise a new grievance. It was also said that the company would look at the possibility of other areas of the business for the claimant to work in.

7.6 Early in November 2018 the claimant contacted Mr Abdu to say that he felt ready to come back to work. A meeting was arranged for 15th November. Noel Foley Transport Service Manager was present. The claimant said he was fit enough to come back to work and that he was getting strength back in his shoulder. He was asked if his wish to return to work was due to

financial reasons or that he felt fit and he said it was both. In evidence the claimant stated that he had been assessed by the DWP as fit for work and that benefits were refused and that he had appealed unsuccessfully. These issues had not been pleaded and no documents related to this were produced or in the bundle. Accordingly, the tribunal could not make any finding of fact with regard to any assessment for benefits or the fact that the claimant was saying that he had no income at all, none being due to him from the company, and of him not being able to claim benefits. At this meeting the claimant said that he hoped that he would be able to perform the task of pulling himself into the waggon. There was discussion as to occupational health. It was suggested that the claimant would need to undergo a four-day induction which is used for new starters in order to assess his abilities as to returning to work. The claimant agreed this and said that he would take some outstanding holidays and then return to work for the induction before Christmas, namely before the Christmas shutdown. Mr Abdu provided to the claimant at that time details of vacancies. It was confirmed that the claimant would have a return date of 19th November 2018, take his holidays and physically return to work on 17th December 2018 for the induction. He did not follow up the vacancies. He did not ask to be considered for any stand-in job as a supervisor which had become available when Gavin Hall left the company.

7.7 On 17th December the claimant returned to the site and had a return to work meeting with Noel Foley. The follow-up actions were to assess the claimant's ability to ingress and egress an HGV vehicle before returning to driving duties and for the claimant to inform his supervisor of any concerns he had. At the time the claimant said that he was not on any treatment or medication. After the interview the claimant went to the despatch bay with Mr Foley and attempted to get in and out of the lorry cab. Mr Foley noted that the claimant did not this in what he regarded as a safe manner by using the three points of contact and therefore it was contrary to company's standard operations and H & S protocol. Mr Heyworth was not able to operate the doors or curtains safely with both hands. Mr Foley assessed that the claimant was not using his left hand properly.

7.8 On 18th December the claimant attended the Turbine site to see Mr Martin and undertake a planned induction including learning about changes which had taken place since he had been off work. Mr Martin noted that the claimant had limited use of his left arm and the claimant demonstrated how high he could raise it, to a horizontal position. Mr Martin also noted that the claimant explained "ouch" whilst shuffling papers. Mr Martin spoke to HR who recommended that he assess the claimant getting in and out of the cab. This assessment indicated that the claimant could not use the three points of contact safely and could not operate curtains or straps and would struggle to open and close the rear doors. This was reported to HR with a view to considering occupational health. Fortuitously, it was possible to arrange for an occupational health nurse to see the claimant that very day as she was on site at HTP.

7.9 The report of that nurse, Maxine Yearnshore of Black and Banton, concluded that the claimant was unfit for manual handling duties and she recommended and occupational work-based assessment by Dr Black. In addition, and in the meantime, she recommended the claimant be restricted from driving duties.

7.10 There was then the Christmas shutdown before which on 21st December the claimant was informed that his workplace ergonomic assessment by Dr David Black would be on 8th January 2019 at Turbine Business Park site and the claimant would take paid leave on Monday 7th and Tuesday 8th January 2019.

7.11 The claimant underwent the assessment. The report was received by the company on 15th January and it concluded that the claimant was permanently unsuited to any work which required him to have access and egress from and into a waggon which required him to pull himself up into the waggon or support his body weight. It recommended he should not perform work with repetitive pushing and pulling of loads. Dr Black stated that the claimant was likely to be regarded as disabled under the Equality Act. Also he stated that the claimant understood that the report would possibly lead to termination of employment on capability grounds.

7.12 On 17th January Stephanie Donaldson wrote to the claimant with the report and stated that as a result the claimant was unfit for work and that he should submit a fit note but that he was not entitled to salary.

7.13 On 21st January the claimant submitted a grievance stated to be against the company's managing director and head of HR. He complained about the fact that he was not being paid and referred to the fact that he had been subjected to bullying and victimisation by managers since 2016. He claimed that Vantec that shown no duty of care towards him and he felt let down. He referred to the two accidents in relation to which he was claiming compensation and for which the company had admitted liability.

7.14 The grievance was acknowledged and the claimant was invited on 5th February to a pre-meeting on 11th February 2019 at the Hillthorn site to be conducted by Abi Curry, Company Secretary and Senior Corporate Compliance Manager. The claimant attended with Chris Dubber his union representative. The purpose of the meeting was stated to be to explore the grievance and to determine against whom it should be addressed. The claimant agreed that it should not be against Martin Kendall and Sharon Clinton. It was clarified that the grievance was about three things – payslips and pensions, any unfulfilled company commitments and paid leave. Abi Curry confirmed that she would investigate this and endeavoured to explain in the meeting some of the points which the claimant had raised. Mr Heyworth was asked if he would agree to progress the consideration of the occupational health reports because he had asked for this to be delayed in the light of the grievance he had submitted. In his evidence he was unsure who had given him the advice to ask for that delay but thought it may be his union representative.

7.15 On 11th February the claimant was invited to a meeting with Bill Martin on 20th February to discuss the occupational health reports. A letter was sent to the claimant on 15th February regarding the grievance issues and contained some relevant documents. A further letter was sent to him by Abi Curry on 25th February in which she stated she hoped the letters had dealt with the issues raised but if the claimant had wished to have a formal grievance hearing would he please let her know. Mr Heyworth did not reply to that letter. The records show that he had contacted ACAS on 19th February to commence early conciliation as a preliminary to presenting his first claim form in the tribunal, which he did on 21st February 2019.

7.16 On 7th March the claimant attended a further absence review meeting with Michael Kelly and Stephanie Donaldson. He was asked if he had any comments on the occupational health reports and he said that he had none but that the company would be hearing from ACAS which was a reference to him having issued his employment tribunal case. He raised the issue of his pay and said he wanted an outcome. He was informed that a capability hearing would be arranged, probably the following week and he accepted this.

7.17 He was then invited to a capability hearing to be held on 14th March 2019 at 12.30pm at Hillthorn. This was to consider his continued absence. It was stated in the letter that a possible outcome was the termination of his employment. The letter provided relevant company policies reports and schedules.

7.18 At the meeting on 14th March the claimant attended with Chris Dubber his union representative. Stephanie Donaldson and Mike Kelly attended for the company. The occupational health reports were discussed. The claimant stated that he agreed the reports and there had been no improvement in his condition. He was asked if he had any recommendations or suggestions as to future work and he said that he did not, unless the cab could be lowered which he felt was unlikely. He was told of two vacancies for supervisors and that interviews for these were the following week. He said he would consider applying. He was asked if he was suggesting any other adjustments or roles but he did not. He then asked if he could have an outcome but he was told that this would not be given that day and that following the capability hearing the company would have to consider alternative roles and amended duties and that he would have to consider options if there were any.

7.19 On advice from his union representative the claimant said he would not wait and he drew out from his pocket an already prepared letter of resignation and cast it on the table and tore up the papers with the details of the vacancies and threw these in the bin. Stephanie Donaldson said that the company had a process to follow and tried to encourage the claimant to withdraw his resignation but the claimant left with his representative saying he would see them in court. He left his fob and said that his uniform would be returned to reception.

7.20 The claimant had contacted ACAS on 4th March and he presented a second claim on 19th March 2019.

Submissions

8. On behalf of the company Mr Rochester made detailed submissions and referred to various legal authorities. In relation to the unfair dismissal claim, he referred to Section 95(1)(c) of the Employment Rights Act 1996 and the well-known case of Western Excavating (EEC)-v-and Clark and the statutory test of unfair dismissal.

9. He then took the tribunal through his view with regard to the allegations which were made by Mr Heyworth as to acts which he said that the respondent had committed and in relation to which he said these were breaches of contract. Mr Rochester submitted that none of these allegations were made out and that there was no basis upon which the claimant was entitled to resign. He also submitted that the claims of disability discrimination, whether direct or arising, were made out and that the company had acted in a proper way taking into account the condition in which Mr Heyworth found himself. He also averred that the claim of reasonable adjustments was not made out in that the company had taken reasonable steps to find or offer alternative options to the claimant but he had not considered these himself or submitted any applications. As to the claim of unlawful deduction of wages Mr Rochester submitted that there was nothing to which the claimant was entitled which he had not been paid and that the company had not had any obligation to pay him anything more than he had received.

10. On his own behalf Mr Heyworth made submissions. He felt that he had been very unfairly treated by the company not only in recent times but over a long period. He submitted that he had been bullied by HR and that no-one had sought to assist him. He considered that the was entitled to resign because of the treatment that he had received and that the company should have found some other suitable work for him and should actively have kept him informed with regard to any vacancies which had arisen during the time that he was off work.

The Law

11. The relevant law to be applied in this case is Section 95(1)(c) of the Employment Rights Act 1996, Sections 13, 15, 20 and 21 of the Equality Act 2010 and Section 13 of the Employment Rights Act 1996.

Findings

12. We take into account that Mr Heyworth has represented himself in these proceedings and has not had the assistance of legal representation. He has endeavoured to deal with the complex issues and evidence in the case and we acknowledge that it is difficult for a lay person to undertake detailed cross examination of witnesses on the relevant issues which are being challenged. However, it is necessary for us to resolve conflicts in the evidence where that which is put forward by the claimant differs from that which is advanced by the respondent. In this case and taking all factors into account and applying the overriding objective to produce a fair hearing, we have concluded that the accounts given by the

respondent's witnesses were clear, reliable and consistent and were corroborated by full documentation at each stage. We noted that many of the respondent's witnesses were asked any or few questions and that their evidence was not challenged. In such a position we must accept the evidence given under affirmation by witnesses if it is not challenged in detail. For these reasons we conclude that where there were conflicts in relation to what was said and done, we find that the case presented on that evidence by the respondent was more convincing and persuasive.

13. In expressing our findings, which are all unanimous, I now deal with the list of issues as the effective agenda setting out those points which we need to determine in order to reach our judgment.

1. As to the claims being in time, we find that the claims were in time and therefore we have jurisdiction to hear them. No case was advanced in relation to any aspect of the case on the basis that any part of it was statute barred.

2. It is therefore not necessary for us to extend the time.

<u>Constructive unfair dismissal</u>

3. The claimant has indicated that he relies upon the alleged breach or breaches of the implied term of mutual trust and confidence rather than breach of any other express or implied term of the contract of employment.

4. With regard to the five acts which the claimant suggests on the part of the respondent caused or triggered his resignation our findings are as follows:

(a) As to finding of alternative employment other than HGV driving, this did not arise until late in the narrative when it appeared that the claimant was suggesting he would be able to consider returning to work. Vacancies were supplied to him at two separate meetings and this included at the capability hearing itself. The vacancies were still available for the claimant to apply for which he said he would consider at the capability meeting but which clearly he did not as he resigned in that meeting. It is significant with regard to the question of alternative employment that the claimant did not make any express suggestions with regard to alternative roles. Some of the matters which were discussed within the tribunal hearing appeared to be matters which would not have led to any alternative role such as the driving of seven and a half ton trucks or the occasional driving of a transit van in relation to which there was no job allocation.

(b) It was suggested that the occupational health appointment was not arranged quickly enough. We find no basis for that suggestion. In the event, very shortly after the question of occupational health became a suitable consideration, it was fortuitous that an occupational health nurse was available on that same day and she undertook a preliminary assessment and expressed a detailed

opinion. There was no further delay in having the full assessment made, the report produced and acting upon it. Any delay that there was in relation to this aspect, appeared to be because the claimant on the basis of some advice he had received, felt that consideration of capability or occupational health should be deferred whilst he had an unresolved grievance.

(c) Sending the claimant home on 18th December after it had been found that he could not safely operate a vehicle is not in our finding something which could amount to a breach of the implied term of mutual trust and confidence. It was an obvious step which had to be taken bearing in mind the claimant could not safely drive and it would not be safe to press him to do so.

(d) The grievance was raised on 20th January and it is suggested by the claimant that it was not dealt with in a timely manner. Having heard the evidence, particularly that of Abi Curry, we find that the grievance was indeed dealt with in a timely fashion. It was appropriate to have a pre-meeting bearing in mind that the grievance had been addressed to the managing director and head of HR of the company and there was doubt as to whether this was in fact the intention. The pre-meeting was able to resolve that it was not appropriately addressed and progress was made with the grievance at that meeting because some of the matters were capable of being answered there and then. This was followed up quickly by two detailed letters giving the claimant answers to points that he made supporting this by relevant documentation. In the second of those letters, Abi Curry had asked the claimant whether he was satisfied with everything that had been produced or whether he still wished to go ahead with a formal grievance hearing. The claimant did not respond to that. Therefore we find that there was no failing with regard to how that grievance was handled by the company.

(e) Failing to dismiss the claimant on capability grounds. The claimant argued that he had been told that by the time of that capability hearing there would be an outcome that day. The evidence informs us that this was not the understanding. The company was pursuing its policy with regard to capability and the claimant had been told in advance that termination may arise but certainly there was no evidence to the effect that he was told that it would definitely arise. It was clear that the claimant hoped and expected that he would get an outcome which would have meant that he would be given notice of termination and in all probability be paid for that notice in lieu, amounting to the £5,000 which he suggested that he would receive. However, we do not find that the failure to dismiss on that day was any breach of the implied duty of mutual trust and confidence bearing in mind that it was a matter of the company following its own policies and also taking into account that at the meeting two vacancies had been suggested which, if the claimant was able to attend interviews and was successful, then his employment would not need to be

terminated at all which would be in his interests as well as in the interests of the company.

5. The question is whether these alleged acts or omissions occurred on which we say that the events occurred but they do not in our view amount to breaches of the implied duty referred to.

6. Issue 6 does not apply as we do not find that these were breaches.

7 As to 7 we find that in relation to the matters listed, the company did have reasonable and proper cause for behaving as it did and this applies in each of the five paragraphs referred to. With regard to the second bullet point we do not find that any of the conduct complained of was calculated to, or did, seriously damage the employer employee relationship of trust and confidence.

8. We do not find on the evidence put forward in this case and in particular on those five grounds or any of them that there was a repudiatory breach of the implied term of trust and confidence. In order to produce a finding of constructive dismissal, there would have to be a breach of a significant term of the contract such as the implied term referred to, but we find that this did not arise in this case.

9. As to whether the claimant resigned in response to the alleged breach or breaches or not, it appeared in the evidence he gave to the tribunal that there may have been a number of reasons for his resignation but what most activated him at that time, and this was clear from the fact that he had already commenced steps to issue a tribunal application, was that he was not being paid by the company because we find that he was not entitled to be. For whatever reasons he was not able to claim benefits. As stated earlier, we could not comment with regard to the reasons why he was unable to achieve any income in benefits but that is outside our jurisdiction and it is not necessary for the purpose of deciding this case.

For the reasons stated therefore the constructive dismissal claim is not made out and is dismissed.

Disability discrimination

10. The claimant was a disabled person within the meaning of Section 6 of the Equality Act 2010 during the relevant period.

Direct discrimination

11. We find that the respondent did send the claimant home from work on 18th December 2018.

12. As to a comparator it was not clear to us who was put forward as a relevant comparator. This should have been a person who was not disabled within the meaning of the Equality Act but who would have been sent home in the

same way. That would be a hypothetical comparator and endeavouring to look at such a person, we find that any other person who was not able to perform the role for which he was employed, in this case an HGV driver, even if not disabled, would have been sent home on the basis that he was not able to do the job and that it would have been unsafe for him to do so..

13. On that basis therefore as indicated in the list this claim fails. Issues 14 and 15 do not need to be considered in the circumstances.

Discrimination arising from disability Section 15 Equality Act 2010.

16. As stated above the respondent did send the claimant home from work on 18th December 2018.

17. The respondent did treat the claimant unfavourably in the sense that if he wanted to stay at work then he was being prevented from doing so, then that was unfavourable.

18. Was the unfavourable treatment due to or in consequence of disability? We find that it did and that potentially that would be a claim of discrimination.

19. However, although this was arising from his disability, the statutory defence is available when considering whether the respondent by its actions was using sending him home as a proportionate means of achieving a legitimate aim. The legitimate aim here we find was not allowing Mr Heyworth to undertake work for which clearly he was not physically capable at the time. The company was preventing Mr Heyworth from causing injury to himself and possibly injury to others. Therefore we find that the statutory defence applies and that sending Mr Heyworth home from work was a proportionate means of achieving that legitimate aim.

Reasonable adjustments Section 20/21 Equality Act 2010

20. The provision, criterion or practice referred to is for Mr Heyworth to carry out the role of HGV driver.

21. Did that put him at a substantial disadvantage compared to persons without disability? We find that it did put him at a disadvantage because it was due to his disability that he was unable to work.

22. Was the respondent in breach of a duty to take such steps as was reasonable to take to avoid that disadvantage? Our conclusion and finding on this is that the respondent did take reasonable steps to seek to prevent the claimant suffering from the disability of not being able to drive. It did this by a full assessment of him both ergonomic and occupational health and obtaining details from his GP and from his surgeon. They did this by asking him at repeated meetings as to whether he had any suggestions with regard to work which he could do and they did this by making available to him vacancies for which he could apply but for which he did not apply and it is relevant that some of those vacancies were open and available on the day

when the claimant brought his own employment to an end. Accordingly, we find that the steps taken by the company were reasonable in all the circumstances and that there was no failure by the respondent to comply with the statutory responsibility and duty under Sections 20 and 21 and this covers the issues in paragraphs 23 and 24.

Constructive dismissal

The further suggested issue is that the alleged acts of discrimination entitled the claimant to resign and that that would be another basis for a finding of constructive dismissal. As we have not found the claims of discrimination established, there is no basis for us to find that these supported a successful claim of constructive dismissal.

Unlawful deduction from wages

26. It is noted that the claimant accepts that he could not do the job he was employed to do when he left work on 18th December.

27. He contends that he was told he would receive full pay and that he should have received that pay. Our finding on the evidence is that there was no agreement that he should receive full pay, that his contract of employment and the company policies did not entitle him to any further payment, apart from that which he received, including payment on 7th and 8th January when he attended by agreement.

28. We find that nothing was properly payable to the claimant after he went home on 18th December other than pay for holidays over the Christmas break and the specific days identified on 7th and 8th January.

29. We find the respondent did pay to the claimant that to which he was entitled.

30. We do not find that any further sums were or are due and owing to the claimant and on this basis the claim of unlawful deduction from wages is refused and the claim fails.

14. For these reasons all of the claims are successful and the unanimous judgment of the tribunal is that the claims fail and are dismissed.

15. These are the findings of the tribunal. We express our sympathy with Mr Heyworth for the injuries he suffered and for what no doubt has been a very difficult period for him and we hope that things improve. We thank those who have attended for their assistance with the hearing.

EMPLOYMENT JUDGE SPEKER OBE DL

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 14 May 2021

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