EMPLOYMENT TRIBUNALS

Claimant: Mr S Cummings

Respondent: London United Busways Ltd

Heard at: London South by CVP **On: 30 and 31 March 2021 and in chambers on 1 April 2021**

Before: Employment Judge Khalil sitting with members
Mr P Adkins
Mr M Marenda

Appearances

For the claimant: Ms Painter, Counsel
For the respondent: Mr Byrne, Solicitor

RESERVED JUDGMENT

Unanimous Decision:

The claim for constructive unfair dismissal pursuant to S.94/95/98 of the Employment Rights Act 1996 is well founded and succeeds.

The claim for a failure to make reasonable adjustments pursuant to S.20 Equality Act 2010 is well founded and succeeds.

A Remedy hearing will be listed if the parties indicate this is required. The parties are encouraged to resolve remedy privately. Both parties are to write to the Tribunal within 28 days of receiving this Judgment to confirm whether or not a remedy Hearing is required and if so a time estimate.

Reasons

Appearances, claims and documents

(1) This was a claim for constructive Unfair Dismissal under S. 94/95/98 Employment Rights Act 1996 ('ERA') and for Disability Discrimination contrary to S.20 Equality Act 2010 ('EqA') (reasonable adjustments). The claimant was

also seeking an award under S.38 Employment Act 2002 in the event that any of the claims were successful and when the claim was presented, there was no up to date S.1 ERA Statement of Employment Particulars.

(2) The claimant was represented by Ms Painter, Counsel; the respondent was represented by Mr Byrne, Solicitor.

(3) Following discussion with the parties on day one, the Tribunal announced it would determine liability only at the Hearing as this would ensure the case finished and would leave enough time for the Tribunal to have deliberation time on day 3.

(4) The Tribunal heard from the claimant. The claimant's mother had also produced a witness statement which essentially dealt with the claimant's disability of depression and its impact on him. It was accepted by the respondent. The Tribunal had no questions on that statement. It was accepted in evidence on that basis. The Tribunal heard from Mr Mitchell, Staff Manager, Mr Newman, Operations Manager and Mr Evans, General Manager, for the respondent.

(5) The issues in the case had been agreed in a Case Management Order dated 8 April 2019. In addition the question of whether the claimant was disabled by reason of depression at the material time had been determined in the claimant's favour following an Open Preliminary Hearing before Judge Cheetham QC on 22 September 2020 (Judgment sent to the parties on 2 November 2020).

(6) The Tribunal had an electronic bundle of 371 pages and a short supplementary bundle of 17 pages. Upon the Tribunal's direction, a few additional documents were produced by the claimant on day two in relation to the claimant's partner's house purchase/move on the basis this may have relevance to the issues the Tribunal needed to deal with.

(7) The evidence and submissions completed just after 4.00pm on day two leaving the Tribunal to deliberate in chambers on day three. Both parties prepared written submissions.

Relevant Findings of Fact

(8) The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence/documentation during the hearing, including the documents referred to by the parties, and taking into account the Tribunal's assessment of the evidence.

(9) Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence or submissions.

(10) On 18 May 2016, the claimant received an oral warning for 6 months. This was in relation to his attendance/absence. The outcome letter was at page 103. The notes of the meeting which took place were at pages 101 and 102. It was noted at the meeting that the claimant had had 29 days of absence for depression since 9 June 2015. He was also taking 40 mg of Fluoxetine. It was noted that he had been on the anti-depressant medication for a couple of years, initially on a 20 mg dose. The claimant said his GP had offered counselling which he had declined. In oral testimony at the Hearing, the claimant said he didn't believe it would work for him. In addition, there had been 15 days of absence for depression, sleep disturbance and then followed by further depression from 8 January 2016. There were a number of shorter absences between 1 and 3 days for unconnected reasons – including childcare, customer disputes, his sister's heart attack and knee pain. The claimant's union representative, Mr Duncan, also referred to his ailments being down to stress.

(11) On 7 March 2017, the claimant received another oral warning for 6 months for attendance/absence. This was at page 116. The notes of the meeting were at pages 113 to 115. There had been 12 spells of absence, 29 days in the 12 months previous. There was no record of any of this absence being because of depression. The range of reasons was: back, dental, vomiting, headache, loss of his wallet, in-growing toe-nail, overslept, looking after his partner's children (twice), upset stomach, an occasion where he thought he was still on holiday and an occasion when he was too tired. The claimant was critical of being told to remain on sick leave instead of being given light duties in relation to the absence for his in-growing toe-nail.

(12) On 11 July 2017, the claimant received a written warning for attendance/absence for 12 months. This was at page 125. The notes of the meeting were at pages 122 to 124. The reasons for absence included childcare because his partner was unwell, blood tests (for diabetes) and sleep disorder. It was noted that he had been suffering with stress for the last 5/6 years and he was still taking Fluoxetine. The claimant was offered counselling which the Tribunal accepted was an offer made by Mr Mitchell but this was declined by the claimant. There was no express discussion or reference to depression at this meeting but the Tribunal noted that between 26 May 2017 and 9 June 2017, the claimant had been signed off with stress/depression (with medication) – the fit note was at page 120.

(13) The claimant was signed off as sick between 15 January 2018 and 29 January 2018 by reason of depression (page 128).

(14) The claimant was also signed off sick between 26 February 2018 and 12 March 2018 by reason of depression (page 135).

(15) On 27 February 2018, Mr Mitchell had a long term sick review meeting with the claimant. The minutes were at pages 133 to 134. At this meeting it was noted the claimant's mother was unwell. Further, the claimant had been referred to 'I-Cope' (Community Mental Health Trust ('CMHT'). The claimant remained on Fluoxetine but had a counselling appointment to see if his medication needed to be adjusted. It was noted the claimant wanted to '*hide away and disappear'*.

(16) The claimant emailed Mr Mitchell on 1 March 2018 asking to alter his holiday dates. In addition, he asked:

"And if there isn't any light duties I could do, would I be able to work Monday to Friday 7.00am to 17.00 as I feel this would help improve my mental health"

(17) In response, on the same day about 1.5 hours later, Mr Mitchell confirmed the claimant's change in holiday, and said he had made enquiries about light duties and said nothing was available. He also said his request to work Monday to Friday could not be allowed as all special arrangements were being reviewed. He said because there were a lot of staff not working weekends, he had been told to cut back the number of staff on special arrangements for business reasons. The Tribunal noted from paragraph 26 of Mr Mitchell's witness statement that at the time approximately 15% of drivers were working 'special' shifts.

(18) On 25 April 2018, the claimant attended a hearing to deal with his attendance/absence. In addition to a series of 7 unconnected periods of absence between 1 and 3 days since 11 July 2017, the claimant had been off for 59 days by reason of depression since 12 January 2018. At this hearing, the claimant's union representative, Mr Duncan, when summing up, asserted that he believed the claimant was covered by the Disability Discrimination legislation; that he had not been give any help from Allocations regarding his shifts to suit his low moods; no reasonable adjustments had been made. He said the claimant's condition was recurring and fluctuating. He said that doing early shifts and different routes would put him in a healthier state of mind. He sought advice and guidance to assist the claimant. This was at page 140.

(19) Mr Mitchell confirmed the outcome of this hearing in a letter dated 25 April 2018. He issued a stage 3 final written warning for 2 years. In his letter, with regard to disability discrimination, he said he had undertaken some internet research and he cut and paste some advice from a law firm about disability. He then went on to say:

"*Giving advice and guidance about coming to terms with the work environment is not relevant as your condition is not work related. Your recent absence from work related to personal family issues for which you are already receiving CMHT treatment"*

(20) He also said he was not aware of any requests to change shifts and said if the claimant submitted a "mutual" exchange, he thought it could be processed with the other requests made on a daily basis.

(21) On 30 April 2018, the claimant made a flexible working application ('FWA'). He asked to do the early shift on different routes and to be finished by 4.00pm.

(22) He did not complete the sections dealing with the impact of the new working pattern or how the respondent could accommodate the new working pattern. This form however was out of date as it still referred to the old requirements of

the applicant needing to care for a child or an adult requiring care which had changed 4 years previous. The form was at pages 143-144.

(23) Mr Mitchell responded to the claimant's FWA by a letter dated 8 June 2018. He did this without holding a meeting with the claimant. In oral testimony Mr Mitchell said this was because a meeting was not required (2.2 of the Flexible Working Guidance, page 87). The Tribunal found that this guidance did not replicate the previous statutory regime as a meeting was not optional. He stated he could not accommodate the claimant's request as there a significantly high number of drivers on special arrangements and the additional cost was not sustainable. In addition, all drivers working flexibly were required to re-apply to enable a full review of the situation. The letter was at page 146.

(24) On 25 June 2018, the claimant wrote to Leanne Hansen in HR and said as follows (page 150)

"I have been advised to contact you to enquire about any help or advice you could give me about my current situation. I recently had a disciplinary and received a stage 3 final written warning for my attendance. I have been suffering from depression since 2012 and have asked on a number of occasions for help in the form of light duties, swapping my lates for early duties and requesting flexi working from my staff manager and allocation which have all been refused. I feel I've been treated unfairly and all of my requests have been ignored despite having mental health issues compounded by work."

(25) In response, Ms Hansen enquired of the claimant if he was seeking to raise a grievance as an appeal against the warning (if this hadn't been exercised sooner) was out of time. She said his complaint would be referred to the Operations Manager at the garage if he wished it to be investigated.

(26) Ms Hansen emailed Mr Mitchell on 26 June 2018 informing him she had received a complaint from the claimant. Ms Hansen was seeking background information and questioned if Occupational Health advice had been sought as "*when someone is claiming disability, I would think that should be something to be considered by the time they reach a stage 3 warning in order for us to address the issue of 'reasonable adjustments' if these are required".* Ms Hansen also expressed her absolute shock that in his letter dated 25 April 2018, Mr Mitchell had researched advice on disability legislation on the internet and not come to HR. She said if he needed legal advice he must go to HR first. She copied in the HR Business Partner and said Mr Mitchell should speak to the HR Business Partner before anything further is done (pages 147 to 148).

(27) In response to Ms Hansen's email, Mr Mitchell said although the claimant had had a couple of bouts of depression, his main problem with attendance was unrelated and in relation to his internet research, as he had got his answer and "as there was no claim of any disability, I closed the question". The Tribunal found that, in the light of the foregoing chronology, both of these statements were misleading and/or factually inaccurate.

(28) The Tribunal also found that, contrary to Mr Mitchell's oral testimony, there had been no referral to Occupational Health. Whilst the Tribunal accepted that the claimant had declined counselling support in the past, his evidence that he did not think this would help him was accepted. He explained he was not that good at talking and it filled him with dread. He was however receptive to and was taking medication. His evidence was accepted in this regard. In relation to occupational health specifically, Mr Mitchell referred to a 'card' which he said had been handed to the claimant but also said the claimant could not self-refer. The card was not in the bundle, neither was it referred to in his email to HR.

(29) On 3 July 2018, the claimant emailed Ms Hansen stated his intention to raise a grievance. He said:

"Whenever I have asked for light duties or different shifts I have either been laughed at (by allocation) or point blank refused (by Dave Mitchell) and also had the mental health act used against me rather than trying I help me to have a better work place environment. I feel that I can't leave this, as the next person may not speak up and end up leaving a good job."

(30) The grievance followed on 9 July 2018. The claimant said he had been discriminated against under the EqA due to a long term mental health disorder. He said he repeatedly requested light duties or early jobs as late jobs compound his symptoms. He said he had submitted a FWA and his union representative had also asked for help and guidance all of which had been refused without any meeting. He quoted disability discrimination legislation from the EqA and said there had been a failure to make reasonable adjustments by swapping his late shifts for early shifts or light duties of any sort. He said his efforts to resolve this with allocations, asking other drivers to swap and speaking to his manager had not provided a satisfactory outcome (pages 152 to 153). The claimant had sought advice from the Citizens Advice and from the Equality Advisory and Support Service and ACAS before submitting his grievance.

(31) Subsequently by a letter dated 10 July 2018, the claimant submitted his resignation. He said he felt he was left with no choice in the light of his recent experiences regarding his treatment when requesting help to deal with his mental health issues. He said he had lost all confidence in his employer in relation to its duty of care and because of the repeated refusals to make reasonable adjustments. He considered it to be a fundamental breach of contract (page 157).

(32) Mr Mitchell acknowledged the claimant's resignation on the same day following a brief discission on the same day too. In his letter he referred to the claimant's 'incomplete' flexible working application; that the claimant had declined Employee Health care assistance; that his written request was denied for operational reasons and because the claimant did not meet the required criteria to make a FWA; that the majority of absences were unrelated to his medical condition and that his continued employment was at risk and as such the claimant had opted to resign before being dismissed for poor attendance. He also observed that the claimant had not appealed the [stage 3] warning.

(33) A grievance hearing took place on 30 July 2018. This was heard by Mr Newman, Operations Manager. The minutes were at pages 167 to 173. The claimant was accompanied at this meeting by Mr Duncan. The thrust of the meeting was about the claimant's desire for Mr Mitchell to receive mental health training so that in future this could benefit somebody else. In addition, the claimant was critical that Mr Mitchell had said that because the claimant's disability had not been caused at work/was not work-related, he did not need to provide assistance. He also referred to 2 people who received help with flexible working – in oral testimony, the claimant said this was for mental health issues. No further evidence was led on this by the respondent.

(34) An outcome letter was sent to the claimant on 23 August 2018. In his outcome letter, Mr Newman stated that following his interview with Mr Mitchell, he was satisfied that the claimant's FWA was treated like any other FWA which the business could not accommodate. He considered no further action was required against Mr Mitchell. However, he recommended that training on mental health issues could be beneficial for managers in the future. The Tribunal asked Mr Newman if that been followed up and Mr Newman confirmed that the training had taken place, including mental health first aiders. Mr Evans also confirmed that training had taken place which was completed by December 2019. Whilst the Tribunal accepted that some training had taken place, there was no evidence in the bundle of what was delivered, when, by whom and in which format in order for the Tribunal to assess the relevance or scope of this. In any event however, it was common ground that such training had not taken place prior to the termination of the claimant's employment. The claimant was given a right of appeal.

(35) The claimant appealed against this outcome. The appeal was heard on 25 September 2018 by Mr Evans, General Manager. There was no appeal letter/notice in the bundle, neither were there any minutes of the meeting. The outcome was provided on 8 October 2018 (page 181). It was recorded in the invitation letter that the appeal ground was "nobody is listening and just focusing on just 1 part of the case". This was not disputed or challenged. In the outcome letter, Mr Evans referred to discussion at the appeal hearing about the claimant seeking compensation for loss of earnings and training for the managers on mental health. The compensation offer was declined but an offer to re-engage the claimant was put to him but which the claimant declined as he was now living in Margate and because he was now a different person. The suggestion of mental health training for managers was also endorsed by Mr Evans.

(36) The claimant had moved to Margate, Kent with his partner (Ms Katie Solomons), who also had worked for the respondent until she resigned from her employment on 20 August 2018. An email of the same date was produced upon the Tribunal's enquiry of when she had resigned. The Tribunal also probed the claimant in relation to paragraph 104 to 106 of his witness statement, regarding when Ms Solomons had inherited money, when she had started looking for a property and when the offer had been placed and accepted on the property that was purchased and when exchange and completion took place. The claimant

was asked to disclose further information in this regard as it was considered relevant to the issue of why the claimant resigned.

(37) The claimant produced an email from the agents instructed in the sale of the property which was purchased which set out the following time line:

First viewed the property: 21 April 2018
Offer accepted date: 17 May 2018
Exchange date: 20 August 2018
Completion date: 29 August 2018

(38) There was no challenge to these dates by the respondent.

(39) The Tribunal enquired further about the timeline of the house purchase by Ms Solomons. The claimant was recalled to give evidence and said that the inheritance was following the passing of his partner's mother who he believed had passed away in February 2017. It was at the end of that year or early 2018 -December 2017/January 2018 that the inheritance was received and which triggered a house search. The claimant said initially the search was more local but the type of property sought was not affordable. Further, that before it was agreed to purchase the property purchased in Margate, about 3 or 4 other properties had been viewed.

(40) The claimant also said that he did not make the decision to move to Margate until after he had resigned. Whilst he had been living with his mother and seeing his partner on his days off, the claimant said he could have commuted from Margate to Fulwell which he estimated to be about 95 miles with a commute time of about 90 minutes to 105 minutes. He cited an example he was aware of where someone commuted in from Portsmouth. The respondent estimated the commute to be 105 miles and the commute time to be 2 hours or more. The Tribunal did not need to resolve the dispute as in either case, it was a substantial commute in terms of mileage and time for a job which itself entailed driving a bus and having regard to the economics.

(41) The Tribunal did not need to make a finding in respect of the route or routes the claimant wished to drive (or not drive) (or its impact on his mental health), as it was not a direct issue in this case. The Tribunal did note however that driving different routes was mentioned by the claimant's union representative on 25 April 2018 (page 140), which was not consistent with the question put to the claimant in cross examination that he only wanted to drive on the 267 route and was also not consistent with Mr Mitchell's evidence under cross-examination that the claimant did subsequently wish to drive on other routes but not initially.

Applicable Law

(42) Under S. 95 Employment Rights Act 1996 ('ERA'), an employer is treated to have dismissed an employee in circumstances where he is entitled to terminate the contract by reason of the employer's conduct.

(43) The legal test for determining breach of the implied term of trust and confidence is settled. That is, neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee ***Malik v BCCI 1997 ICR 606.***

(44) The correct test for constructive dismissal was set out and established in ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221*** as follows:

Was the employer in fundamental breach of contract?
Did the employee resign in response to the breach?
Did the employee delay too long in resigning i.e. did he affirm the contract?

(45) In ***Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*** it was confirmed that any breach of the implied term of trust and confidence was repudiatory.

(46) In ***Ishaq v Royal Mail Group Ltd UKEAT/0156/16/RN***, the EAT, following a review of relevant authorities, approved the principle that it is enough that an employee resigns in response, at least *in part*, to a fundamental breach by the employer citing the Court of Appeal decision in ***Nottinghamshire County Council v Meikle 2004 EWCA Civ 859.***

(47) S.20 EqA provides:

Duty to make adjustments

Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

The duty comprises the following three requirements.

(3) The first requirement is a requirement, 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.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

Part 3 of Schedule 8, S.20 EqA provides:

Part 3
Limitations on the duty
Lack of knowledge of disability, etc.

20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know:

in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

(48) The general burden of proof is set out in S.136 EqA. This provides:

"If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."

(49) S 136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

(50) The guidance in ***Igen Ltd v Wong 2005 ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

(51) More specifically, in relation to reasonable adjustments, a claimant must establish he is disabled and that there is a provision, criterion or practice which has caused the claimant his substantial disadvantage (in comparison to a non-disabled person) and that there is apparently a reasonable adjustment which could be made. The burden then shifts to the respondent to prove that it did not fail in its duty to make reasonable adjustments ***Project Management Institute v Latif 2007 IRLR 579***. The respondent may advance a defence based on a lack of actual or constructive knowledge of the disability and of the likely substantial disadvantage and the nature and extent of that because of a PCP - S.20, Part 3, Schedule 8 EqA and ***Newham Sixth Form College v Sanders 2014 EWCA Civ 734***.

Conclusions and analysis

(52) The following conclusions and analysis are based on the issues are based on the findings reached above by the Tribunal having regard to the applicable law and the burden of proof. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considers this necessary for emphasis or otherwise.

Constructive Unfair dismissal: was there a breach of the implied term of trust and confidence

Failing to allow the claimant to work on light duties

(53) The Tribunal concluded this was in relation to his request for light duties on 1 March 2018 rather than the anecdotal issue in relation to the claimant's request for light duties instead of being on sick leave when he had his in-growing toe-nail. Nothing was asserted at the time by the claimant as to what this might have entailed, how frequent, for how long and whether this was to be performed exclusively or as part of some other role. Neither was anything fleshed out in the claimant's witness statement, or in oral testimony/under cross examination. There was reference to 'run out duties'/'run-out supervisor' but this was only in relation to the occasion when the claimant suggested he could work instead of being on sick leave because of his in-growing toe-nail. There was no further description of what such duties would entail. The evidence and information on the possibility of undertaking light duties was inadequate in particular which light duties the claimant had in mind which might be available. There was no detail or specificity given to the Tribunal.

Failure to allow the claimant to work flexibly

(54) On 1 March 2018, the claimant requested to work flexibly between Monday to Friday 7.00am to 5.00pm because of his mental health. The Tribunal accepted the claimant had repeatedly made verbal requests of Mr Mitchell and of Allocations in addition. Mr Mitchell accepted the claimant was in his office an "awful lot". The claimant's FWA was rejected without a meeting. Whilst the claimant did not reference his mental health on the form, the form was out of date. He could have said something, but was expecting a meeting. That didn't happen. The flexible working policy which was in the bundle and not a correct replication of the previous Statutory regime in-so-far as a meeting only bring required if necessary; that would only apply if the request was agreed. There was no evidence of what the many meetings between the claimant and Mr Mitchell were about if they not about changing his shift pattern. Whilst the claimant's reason was rooted in his depression, the Tribunal concluded that even if the claimant was asserting the reason was not because of a qualifying disability, it was still related to health or personal circumstances for the foreseeable future. There was no investigation or enquiry, or if there was one, it was wholly inadequate and in paragraph 39 of Mr Mitchell's evidence, the Tribunal noted that his desire was to 'close down' the question. The Tribunal inferred from that language that Mr Mitchell had no open mind at all to the prospect of flexible working having regard to the claimant's depression. The

earlier internet based research without any involvement or engagement with HR was a woefully inadequate way to address the matter. It left a lasting impression in the Tribunal's mind this was the first time Mr Mitchell had ever dealt with a disability related matter and reasonable adjustments in the context of that. There was no referral to Occupational Health. By this time there was an abundance of evidence that the request was, or could be causally linked to his depression.

Being told that because his depression was not caused by work, the respondent was not required to adjust his working pattern

(55) On 25 April 2018, page 142 of the bundle, Mr Mitchell said "*Giving advice and guidance about coming to terms with the work environment is not relevant as your condition is not work related"* This arose from Mr Duncan's statement regarding disability discrimination and reasonable adjustments at the hearing on the same day and the plea for support. This response was, in the Tribunal's unanimous view, as bad as it gets. Notwithstanding the acknowledgment that disability discrimination was extremely complicated, Mr Mitchell had sought to close down the reference based on internet legal advice (which referred to the Disability Discrimination Act 1995 not the Equality Act 2010) and where one of his statements therein manifested a shocking mis-understanding of disability discrimination protection in the workplace – essentially, that if the cause of the physical or mental impairment is not work related, protection is lost. Whether or not a presenting disability triggers the duty to make reasonable adjustments in the workplace is a different question. It was, emphatically, an incorrect statement to say that making adjustments to the workplace was not required *because* the disability was not work related. In relation to this issue and in relation to the working flexibly issue, the Tribunal also noted the respondent's evidence that there was a 10 year wait for early shifts which was viewed by the Tribunal as an unmoveable/unchangeable list regardless of whether there was a more worthy cause for someone to move up the queue, because of their health for example. In addition, the respondent was under pressure to reduce its special arrangements (which Mr Mitchell said in evidence appeared to be exclusively for childcare), to zero. There may well have been business and operational reasons for reducing the numbers but with a target to reduce the special arrangements to zero, this without more, presented as an astounding statement going against the grain of equality, diversity and inclusion as there was no evidence offered that there would be any attention given to making exceptions to such a policy.

(56) In the light of the conclusions above in respect of the failure to allow the claimant to work flexibly and being told that because his depression was not caused by work, the respondent was not required to adjust his working pattern, the respondent did individually and cumulatively breach the implied term of trust and confidence.

Affirmation

(57) The purported delay was between 8 June 2018 (when the FWA was declined) and 10 July 2018 when the claimant resigned and he instigated a grievance.

The claimant did go to HR on 25 June 2018 (page 150) to complain about unfair treatment. That was not consistent with affirmation 'conduct'. The Tribunal also concluded the grievance letter was written on advice which the claimant sought from the Citizens Advice, the Equality Advisory and Support Service and ACAS. It looked like a template and the claimant was told to set out his reasons. In reality it was a resignation grievance, although that was separated out and sent the next day. His grievance resolution was essentially about mental health training – not to get his job back. The reference to compensation at the grievance appeal did not alter that conclusion. It was for the alleged past conduct. He had 2 spells of unauthorised absence in this period around the times he wrote to HR and his grievance and resignation letters (page 183). He had one foot out of the door. There was no affirmation.

Resignation in response

(58) The Tribunal deliberated this issue at length and the claimant had been questioned at length about this by the Tribunal and additional documentation had been requested in relation to when the claimant's partner had purchased her property in Margate, Kent. The claimant was also recalled to give evidence. Having regard to the all the evidence before the Tribunal, the Tribunal concluded, unanimously, that the breaches of the implied term were causally and genuinely linked to the claimant's decision to resign (***Ishaq*** applied). They were not the exclusive cause, there was a clear concurrent issue of the claimant's partner's inheritance from her mother in or around December 2017 and January 2018. The Tribunal concluded that the claimant's partner did start to think about acquiring a property with that money. It was more likely than not that the claimant, who was her partner of 4 years and was clearly integrated in the care/welfare of her children too, would make decisions about his future with the possibility of cohabiting in mind. The Tribunal concluded that the absolute refusal of any reasonable adjustment possibility (because of the claimant's mental health), on 1 March 2018 – on the same day as the request being made would have triggered or catalysed a more advanced thought process about leaving his job. The property which was ultimately purchased by the claimant's partner was viewed on 21 April 2018, and the offer was accepted on 17 May 2018 and contracts were exchanged on 20 August 2018. The key event after 1 March – namely the FWA (which was about 3 weeks before the offer on the property was accepted) and in particular the refusal of the FWR on 8 June 2018 was still a contributing reason to the claimant's resignation. The Tribunal concluded that the requests of the claimant to work flexibly because of his mental health, having had substantial depression absence in the first quarter of 2018, were bona fide and thus not the actions of an employee who had already decided to leave employment and relocate with his partner. The Tribunal concluded, on a balance of probabilities, if the respondent had upheld the claimant's request for flexible working, he would have stayed with his mother during his working days and with his partner on his non-working days. He had lived with such arrangements previously for a number of years. This may well have been reviewed in the future but the Tribunal did not need to speculate beyond that. The Tribunal rejected the plausibility of the claimant commuting daily from Margate to Fulwell which was up to 4 hours of travelling each day. It would not have made any time or economic sense.

Disability – knowledge

(59) The Tribunal concluded that the respondent did not know expressly that the claimant was disabled at the material time. However in dealing with the question of whether the respondent could reasonably have been expected to know, the Tribunal concluded that there was overwhelming evidence that the respondent could be imputed with such knowledge. The gist of the extract quoted in the letter of 25 April 2018 was not neutral and leaned towards a finding against disability by reason of depression. The statement -

"*Even if symptoms of depression have existed for over 12 months, the question is not 'how long has the impairment lasted', rather it is 'how long has the adverse effect on your ability to carry out normal day to day activities lasted*"

- missed out or the likelihood of lasting for 12 months. In any case, this was an entirely unreasonable manner to assess the likelihood of whether the claimant was disabled or not. The respondent did not make sufficient enquiries and fundamentally failed in the face of compelling evidence of multiple absences for depression including a spell of 59 days over a 73 day period, to refer to or seek advice from, Occupational Health (as indicated retrospectively by HR). Had it done so, a proper review of his medical records would have been undertaken and confirmed the conclusion on disability based on some, or all of the analysis and evidence undertaken by the Tribunal who decided the disability question.

Was a PCP of requiring drivers to work 5 out of 7 days with a mix of early, middle and late shifts applied

(60) This was accepted by Mr Mitchell under cross examination. It was also accepted in paragraph 8 of the grounds of resistance (page 49).

Did the PCP put the claimant at a substantial disadvantage because lateshifts adversely impacted the claimant's depression?

(61) The Tribunal announced at the outset of the hearing that paragraph 23 of Judge Cheetham's Judgment (page 42) appeared to have made a finding of fact in relation to the impact of the claimant's depression and the requirement to do late shifts:

"*One of the issues he had was with late shifts, in part because of the amount of time he had to spend between waking up and starting work. Late shifts also adversely affected his already disturbed sleep patterns. I accept the claimant's evidence about his symptoms and about how they affect him*."

(62) The parties, upon the Tribunal's invitation to comment, said that it was *not* open to the Tribunal to go behind this judicial finding linking the claimant's depression and the adverse effect on him, as a result, of doing late shifts. The Tribunal agreed. It was a finding reached following a Hearing, with written documentary evidence and testimony, including a disability impact statement, on the question of whether or not the claimant was a disabled person. Even if the Tribunal was

wrong in this regard, its own analysis of whether the PCP substantially disadvantaged the claimant was consistent. Although there was no medical evidence (causal) before the Tribunal, there did not need to be. The claimant asserted the disadvantage persistently both verbally and in writing (1 March 2018 and via Mr Duncan on 25 April 2018 (page 140). Mr Mitchell had accepted he had a lot of meetings with the claimant. It was not said these were not about his shifts, in particular the claimant's difficulty doing the late shifts. There was no assertion by the respondent to the contrary, the respondent's resistance was about accommodating it. The claimant said he was passed between Allocations and Mr Mitchell with no investigation or resolution. The claimant's evidence was accepted. The Tribunal also noted the claimant's evidence in his impact statement especially paragraphs 22 and 23. The Tribunal reminded itself that substantial means more than minor or trivial (S.212 EqA).

Knowledge of substantial disadvantage

(63) The Tribunal refers to and repeats its conclusions under knowledge and under substantial disadvantage caused by the PCP above in concluding that the respondent could reasonably be expected to know that the claimant was likely to be placed at the disadvantage.

Reasonable Adjustments to avoid the disadvantage

(64) The Tribunal concluded that the respondent could have taken the claimant off late shifts completely; alternatively, to reduce the claimant's late shifts. These adjustments could have been at the Fulwell garage or another garage. There was no evidence of any wider or proper enquiry. In paragraph 1 of the claimant's witness statement, it was stated that the respondent was part of the RATPDEV group operating 1,000 buses over 96 routes with 10 garages in the west, north-west and south-west areas of Greater London. The target to get to zero special arrangements was fanciful as was the suggestion that the claimant had to surmount a 10 year waiting list. No proper or any enquiries were made. There was no evidence as to what had happened with the review of the special arrangements or why there could be no consideration of disability-related or child-care related circumstances beyond a sweeping generalisation about operational reasons and costs. If an adjustment was not reasonable, this would require cogent evidence to say so, which was not forthcoming.

Public access to Employment Tribunal decisions
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

_____

Employment Judge Khalil

18 May 2021

Sent to the parties on:

…….

For the Tribunal:

……..