



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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Case No: 4114726/2019 (V) Hearing at Edinburgh on 16 November 2020, and by  
Cloud Video Platform on 10 and 11 May 2021

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Employment Judge: M A Macleod  
Tribunal Member: M McAllister  
Tribunal Member: M-C McFarlane

Allan Jones

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Claimant  
Represented by  
Mr G Booth  
Consultant

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Kwik-Fit (GB) Limited

Respondent  
Represented by  
Mr A Willoughby  
Barrister

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The unanimous Judgment of the Employment Tribunal is that the claimant's claims  
fail and are dismissed.

### **REASONS**

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1. The claimant presented a claim to the Employment Tribunal on 20  
December 2019, in which he complained that he had been unfairly  
dismissed and discriminated against on the grounds of disability by the  
respondent.
2. The respondent submitted an ET3 resisting the claimant's claims.

3. A hearing was listed to take place in person within the Edinburgh Employment Tribunal on 16 November 2020. The claimant attended and was represented by Mr Booth, Employment Consultant. The respondent was represented by Mr Willoughby, Barrister.
- 5 4. The parties had produced a joint bundle of documents to which reference was made in the course of the hearing.
5. The claimant gave evidence on his own account, and the respondent called as witnesses James Joseph Malley, Operations Manager; Raymond Kerr, MOT Tester; and Andrew Delaney, Supervisor/MOT Tester. The evidence  
10 in chief of each witness was taken by way of witness statement, although the claimant's witness statement was augmented by oral evidence elicited by relatively lengthy questioning by Mr Booth, permitted by the Tribunal.
6. At approximately 12 noon on 16 November 2020, following a short adjournment taken to allow the claimant a break from questioning,  
15 Mr Willoughby notified the clerk that he had received a notification on his mobile telephone advising him that he had come into contact with someone who had tested positive for Covid-19. As a result, Mr Willoughby sought an adjournment of the hearing in order to return to his home to self-isolate in accordance with Government guidelines. Mr Booth consented to this  
20 application, noting that the claimant was very anxious, given the medical conditions from which he suffers, not to be in the same environment as Mr Willoughby. Indeed, he preferred not to return to the Tribunal room while this application was made and discussed. The Tribunal therefore granted the application to adjourn.
- 25 7. The hearing reconvened on 10 May 2021, by Cloud Video Platform (CVP), in light of the claimant's sensitivity to exposure to the virus. The claimant was restored to the witness table (remotely, on this occasion) and concluded his evidence both in chief and under cross-examination.
8. The hearing concluded on the following day, 11 May 2021. It proceeded  
30 smoothly by CVP, there being no significant difficulties with the technology. All participants were able to see and hear each other, and the Tribunal was

therefore satisfied that a full hearing was able to be concluded in a fair and just manner.

9. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

5 **Findings in Fact**

10. The claimant, whose date of birth is 19 July 1960, commenced employment with the respondent on 10 February 2010 as a Master Technician. Initially his role was a mobile role, whereby he would support Operational Managers with technical information and higher level expertise across different  
10 branches of the respondent's business.

11. The respondent is a car servicing and repair company which has over 600 depots across the United Kingdom.

12. In approximately 2015 or 2016 (by the claimant's estimate), he was moved to a static role as Master Technician, based in their Livingston depot at the Carmondean Centre. He was accountable to the Depot Manager, who in  
15 turn reported to the Operations Manager.

13. The respondent issued the claimant with an updated contract of employment (64) as "Master Technician (Static)". The terms and conditions confirmed that the claimant's normal paid working hours would be Monday  
20 to Friday 8.30am until 6pm, with a requirement to work additional hours if necessary.

14. The contract provided that *"You are entitled to a rest break when working in excess of 6 hours. Your line manager will agree the actual schedule and hours of work on a week-by-week basis."*

25 15. With his application in 2010 to the respondent, the claimant was required to complete a confidential medical questionnaire (69). In particular, he answered "No" to questions asking him whether he had any history of asthma or diabetes.

16. In October 2011, the claimant was diagnosed with Type II Diabetes (which was confirmed to the respondent in a letter by Dr Musk, his GP, on 22 April 2014 (81). It was noted that he had a previous history of Irritable Bowel Syndrome, and his doctor said that they were trying to adjust his medication so as to provide control over his diabetes while not affecting his ability to carry out his work. At that point, he expressed the view that the claimant was not suffering from “a disability as such”.
17. The claimant was also diagnosed as suffering from asthma, in approximately 2016 or 2017.
18. His work was affected by his diabetes, but not by his asthma.
19. The claimant requires, and at the material time required, to take medication for both conditions. For diabetes, he has been prescribed Metformin since 2011, Sitagliptin since 2014; and Gliclazide, since 2018. For asthma, he was prescribed Fostair since 2019, and a Salbutamol inhaler which he has used as required since 2019.
20. The claimant’s colleagues, and in particular Mr Delaney and Mr Kerr, were aware that the claimant suffered from diabetes, and from time to time, Mr Kerr would discern that the claimant required to eat in order to supplement his blood sugar, and would provide him with a biscuit or similar snack. Mark Tait, the centre manager at Livingston, said that he was not aware that the claimant suffered from diabetes, though he accepted that he would go home for lunch each day.
21. The respondent, it should be noted, conceded in submission that the claimant does, and did at the material time, suffer from a disability under section 6 of the Equality Act 2010, both in relation to diabetes and to irritable bowel syndrome.
22. On 10 March 2014, the claimant emailed Charles Kelly, Operations Manager (69). In that email he made reference to his medical conditions:
- “We all know people with diabetes and how this can be managed with good drug control and diet. The side effects of the drugs I am required at this*

*time to take are painful and embarrassing. My doctor has made my position clear if I don't conform to medication, I am at risk of organ failure and a reduced life span of 15 years.*

5 *The medication makes [me] very weak, nausea, pain in my lower left side, and impairs my concentration skills. This also affects my bowel control.*

*Why consult you know (sic)? This is because I know my monitoring within the NHS will impede on the business and my operational schedules. Please accept my apologies in advance.*

10 *I strive to support the company 100% and for the first time in my career have not had the resolve to do so. Nothing less is enough for me. You have supported me in my role as Master Technician from the onset and you deserve nothing less in return. Thank you.*

15 *I am hopeful that once my medication balance is achieved I can return to the Jones you had. Thill then I assure you of my best attention that I can provide.”*

23. The claimant met with Mr Kelly and stressed that he had to take better care of himself and take his doctor's advice seriously. The claimant took to heart the doctor's instruction that if he did not conform to his advice there may be consequences for his life expectancy and general health. As a result, the  
20 respondent referred the matter to their HR department, who in turn sought a medical report from Dr Musk. That report, dated 22 April 2014 (81), confirmed that he had been diagnosed with IBS and Type II Diabetes.

24. It was agreed with the claimant that he could take breaks in order to ensure that he eat, drink, test his blood sugar levels or self-medicate, or attend a  
25 medical appointment as required.

25. In March 2015, the claimant submitted his resignation to the respondent (82). He confirmed that his reasons for resigning at that point were personal, and did not reflect the running of the establishment. His resignation followed an incident in which he had refused to look at a

customer's car in Livingston, and had left the building without speaking to Mr Kelly (83).

26. On 27 March 2015, Mr Kelly emailed HR and others to advise that he had met with the claimant on the previous day, and that he had withdrawn his resignation. He said that *“Current situation is that Allan has Serious Diabetes and his friend is Terminal with cancer, He takes on too many jobs and when he can't cope he lashes out as he did on Wednesday.”*

27. The claimant had advised Mr Kelly that the reason why he had resigned was that he was stressed and having difficulties with bowel control, and also that he had a friend who was dying of cancer.

28. On or about 1 or 2 August 2019, an incident occurred at work. At approximately 11am, the claimant, Mr Delaney and Mr Kerr were in the MOT office (some distance from the reception area). Mr Delaney had gone to a local branch of Subway, the sandwich shop, to buy rolls for each of them for a mid-morning snack. The claimant felt his blood sugars were low, and therefore wanted to eat something. Mr Tait entered the MOT office and expressed his annoyance at the three of them having a break together when there was a lot of work to be done. Mr Tait shouted at the three together, and said something to the effect of “I am going to get really angry”. He handed a clipboard and keys to the claimant and instructed each of the men to go back to work. Although he did raise his voice, Mr Tait did not swear at them. His annoyance was directed at all three, and not just at the claimant.

29. The claimant was very unhappy about this incident. His reaction was that since he needed to self-medicate at that point, and felt that he would not be permitted to do so at work, he had to go home. He approached Mr Tait, handed the clipboard and keys to him, shook his hand and said goodbye, wishing him well.

30. The claimant did not specifically say to Mr Tait at that point that he was resigning, or that he would not be back to work. He left the building, and went home in order to self-medicate. He was upset and annoyed at the way

in which he had been treated. He did not raise a grievance against Mr Tait, though he was aware he could do so.

31. Before leaving, the claimant told Mr Kerr that he would not “stand for this”. Mr Delaney and Mr Kerr took the incident to be “one of those things”.

5 32. The claimant did not return to work. On 7 August, Hazel Britt, HR Administrator, wrote to him (107) to say that she was concerned that he had been absent from work since 2 August 2019, and that they had tried to contact him on a number of occasions to no avail. She asked him to contact her within 24 hours, and reminded him that failing to comply with the  
10 respondent’s procedures for notification of absence may lead to disciplinary action against him.

33. On 9 August 2019, Ella Atherton, HR Administrator, wrote to the claimant to invite him to an investigation meeting on 13 August 2019 with Jim Malley, Operations Manager (108). The claimant did not attend the meeting, and  
15 Ms Atherton therefore wrote again to the claimant (109) to advise him that he required to attend a disciplinary hearing on 16 August 2019 with Mr Malley, in respect of gross misconduct, and in particular unauthorised absence, and breaching the absence notification procedures.

34. The claimant wrote to the respondent by letter dated 13 August 2019, sent  
20 by post to their HR department in Letchworth, Herts (110) and received on 15 August 2019:

*“I am writing to confirm that I am resigning from my employment with Kwik-Fit with immediate effect. My resignation is due to the intolerable conduct of Marc Tait who was my manager and my former employer’s failure to make  
25 reasonable adjustments.*

*I consider myself to be a disabled person. I have a number of health issues including diabetes and asthma which HR and staff were well aware of. As a diabetic, I have to ensure that I eat regularly and take relevant medications. I also require medications for my asthmatic conditions and on occasion  
30 medical intervention.*

*I am currently under investigation by my former employer and I was requested to attend a meeting today. Since I have resigned from my employment, I will not be attending any meetings nor will I participate in any investigation because I have lost all trust and confidence in Kwik-Fit, and as such, I do not expect any investigation to be fair.*

*On 1 August 2019 at 10.30, I had a morning break which was due to me. I needed this break because of my conditions. This was because I have to ensure that I eat regularly and take relevant medications for my diabetic and asthmatic conditions. Marc Tait interrupted my break and shouted at me. Among other things, he said 'I am going to get really angry' and he instructed me back to work. He gave me a job sheet and clip board with keys. Two other members of staff were present when this altercation took place.*

*On 2 August, I walked out due to my manager's intolerable conduct and because I could not regulate my blood sugars and control my condition without a break. I am disgusted at the way I have been treated which is why I walked out. Moreover, I think the treatment afforded to me was intolerable because I was prevented from regulating my blood sugars and controlling my conditions. Therefore, I consider myself to have been constructively dismissed and that Kwik-Fit has failed to discharge a legal obligation by failing to make reasonable adjustments.*

*Yours sincerely,*

*Allan David Jones"*

35. Ms Britt wrote to the claimant in response to this letter, confirming the respondent's acceptance of his resignation (113) on 20 August 2019. She invited him to raise his concerns formally if he wished to do so.

36. HR invited Mr Malley to carry out an investigation relating to the issues raised in the claimant's resignation letter. He did so, on 26 November 2019, by interviewing Mr Kerr, Mr Delaney and Mr Tait. Notes of these meetings were produced at 119-127.



37. The notes of the investigation meeting with Mr Kerr confirm the following exchange:

*“JM: Any issues with getting lunch and getting breaks?”*

*RK: None I work mine round the mots and just get them when there is time available but never any problems.*

*JM: What went on with Mark and Allan?*

*RK: Allan didn't like the way that Mark spoke to him and said he had had enough.*

*JM: Does this relate to the time you Allan and Andy were all together?*

*RK: Yes we were all having a roll when Mark came and got us he was not happy and had a go at us all.*

*JM: What did he say?*

*RK: Something about having to find us and we all have jobs to do.*

*JM: Was this pointed to all of you or Allan?*

*RK: All of us...*

*JM: Do you think Mark was out of order?*

*RK: He was annoyed was busy and I've heard worse so no really.*

*JM: Have you heard Mark shout at Allan before?*

*RK: No.*

*JM: Have you heard Mark ever saying to Allan or anyone else including yourself that they are not getting their break?*

*RK: No.”*

38. The notes of Mr Delaney's meeting with Mr Malley disclosed the following exchange:

*JM: How do breaks work in here?*

*AD: Everyone gets them when they want if they're not busy or doing a job. Raymond gets his around the mots and I get them on the move.*

*JM: Has anyone moaned to you about not getting regular breaks?*

5 *AD: No.*

*JM: Now I heard of an incident involving you Allan and Raymond where Mark did shout at you what can you tell me about that?*

*AD: Yes we were having a roll in the mot office and Mark had to come to find us he was not happy and did have a go at us but I understood why.*

10 *JM: What did he say?*

*AD: He just said I'm not here to run after us and gave us jobs to do.*

*JM: How did you all react?*

*AD: Me and Raymond grabbed the jobs and cracked on.*

*JM: And Allan?*

15 *AD: Allan was not happy going on about not getting spoken to in that manner and that he's had enough and said he was off.*

*JM: What happened next?*

*AD: Not sure what happened I think he went up to Mark then left and never came back.*

20 *JM: Have you ever heard Mark shouting at Allan before?*

*AD: No.*

*JM: Had Allan ever mentioned not getting regular breaks or of Mark refusing a request for a break?*

*AD: No.*

*JM: Why do you think Allan reacted the way he did?*

*AD: It's hard to say but I know he had a lot going on in the background his health and other things..."*

5 39. The notes of Mr Malley's meeting with Mr Tait disclosed the following exchanges:

*"JM: He [the claimant] has complained that you weren't giving him his breaks and you shouted at him for having something to eat and he needed regular breaks because of his diabetes.*

10 *MT: Firstly he never told me that he had diabetes I only found out after he left he was never stopped by me for having any breaks in fact he decided when he wanted them and around between 1-2pm he would always leave the centre and go home for something to eat and I never stopped or questioned him about it this was in place before I arrived and it just continued as normal.*

15 *JM: Why is he saying you shouted at him what is that all about?*

*MT: this is the day he left I was in reception it was busy I had jobs needing done and was looking for help and the staff I walked round the centre trying to find Andy Allan and Raymond but couldn't see them I eventually found them all together in the mot office having a roll so I did shout at them all saying I was here to run around and find them and gave them all jobs to do.*

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*JM: So be clear you shouted at all 3?*

*MT: Yes.*

*JM: You did not single Allan out?*

*MT: No all 3.*

25 *JM: How did they react?*

*MT: Andy got on with a job Raymond got on with an mot I asked Allan to check a car over but 5 mins later he came up to me shook my hand and left the centre and never came back.*

*JM: Have you ever shouted at him before?*

5 *MT: Never.*

*JM: Had he ever spoken to you about not getting time to have food breaks or complained about any issues?*

*MT: Never.*

*JM: Has anyone in the centre ever complained about not getting breaks?*

10 *MT: No everyone gets time to have breaks all they do is ask if they are allowed and as long as they are not in the middle of a job I let them crack on.”*

40. Following receipt of the papers, Lauren Hart asked Mr Malley a number of questions by email dated 3 December 2019 (128). Mr Malley replied, that day, with the following answers:

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*“(1) Both Andy and Raymond both say he was not treated any differently than anyone else in the centre.*

*(2) Both Andy and Raymond confirm that Allan was not singled out but he was the only one that took exception to the way Mark had spoke to them all.*

20 *(3) Both Andy and Raymond were aware of Allan’s health issues but Mark states he was not aware.*

*(4) I can’t confirm if Alan ever had a conversation with Mark about his health situation but I am aware that Allan did get released for doctors and dental appointments so I can assume some sort of conversations must have taken place I know for sure that Andy [and] Raymond knew about Allan’s health issues.*

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*(5) They all mentioned that it was the morning and I got a call in the morning that he had walked out from Mark.*

*(6) Andy did see Allan walk up to Mark but he was not close enough to hear how the conversation went.*

5 *(7) Asked this question to all 3 of them said no there was no other situations or incidents like this and both Andy and Raymond said they think Allan overreacted.”*

41. Mr Malley concluded that every member of staff would be given their break each day, and that this was not an issue in the Centre.

10 42. Following his resignation, the claimant commenced new employment with D&G Autocare on 14 October 2019, earning a weekly wage £71.60 less than he earned with the respondent (when comparing gross pay).

### **Submissions**

15 43. For the claimant, Mr Booth submitted that the claimant was diagnosed with IBS in 1999, and diabetes in 2011, following the start of his employment with the respondent.

20 44. He submitted that the respondent were well aware of the claimant's conditions, and in particular that Mr Tait knew that the claimant had diabetes. He asked the Tribunal to accept the claimant's evidence that he had been criticised by Mr Tait for eating a banana in the workplace during the course of June 2019, and that it was more likely than not that the claimant had mentioned his diabetes to Mr Tait at that point.

25 45. The claimant had met with Mr Kelly in 2014 and 2015 and had told him about his medical conditions in those meetings. Given the information which was then provided by the claimant, the only logical conclusion was that the respondent was aware of the claimant's medical conditions and that they amounted to disabilities within the meaning of the 2010 Act.

46. There are indications that the respondent fell short of taking reasonable steps to inform themselves of the claimant's medical conditions. The

respondent was aware that Dr Musk was working with the claimant to improve the management of his conditions. As a result, the respondent should reasonably have contacted Dr Musk in order to obtain further and better information about those conditions.

5 47. Jennifer Connelly, Raymond Kerr and Andrew Delaney all knew that the  
claimant had diabetes. Mark Tait says he did not know, but Mr Booth  
argued that it was more likely than not that he did. When Mr Tait started in  
position it would have been a reasonable precaution by the respondent to  
ensure that an incoming manager be made aware of the claimant's medical  
10 conditions.

48. He argued that the mere fact that the claimant did not advise his new  
employer of the conditions he was suffering from at the point when he was  
appointed does not alleviate the respondent of their obligation to understand  
fully what his medical condition was. It is not unusual for an employee to  
15 refrain from providing full information of a medical condition to a new  
employer.

49. At this point, Mr Willoughby helpfully intervened and conceded that the  
respondent accepted that the claimant was a disabled person at the  
material time, and that they had knowledge of that at the material time.

20 50. The PCP relied upon by the claimant, said Mr Booth, is the requirement to  
work through breaks. Adjustments seem to have been on an informal basis  
rather than a positive commitment by the respondent, and therefore fell  
short of reasonable adjustments made in respect of the claimant. The  
process does not seem to have been reasonable, he argued. It is not clear  
25 what subsequent managers understood the reasonable adjustments to have  
been. The duty to consider reasonable adjustments falls on the respondent,  
not upon the claimant.

51. Mr Malley suggested that there were no problems about the claimant taking  
breaks when he needed them, but Mr Booth argued that this was clearly not  
30 the case, as when he was pulled up about the banana and with what  
happened on 1 (or 2) August. It was all according to the will of Mr Tait. Mr

Tait said that as long as he was not in the middle of a job he would let a member of staff have a break. Mr Malley's investigation was insufficient as he never considered the claimant's resignation letter, and it was carried out 3 months later.

5 52. The event on 1 August (or 2 August) was significant. The claimant described Mr Tait's conduct as very rude, and aggressive. Mr Kerr agreed. Mr Delaney did not, but Mr Booth observed that he was a supervisor. An employer who refuses an employee with diabetes a break is likely to undermine the fundamental implied term of trust and confidence between  
10 employer and employee. He decided that he could not continue to work for a manager who was so hostile and unsympathetic. He had to go home and self-medicate because he was so unwell.

53. The conduct of Mr Tait was sufficiently serious to justify the claimant's resignation.

15 54. Mr Booth referred the Tribunal to the schedule of loss and invited the Tribunal to exercise its discretion in determining the amount of any award to be granted to the claimant.

55. For the respondent, Mr Willoughby repeated his concession that the respondent accepted that the claimant was a disabled person, and that the  
20 respondent was aware of this, at the material time.

56. He addressed the claimant's constructive dismissal claim first. He observed that this emerges from the 1 August incident. The question for the Tribunal is whether or not the implied term of trust and confidence has been breached, by actions calculated to destroy or seriously damage the  
25 relationship.

57. He sought to outline the circumstances of the day in question. He asked the Tribunal to put the interaction into context by noting that the centre manager had been looking for the 3 technicians in order to allocate jobs to them, as he was busy, and found them together eating rolls. He expressed his  
30 dissatisfaction at all 3, not just at the claimant himself.

58. Mr Willoughby pointed out that the claimant gave evidence, orally, before this Tribunal that Mr Tait had “lunged” at him with the clipboard and car keys. That was never alleged in either the ET1 or in the claimant’s original witness statement, in which he says that the clipboard was handed to him.

5 59. Was Mr Tait’s conduct, in that context, so intolerable as to breach the fundamental term of trust and confidence? The respondent says that it was not. Different people interpret actions in different ways, as is shown by the different ways in which the three individuals characterised Mr Tait’s conduct, but none of them suggested that he swore or issued threats. He was simply  
10 frustrated that he could not find 3 mechanics.

60. The claimant’s response, said Mr Willoughby, was not measured nor reasonable. It does not meet the interaction which went before it. He could have phoned Mr Malley, with whom he said he had a good relationship, or he could have employed the grievance procedure. He did neither of these  
15 things but chose the most extreme option. 12 days passed between the incident and the claimant’s eventual resignation. He could have engaged with his employer in that period. The respondent invited him to engage with the investigation and after he resigned they offered him the opportunity to use the grievance procedure. He knew from his experience in 2015 that  
20 when he resigned then the respondent made a considerable effort to reconcile him to them again and to restore him to the business but in this case he did not engage with that process.

61. This was not, he submitted, a repudiatory breach of contract.

62. With regard to the reasonable adjustments claim, Mr Willoughby submitted  
25 that it was put to Mr Malley in cross examination that this was related to fixed breaks. He was concerned that this meant that the claim was making but it now appears that the main concern about reasonable adjustments related to the requirement to work through his breaks.

63. Between the banana comment and 1 August, the claimant was able to take  
30 breaks as and when he wanted. He could go home for his lunch each day. His only concern related to 1 August, and that cannot amount to a PCP.



There is no evidence that in June or July the claimant was required to work through a break, and accordingly the evidence is insufficient to demonstrate that any PCP was applied to the claimant in this manner.

64. Mr Willoughby invited the Tribunal to dismiss the claimant's claims.

5 **The Relevant Law**

65. Section 95 of the Employment Rights Act 1996 ("ERA") sets out the circumstances in which an employee is treated as dismissed. This provides, inter alia

10                   “(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

...

15                   (c) 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.”

66. Where a claimant argues that there has been constructive dismissal a Tribunal requires to consider whether or not they had discharged the onus on them to show they fall within section 95(1)(c). The principal authority for claims of constructive dismissal is **Western Excavating -v- Sharp [1978] ICR 221**.

67. In considering the issues the Tribunal had regard to the guidance given in **Western Excavating** and in particular to the speech of Lord Denning which gives the “classic” definition:

30                   “An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances

5 is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.”

10 68. The Western Excavating test was considered by the NICA in **Brown v Merchant Ferries Ltd [1998] IRLR 682** where it was formulated as:

15 “...whether the employer’s conduct so impacted on the employee that, viewed objectively, the employee could properly conclude that the employer was repudiating the contract. Although the correct approach to constructive dismissal is to ask whether the employer was in breach of contract and not did the employer act unreasonably, if the employer’s conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract.”

20 69. What the Tribunal required to consider was whether or not there was evidence that the actions of the respondents, viewed objectively, were such that they were calculated or likely to destroy or seriously damage the employment relationship.

25 70. The Tribunal also took account of, the well-known decision in **Malik v Bank of Credit & Commerce International SA [1997] IRLR 462**, in which Lord Steyn stated that “The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.”

30 71. It is also helpful to consider the judgment of the High Court in **BCCI v Ali (No 3) [1999] IRLR 508 HC**, in which it is stressed that the test (of whether a breach of contract amounts to a breach of the implied term of trust and confidence) is “whether that conduct is such that the employee cannot

reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice.”

5 72. Section 20 of the 2010 Act sets out requirements which form part of the duty to make reasonable adjustments, and a person on whom that duty is imposed is to be known as A. The relevant sub-section for the purposes of this case is sub-section (3): *“The first requirement is a requirement, where a provision, criterion or practice 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.”*

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73. Section 21 of the 2010 Act provides as follows:

15 *“(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

*(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person...”*

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### **Discussion and Decision**

74. The Tribunal requires to determine two issues in this case:

1. **Did the respondent constructively, and unfairly, dismiss the claimant?**
- 25 2. **Did the respondent discriminate against the claimant on the grounds of disability by failing to make reasonable adjustments in relation to that disability?**

### ***Constructive Dismissal***

75. The claimant complains, in this case, that he was constructively unfairly dismissed by the respondent, and focuses his complaint on the conduct of Mr Tait on 1 or 2 August 2019. We were slightly unclear from the evidence

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as to whether this took place on 1 or 2 August, but are satisfied that the events all played out within the same morning.

5 76. The Tribunal did not have the benefit of hearing evidence from Mr Tait, but did hear evidence from the claimant, Mr Kerr, Mr Delaney and (with regard to his investigation, in which he interviewed Mr Tait) Mr Malley.

77. There is no doubt that Mr Tait entered the MOT office in a state of frustration, and conveyed that frustration to the three individuals seated there, including the claimant, by raising his voice, and telling them that he was going to get very angry.

10 78. Mr Willoughby encouraged us to take into account the context, and we considered that to be appropriate. Mr Tait had spent some time – and there appears to be no dispute about this – looking for 3 experienced mechanics, and when he found them, they were all away from the workshop floor relaxing with a mid-morning snack. The centre was busy that morning, and he wished to ensure that a number of customers who had attended with  
15 their vehicles were served promptly. There is no doubt that he was anxious to get the work done, and that anxiety translated into frustration and irritation with his three senior staff when he found them.

20 79. Neither Mr Kerr nor Mr Delaney took any offence at Mr Tait's annoyance at them, but accepted the rebuke and returned immediately to work. Only the claimant took offence. We accept that an employee may react differently to colleagues when placed in such a position, but it is for the Tribunal to determine whether or not the actions of Mr Tait amounted to repudiatory conduct such as to undermine the implied term of trust and confidence  
25 between employer and employee.

30 80. In our judgment, this interaction fell far short of one which would justify the claimant's resignation in response. Mr Tait expressed frustration and irritation momentarily, in order to encourage staff to return to their stations and continue the work for which they were employed. It is not at all clear that Mr Tait interrupted the break which they were enjoying, as this seems to have been coming towards an end. The claimant did not take any issue

with Mr Tait at that time, nor did he protest that he was entitled to complete his break due to his medical condition.

5 81. Furthermore, the claimant said in evidence that Mr Tait lunged at him when handing him the clipboard and keys. Not only was that evidence not supported by what Mr Kerr and Mr Delaney said, it was also new to the claimant's statements to the Tribunal. He made no reference to what would surely have been a significant adminicle of evidence in either his claim form or his witness statement. This, in our judgment, rather undermined the claimant's credibility, as we considered that it demonstrated that he was 10 willing to exaggerate his evidence in order to inflate the significance of the event, and perhaps more importantly to show up Mr Tait in a much worse light.

15 82. We did not believe that Mr Tait lunged at the claimant, and concluded that this evidence was an attempt to distinguish his behaviour towards him from his behaviour towards all 3 of them in the room. There is nothing to suggest that the claimant was singled out in this interaction. He was treated exactly the same as his colleagues. It is clear that the claimant was very offended by Mr Tait's approach, but that is not to say that Mr Tait was wrong to take a strong line in the matter, nor that this amounted to anything other than a 20 fairly straightforward interaction between a manager with responsibility for a busy workplace under pressure and the senior staff upon whom he must rely in order to fulfil his responsibility.

83. Accordingly, we do not consider that the claimant's contract of employment was in any way breached by the actions of Mr Tait on 1 or 2 August.

25 84. In any event, we would not have been persuaded that the claimant would have been justified in resigning in response to those events. He could have contacted Mr Malley, the senior manager on site, or he could have employed the grievance procedure, but he did not take either of those steps. He did not resign immediately, either, but waited almost two weeks 30 before tendering his resignation. He may have been upset by the prospect of having to attend an investigatory meeting with Mr Malley, but the reason

for that investigation was unrelated to the events of the day in question. He was being investigated for what appeared to be unauthorised absence, and a failure to comply with the requirement to report his absence to his employer. There was no suggestion that the claimant was going to be disciplined for anything he did or said in his interaction with Mr Tait.

85. As a result, we are unable to conclude that the claimant was entitled to resign in response to the actions of Mr Tait, nor indeed of the respondent as a whole, and it is therefore our judgment that the claimant's claim of constructive unfair dismissal must fail, and is dismissed.

### ***Disability Discrimination***

86. The PCP relied upon by the claimant appears to be that "On occasions, my former colleagues and I were required to work through our breaks". As a result, he maintains that he suffered a substantial disadvantage owing to his disability – diabetes – and that the respondent failed to make reasonable adjustments to take account of and ameliorate that disadvantage.

87. On the evidence before us, the claimant has pointed to two occasions on which he maintained a break was interrupted. On the first occasion he said that Mr Tait criticised him for eating a banana on the workshop floor, but our understanding of that evidence was that that was not during a normal break. Rather, that was a snatched opportunity by the claimant to maintain his blood sugar by eating fruit. There is insufficient evidence upon which the Tribunal could conclude that this amounted to a refusal to allow him to take his full break, and we were unclear as to the point of this particular chapter of evidence.

88. The second occasion related to 1 or 2 August. In our judgment, there is simply no evidence that the claimant was not permitted to take his normal break. The issue which arose was that work needed to be done, with a degree of urgency, and the senior manager had been unable to find three of his senior staff at that crucial moment. It is not clear from the claimant's evidence that his break was interrupted other than by a short period, since it

is clear that the three of them had been in the MOT office for some time by the point when Mr Tait arrived.

89. In any event, we accepted Mr Willoughby's contention that this one incident could not amount to a PCP being applied by the respondent. It is clear that on every other day, the claimant was permitted to take his morning and/or afternoon break, and that he was able to go home for lunch every day. While there was a degree of flexibility about when the break would be taken, depending on the needs of the business, the claimant did not suggest that he would be unable to have a break on any other day he worked with the respondent.

90. To suggest, then, that this amounted to a PCP would be to place too much weight upon the evidence which we have heard. One interrupted morning break, in circumstances where the claimant did not protest to Mr Tait that he was entitled to the break due to his diabetes, does not amount to the application of a PCP by the respondent in this case. The respondent asserted that the claimant overreacted by then inferring that this meant that he would not be permitted, as he always had been, to take breaks to self-medicate, eat, drink, check his blood sugars or attend a medical appointment.

91. The evidence demonstrated, in our judgment, that the claimant was consistently and regularly (on a daily basis) allowed to have his breaks, including his lunch away from the workplace, and as a result, the respondent did not apply to him or his colleagues the asserted PCP.

92. In that light, it is our conclusion that the claimant's claim that the respondent failed to make reasonable adjustments must fail. The respondent did, in any event, make reasonable adjustments to ensure that the claimant, for whatever reason, had access to breaks when he needed them, including a daily lunch break away from the workplace, and his own evidence supports the conclusion that when he needed to slip away to eat, drink or self-medicate, the respondent permitted him to do so.

93. It is therefore our judgment that the claimant's complaint that the respondent failed to make reasonable adjustments in respect of his disability must fail, and it is also dismissed.

5 94. The Tribunal owes the parties, and particularly the representatives, a debt of gratitude for their assistance in recasting this hearing at short notice and complying with the requirements of the Tribunal to ensure that the hearing could proceed in such a helpful manner to a conclusion.

10 Employment Judge: Murdo Macleod  
Date of Judgment: 23 June 2021  
Entered in register: 24 June 2021  
and copied to parties

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