THE EMPLOYMENT TRIBUNALS

Claimant: **Mr K Mould**

Respondent: **Go North East Limited**

Heard at: **Newcastle upon Tyne Hearing Centre**
On: **Monday 10th & Tuesday 11th May 2021 (via CVP)**
Deliberations: **Tuesday 25th May 2021**

Before: **Employment Judge Martin**

Members: **Mrs L Jackson**
Mrs R Bell

Representation:

Claimant: **Mr Jackson (Solicitor)**
Respondent: **Mr D Gibson (Solicitor)**

This case was heard by Cloud Video Platform (CVP). The parties agreed to the hearing being conducted by way of CVP, due to the ongoing Coronavirus pandemic.

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is well-founded.

2. The claimant's complaint of disability discrimination is also well-founded.

3. The respondent is ordered to pay to the claimant compensation for unfair dismissal and disability discrimination in the sum of £41,450.36

REASONS

Introduction

1. Mr Jeff Hodgson, the claimant's line manager, Mrs S Connell, Senior Manager, and Mr G Edmundson, Operations Director, all gave evidence on behalf of the

respondent. The claimant gave evidence on his own behalf. The tribunal was provided with an agreed bundle of documents marked Appendix 1.

The law

2. The law which the tribunal considered was as follows:-

Section 98 (1) of the Employment Rights Act 1996 (ERA 1996) "In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show:-

(a) the reason (or if more than one, the principal reason) for the dismissal and,

(b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

Section 98 (2) ERA 1996 "the reason falls within this subsection if it

(a) relates to the capability of the employee performing work of the kind which he was employed by the employer to do"

Section 98 (4) ERA 1996 "the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Section 13 (1) of the Equality Act 2010 "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 15 (1) of the Equality Act 2010 "A person (A) discriminates against a disabled person (B) if--

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

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

Section 15 (2) "Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

Section 20 (1) Equality Act 2010 “Where this Act imposes a duty to make reasonable adjustments on a person, section 21 applies and for those purposes, a person on whom the duty is imposed is referred to as A.”

Section 20 (3) Equality Act 2010 “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.”

Section 21 (1) Equality Act 2010 “A failure to comply with the first requirement under Section 20 is a failure to comply with a duty to make reasonable adjustments.

Section 21 (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.”

Section 136 (2) Equality Act 2010 “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.”

Section 136 (3) “but subsection (2) does not apply if A shows that A did not contravene the provisions.”

Section 123 (1) ERA 1996 “The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.”

Section 123 (4) ERA 1996 “In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales.”

Section 124 (2) Equality Act 2010 “If an employment tribunal finds that there has been a contravention of a provision, the tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate and order the respondent to pay compensation to the complainant.”

Section 124 (6) provides that the amount of compensation which may be awarded corresponds to the amount which could be awarded by a county court under section 119 Equality Act 2010.

Section 119 (4) provides that an award of damages may include compensation for injury to feelings.

3. The case Efobi v Royal Mail 2019 EWCA CIV18 confirmed the guidance in the case of Igen v Wong 2005 EWCA CIV 142, which reiterated the two stage test as required under 136 of the Equality Act 2010.

3 a. The case of Amnesty International v Ahmed 2009 IRLR884 held that the inquiry in respect of an act of discrimination relates to the ground of or reason for the alleged discriminator's actions and n ot the motive for those actions..

3 b. In the case Nagarajan v London Regional Transport 1999 IRLR 572, the House of Lords held that the inquiry in a case of discrimination is whether the protected characteristic had a significant influence on the outcome.

4. In the case of Alidair v Taylor 1986 IRLR 420 the Court of Appeal held that in a case of dismissal for capability, the employer has to show that it has a reasonable belief that the employee was incapable and that there were reasonable grounds to sustain that belief.

5. In the case of East Lynsey District Council v Daubney 1977 IRLR 566 the EAT held "unless there are wholly exceptional circumstances before an employee is dismissed on the ground of ill-health, it is necessary that he should be consulted and the matter discussed with him, and steps should be taken by the employer in one way or another to discover the true medical position."

6. In the case McCulloch v ICI 2008 IRLR846 the Court of Appeal set out a four stage test to determine justification namely:-

   i) the burden of proof is on the respondent to establish justification;

   ii) the tribunal must be satisfied that the measures must "correspond to a real need…are appropriate with a view to achieving the objectives pursued and are necessary to that end." The reference to "necessary" has subsequently been held to mean "reasonably necessary";

   iii) the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it;

   iv) it is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter.

7. Regulation 6 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provides that, in the case of any sum for injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation. In the case of all other sums of damages or compensation, interest shall be for period beginning on the midpoint date and ending on the day of calculation. The parties agreed that the appropriate rate of interest was 8%.

8. The Equality and Human Rights Commission Code of Practice 2015 (EHRC) which the tribunal is obliged to consider and take into account.

9. The case of Polkey v AE Dayton Services Ltd 1987 IRLR 503 where the House of Lords held the tribunal had to consider whether an employee might have been fairly dismissed in any event and the consider chance of that occurring.

10. The case of Chief Constable of West Yorkshire Police v Vento (no 2) 2003 IRLR 102 and updated Presidential Guidance March 2021 on Vento guidelines which states that the three bands are now: lower band for isolated / one off occurrences - £900 - £9100; middle band for more serious cases that do not warrant the higher band - £9100 - £27400; upper band - £27,400 - £45, 600.

The issues

11. The issues which the tribunal had to consider were as follows:

    11.1 In relation to the complaint of unfair dismissal the tribunal had to consider the reason for dismissal. It was pleaded as capability. In that regard the tribunal had to consider whether the respondent believed that the claimant was incapable and had reasonable grounds for doing so. The tribunal had to consider whether the respondent had consulted with the claimant and obtained medical advice and considered alternative employment.

    11.2 The respondent had pleaded some other substantial reason as the reason for dismissal in the alternative, but they did not really pursue this alternative reason.

    11.3 The tribunal had to consider whether the respondent acted reasonably in dismissing the claimant either for capability or for some other substantial reason.

    11.4 The tribunal also had to consider whether the respondent followed a fair procedure and whether dismissal was a reasonable response in the circumstances of the case.

    11.5 In relation to the complaint of direct discrimination, the tribunal had to consider whether the respondent had treated the claimant less favourably by dismissing him. In that regard the claimant relied upon a hypothetical comparator who had also lost his or her PCV licence.

    11.6 In relation to the complaint of unfavourable treatment in respect of discrimination arising from disability under Section 15, the tribunal noted that the unfavourable treatment relied upon was set out at paragraphs 27 1 – 5 of the further information provided with the ET1, namely:- termination of the claimant's employment in breach of contract with short notice; not obtaining further and future medical evidence; avoiding paying company sick pay; avoiding providing private physiotherapy treatment; and denying the opportunity for alternative duties and dismissing the claimant. The claimant's solicitor acknowledged in closing submissions that some of that unfavourable treatment may well amount to consequences of the unfavourable treatment of dismissal. The "something arising in

consequence of the claimant's disability" was the revoking of the claimant's PCV licence by DVLA, because he had suffered a stroke which it was acknowledged did amount to a disability.

11.7 The legitimate aim relied upon by the respondent was to have drivers capable of performing their bus driving duties.

11.8 In relation to the complaint of failure to make reasonable adjustments, the PCPs relied upon were as follows: - terminating the claimant's employment without notice in the event of his PCV licence being revoked for twelve months; providing physiotherapy or other medical treatment; proceeding without obtaining further medical evidence; choosing not to pay his sick pay and proceeding to dismiss him without giving him the opportunity to consider alternative employment. The claimant's solicitor acknowledged that it was really the first of those PCPs which he was relying upon.

11.9 The tribunal then had to consider whether any of those PCPs put the claimant at a substantial disadvantage when compared to non-disabled persons. The substantial disadvantage relied upon was dismissing him without notice.

11.10 The steps which the claimant said should have taken are set out at paragraphs 30.1 to 30.7 of the further information provided with the ET1 which include:- allowing the claimant to serve his notice period and keeping matters under review throughout; allowing the claimant time to recover and consider ability to perform other roles; to provide private physiotherapy treatment through the respondent; obtain further and future medical evidence; pay company sick pay; utilise the furlough scheme; delay and/or avoid a decision to dismiss.

11.11 The tribunal noted that the parties had not agreed a list of issues prior to this hearing. The claimant and respondent were both asked respectively to identify the PCP(s) and legitimate aims relied upon at the outset of the hearing.

11.12 The respondent had conceded that the claimant was a disabled person under the definition of Section 6 of the Equality Act 2010. The respondent did not take any issue about knowledge with regard to the claimant's disability or the potential disadvantage to him.

11.13 In relation to any remedy the tribunal had to consider what was the loss sustained by the claimant, what was the period of any loss, whether he had acted reasonably in mitigating his loss, whether he might have been fairly dismissed in any event and, if so, when and what was the chance of that happening. Finally whether he was entitled to any injury to feelings and, if so, in what amount and whether he was entitled to interest on any such award.

<u>Findings of fact</u>

12. The respondent is a large bus company operating in the north east of England. It employs approximately 1900 staff, the vast majority of whom are drivers. The claimant was employed as a bus driver by the respondent from November 2000. He was recognised to be a good employee with a clean disciplinary record. In 2018, he received a customer excellence out of 1,750 drivers.

13. The claimant's contract of employment is at 61 – 68 of the bundle. At page 6 it refers to termination. It states that an employee will be entitled to twelve weeks' notice after twelve years of continuous employment. It does not indicate that notice can be paid in lieu.

14. The respondent has an attendance management policy which is at pages 77 – 91 of the bundle. At pages 85 – 86 the procedure deals with the management of long-term sickness absence. At page 86 it outlines the procedure for managing long-term sickness absence. It looks to refer employees to occupational health and set dates for review to consider whether an employee is fit to return to work with or without adjustments, and refers to timescales being reasonable for the business. It goes on refer to accommodating for reasonable adjustments and finally refers to consideration of alternative employment.

15. The policy does not set out details about the payment of sick pay. No sick pay policy has been produced by the respondent. It has however produced a schedule showing provisions relating to sick pay entitlement at page 189 of the bundle. The respondent says that employees were entitled to six months full pay and thereafter SSP. The claimant says that employees were entitled to six months full pay and six months half pay. He relies on page 190 of the bundle which seems to suggest that there are two schedules:- one referring to twenty-six weeks full pay and a schedule referring to twenty-six weeks half pay. The same schedule also refers to twenty weeks half pay which Mrs Connell said in evidence on cross examination referred to office staff which was small group of employees. The document at page 189 also refers to SSP. The documents are confusing, but Mrs Connell said tin evidence on cross examination that the additional schedule was simply an error and that the company only ever paid for six months full pay. She said the respondent did not pay six months half pay for drivers but that after six months they were only entitled to SSP.

16. There is no reference in any disciplinary policy or the absence policy regarding what might happen if a driver lost his licence or his PCV licence. There was no suggestion that a driver might be dismissed; albeit that the respondents witnesses suggested that is what would occur. The only reference is at paragraph 19 at page 75 of the contract of employment indicating that an employee must notify their depot manager without delay if their personal circumstances change. In particular, if there are any endorsements on their licence or any other action taken which could be detrimental to their employment with the company as a driver. It also indicates that they have the responsibility of informing the licensing authority, as well as the company, of any changes which could include notifying the company of any change in medical conditions, which could affect their driving ability.

17. The respondent had an agreement in place with the Unite Union which related to medical capability dismissals and the potential for future re-employment which is at page 145 – 146 of the bundle. It states that, in the case of medical capability dismissals only, the possibility of re-employment will be considered, but only if the following criteria were met: - namely the ex-employee becomes fit and well enough to return to work within twelve months post termination and that assessment is based upon a GP or occupational health assessment. If so, re-employment will be offered and the basic previous terms and conditions of employment will be honoured.

18. On 22nd December 2019 the claimant suffered a stroke.

19. The claimant informed his employer and was referred almost immediately to occupational health, the referral being on 31st December - page 147 – 148 of the bundle. He was issued with a sick note for four weeks on 27th December – page 145 of the bundle.

20. A report from occupational health was received by the company on 9th January. It is at page 151 of the bundle. It is a very basic report and provides little in the way of information. It states simply that the claimant is not yet fit to return to normal duties and estimates that the timescale is long-term. It also states that some of his symptoms are improving and will advise at a later date about any temporary or permanent adjustments. It refers to the fact that the employee is likely to be designated disabled under the Equality Act 2010. It also says that occupational health has assisted in completing the DVLA notification and it is likely that there will be implications for his PCV licence. The report states that the claimant is making a good recovery with some residual symptoms and that it will review him further by telephone at the end of January. The report did not provide any specific medical information about the claimant and simply indicated that he was making a good recovery. There was no comment on reasonable adjustments.

21. On 17th January 2020 the DVLA revoked the claimant's PCV licence with effect from 18th January – page 153 of the bundle. It states that they would only consider a reapplication if he can demonstrate at least twelve months freedom from episodes. It does also however indicate that if he has any additional medical information it will be considered as it may able to review his case or that he could appeal against the decision within six months - page 153 – 154 of the bundle.

22. The claimant attended a formal sickness review meeting on 28th January. There are no formal notes of that meeting but simply a brief record of the meeting at page 157 – 158. The claimant was represented by his trade union representative. At the meeting, the respondent referred to the occupational health report received on 9th January and there was a discussion about the DVLA. The brief note of the meeting and Mr Hodgson's evidence indicate that, if DVLA decide to take the claimant's licence, there might be a decision to terminate the claimant's employment and that they will look for suitable alternative employment. He was referred back to occupational health on 11th February.

23. A further occupational health report was received by the respondent. The report is at page 161 of the bundle. By that stage, the claimant's PCV licence had been

revoked. Again, the report does not provide any comment on the claimant's medical condition. It states that he is not fit to return to normal duties and estimates the timescale for return is long-term. Suitable alternative employment is to be considered if it can be accommodated. No reasonable adjustments are suggested. Occupational health also now suggest that it is unlikely that the claimant fits the definition of disabled under the Equality Act 2010. There was no indication that occupational health will review the claimant again.

24. The claimant was then invited to a formal sickness review meeting on 18th February.

25. Brief notes were made of that meeting which are at page 164 – 165 of the bundle. No handwritten notes were produced. At the meeting, it was confirmed that the claimant had had his PCV licence revoked for a year. Mt Hodgson said that the respondent would look for alternative employment. He also suggested that if no suitable alternative employment was available the claimant's employment would be terminated on capability grounds.

26. The respondent wrote to the claimant following that meeting confirming the discussion. The claimant was represented by his trade union representative at the meeting. A further meeting was arranged for 25th February – page 166 of the bundle.

27. The claimant's P45 is at page 171 of the bundle. It states that his leaving date is 21st February 2020. No explanation was given by the respondent as to why the claimant's leaving date was before the final meeting when he was told he was dismissed. Mrs Connell said in evidence that the information relating to the date on the P45 would have been given to her by Mr Hodgson. However, Mr Hodgson could give no explanation as to why the date on the P45 was prior to the final meeting with the claimant to discuss alternative work and dismissal.

28. In his evidence, the claimant said that, on 23rd February 2020 he was told by colleagues that a leaving collection had been arranged for him. It would appear that the leaving collection must have been arranged by the trade union.

29. In his evidence to the tribunal, Mr Hodgson said that he looked for alternative employment for the claimant. He said he used the system which the respondent has where all vacancies are posted called Sharepoint. He also said that, prior to the meeting with the claimant on 25th February, he undertook a further search and telephoned the Deptford depot to find out whether there was any vacancy on the shuttle van service. He said he was told that there was no vacancy – page 167 of the bundle.

30. The claimant attended the meeting on 25th February 2020 which was conducted by Mr Hodgson. The claimant attended with his trade union representative. No notes whatsoever have been produced of that meeting. The only written record of the meeting appears to be the letter of dismissal which it is said confirmed the discussion at the meeting which is at page 168 of the bundle.

31. Mr Hodgson said that he told the claimant at that meeting that he had looked for various vacancies on the internal vacancy server but that there were no vacancies. He said he showed him the server. He also said that he told the claimant that he had contacted the operations manager to find out if there was a vacancy for the Deptford shuttle van but there was told that there was no vacancy. At that meeting he then confirmed that, because of the claimant's medical condition and the restrictions on his PCV licence and that as there was no suitable alternative employment, his employment would be terminated on the grounds of capability with notice. Mr Hodgson stated that the termination would be effective from Friday 28th February.

32. In the letter at page 168, (which is the only apparent note of the meeting), it is suggested that this was something that the claimant understood and accepted. In his evidence, the claimant said the meeting was short. He said he did not really do a great deal of the talking. He said that the union representatives really spoke for him, but they did not really say anything either. He told the tribunal he was not particularly well at the meeting, but was making a good recovery. He had in fact driven his own car to the meeting. The claimant said that he had been assured that something would be done for him and therefore was somewhat shocked to find out that he was dismissed. He also said it was not in his nature to be confrontational and he may well have appeared to have simply gone along with things, bearing in mind he was still suffering the after effects of the stroke.

33. The respondent wrote to the claimant to confirm his dismissal on 26th February which is at page 168 of the bundle. The claimant was paid his three months' notice in lieu.

34. In his evidence, the claimant said that he did not challenge the evidence at the meeting. He trusted his union and thought that they were all working in his best interests. His personality was such that he would not normally challenge such things and was quite an amenable person. That certainly came across in his evidence to this tribunal. At that meeting, he said he was still suffering from the ongoing issues from his stroke and had some problems with speech and concentration. He had left it very much with his union to represent him at the meeting. At that meeting he did however tell the respondent he had driven his own car to that meeting. He still however had some problems with his right hand.

35. The claimant came across in his evidence as a very honest and credible witness He appeared to be somebody who was not very keen on confrontation. He said that he believed that the company would look after him and that the union would be supporting him.

36. In evidence the claimant said it was not clear to him why the union had not been more supportive and forceful at the meeting. He said that it was possible that they simply considered that he would be able to come back because of the union agreement. He said that there was no discussion however about the union agreement at that meeting. He was not told that he would be able to apply to come back within a year. He said that, now in hindsight, he believed that the union were effectively on board with the decision made by Mr Hodgson and did not challenge it on his behalf possibly because of the union agreement.

37. The claimant said that he then went home and decided to appeal against the decision. He sent in a letter of appeal on 29th February 2020, which was three days later. That letter is at page 169 of the bundle. In his appeal letter, he said that he had complied with everything that was asked of him by the respondent. He refers to his good record. He also refers to wanting to work beyond retirement age. He expresses concern about the respondent terminating his contract after eight weeks of sick leave following his stroke. He indicates that he is devastated by what has happened and wants the matter to be resolved internally.

38. An appeal hearing was arranged. However, due to the Coronavirus pandemic it was not possible for it to take place. The claimant put in a more detailed letter of appeal subsequently which is at page 175 – 177 of the bundle. The letter was sent in in March due to the fact that it was not possible to actually hold the meeting because of the pandemic. In that letter, the claimant talks about his record as a driver; the timescales after his stroke up to his dismissal.. He also refers to the fact that colleagues had apparently made a collection for him prior to him being informed of his dismissal. He also indicates that he was improving, as noted by occupational health and believes that alternative employment might be possible. He indicates that the decision to dismiss him was premature bearing in mind his improvement. He asks for his employment to be reinstated and his full sickness entitlement to be fulfilled.

39. The claimant put in a further fit note dated 25 March in which he is certified sick for a further twelve weeks.

40. The respondent offered to delay the appeal until it was possible to meet. Alternatively, they offered to deal with it in writing. The claimant had a number of personal issues in his life relating to his mother at that time and the further delay would assist him in being able to manage those other personal issues.

41. In her evidence Mrs Connell said that she had looked at alternative employment over that period and that no alternative work was available.

42. The claimant agreed to proceed without a face to face meeting. He agreed that the respondent could deal with the matter in writing. Mrs Connell did not offer to do the meeting by telephone, so she could discuss the matter with him and clarify any issues with him.

43. In her evidence, Mrs Connell said that she was looking for alternative work over that period through the Sharepoint scheme. She said that, at the time of the pandemic, no drivers were made redundant although some administrative staff were made redundant.

44. It appears that some drivers were given cleaning duties at the beginning of the pandemic in March 2020. A memo was issued on 18th March asking drivers to volunteer to undertake cleaning duties as is noted at page 236 of the bundle. Mr Edmundson said that the drivers were being asked to do this alongside doing their driving duties.

45. The respondent agreed to the claimant's request to delay his appeal and agreed to deal with it on paper following his request. Mrs Connell did not attempt to telephone the claimant to discuss it.

46. Mrs Connell considered the appeal. Her letter rejecting the claimant's appeal is at page 185 – 186 of the bundle. She notes that Mr Hodgson had checked the company system and with other colleagues to find alternative duties but none were available. She also went on to say that no suitable alternative employment was available. She said that company sick pay is paid at the discretion of the company. She upheld the decision to dismiss the claimant. In the letter, she refers to the agreement with the union which allows employees to return on the same terms and conditions if they regain their licence within twelve months and can meet criteria – page 186 of the bundle.

47. In her evidence, Mrs Connell said that she had looked at alternative employment and concluded that there was nothing available. She said that, at that stage, the respondent was not hiring drivers due to the pandemic. Mr Edmundson accepted in his evidence that some alternative employment might have come up within those twelve months, although it did not do so.

48. Mrs Connell suggested in her evidence that, if the claimant had reapplied outside the 12 month period for re – employment after he got his licence back, he would have been treated favourably bearing in mind the Coronavirus pandemic. Mr Edmundson in his evidence also suggested that the claimant might be looked on favourably. However no contact was made with the claimant by anyone at the company prior to the claimant issuing these proceeding to suggest that he might be favourably treated if he decided to apply under that union agreement.

49. In his evidence, the claimant said that he did not believe that he could apply because he did not get his licence within that twelve month period. He said that no-one in the company had suggested that they would consider him if he applied outside that time limit, because of the pandemic or for any other reason.

50. Another employee Mr V had a stroke in 2018. He had his PCV driving licence removed for twelve months like the claimant. Details regarding this employee are at page 130 – 131 of the bundle. Mr Edmundson gave evidence about this driver. Mr Edmundson had not been involved in the case specifically, but said that this driver was a shuttle bus driver and did not need a PCV licence for that vehicle. He said that, as Mr V did drive a bus which required a PCV licence, the company could continue to employ him.

51. The letter to Mr V by the assistant depot manager at Deptford refers to Mr V's long service and quick recovery from a recent stroke. He talks about retaining him in the role of a shuttle bus driver. In that letter, the assistant manager indicates that the company will review the situation and take account of operational difficulties and unreasonable additional costs as a result of interchanging vehicles to enable a Group 1 vehicle being made available for Mr V. In the letter, he also refers to review periods of three, six and nine months with a view to the employee's Group 2 driving licence being applied for and successfully reinstated after that twelve month revocation. The letter goes on to refer to if

there is any costly or operational difficulties then the company reserve the right to review the situation if it is considered serious or if there is continuous operational difficulties or unreasonable costs and that they may need to reconsider Mr V's continued employment given his lack of a PCV licence and that if no shuttle vans or vehicles are available that they may send him home without pay. This letter shows that the respondent was prepared to retain employees and keep the situation under review until the return of a PCV licence in certain circumstances.

52. On reading the letter it appears that the employee V may have been originally employed as a bus driver and that the respondent was able to accommodate him in the role as a shuttle bus driver and did so. The fact they are reviewing the situation and looking at the position regarding his PCV2 licence suggests that employee V does not appear to have always been employed as a shuttle bus driver, otherwise there would be no reason for them to continue to review the situation or indeed indicate that the situation may change if there were any changes in costs or operational difficulties. It is clear that there was a vacancy and that the respondent was prepared to accommodate him. What is clear from this letter is that a vacancy was available in that case and that they decided to retain employee V as a shuttle bus driver subject to him obtaining his PCV2 licence within twelve months. That appears on the face of it to be a reasonable adjustment which had been put in place for Mr V. Not only did they find him alternative employment, but they made reasonable adjustments for him.

53. The other employee Mr W was driving a shuttle bus. He did not lose his licence. The details regarding Mr W are at pages 128 – 129 of the bundle. It appears that reasonable adjustments were made for him because he required access to the toilet. Accordingly, the respondent in this case again provided reasonable adjustments including a phased return to see if he could permanently return to work driving a bus.

54. The circumstances relating to employee W do not appear similar to the claimant's circumstances. However, his circumstances are possibly very similar to the case of employee V. They may not be entirely the same, but what is clear is that the respondent did, in both cases, address their minds to the question of what, if any, reasonable adjustments could take place.

55. It was clear that the manager who was involved in managing the position regarding employee V tried to retain him. The respondent's witnesses suggested in evidence that, if a driver loses their licence, they will almost certainly be dismissed unless alternative employment is available. That appears to be contrary to what occurred with employee V, who like the claimant ,is likely to have been classed as disabled.

56. In her evidence, Mrs Connell said that the respondent did take advantage of the furlough scheme implemented by the Government to assist employers during the coronavirus pandemic. She thought it unlikely that the claimant would have been placed on that scheme as it was to prevent redundancies. She did not think it would be a correct use of the scheme to put on someone who was unable to work due to the revocation of his PCV licence.

57. The claimant has been on sick leave since his dismissal. He received his PCV licence back from the DVLA in February/March 2021.

58. The claimant said that he was subsequently signed off sick until April 2021. Since then he has been looking for work. He said in evidence that he did not wish to go back to the respondent company because of the way he was treated. In his evidence, he said that he has an opportunity to undertake taxi work with his son-in-law, who undertakes school runs for a local authority. The claimant is going to do the course which would enable him to undertake that work. He anticipates that he would be working a couple of days a week and would be getting about £150.00 per week. It appears that, after a few months he would probably be able to earn as much as he earnt with the respondent if he was working the same number of days. Further, with the economy opening up with the reduction in restrictions due to COVID 19, he acknowledged that there would be more driving work available. He expected to work for another five years.

59. The claimant's gross weekly wages with the respondent was £417.87. His net weekly wage was £352.18. He received £15.04 pension contribution. His net income with pension was £367.23 per week.

60. The claimant said that he had not been to see his doctor or sought other medical treatment following his dismissal. He did however give evidence about how upset he was about the situation and the impact of how had been treated on his confidence, just after having suffered a stroke with the debilitating effects of that condition on him at the time. He talked about how much he enjoyed the job and how he wanted to continue working beyond retirement.

61. It was quite clear to the tribunal from listening to the claimant's evidence that he was still very upset about the situation. He did not come across as someone who would have visited his doctor to discuss the matter.

Submissions

62. Both parties filed written submissions.

Conclusions

63. This tribunal finds that the claimant was dismissed because he suffered a stroke in December 2019. His PCV licence with the DVLA was revoked, so he effectively lost his PCV licence and was therefore unable to drive a bus. Accordingly, he was not capable of undertaking his role. The reason for dismissal was therefore capability.

64. Capability is a fair reason for dismissal under Section 98 (2) of the Employment Rights Act 1996.

65. This tribunal does not consider that the respondent acted reasonably in dismissing the claimant for that reason. They acted too quickly in dismissing him. The dismissed him within approximately eight weeks of him having suffered a stroke. Further, and more significantly they did not properly consult with the

claimant. The meetings with him were brief. Moreover, the respondent made no attempt to obtain any proper medical evidence about the claimant's condition. No medical evidence was provided by occupational health to them. They made no attempt to contact the claimant's GP and obtain proper medical information about his condition. The respondent relied upon an occupational health report which was provide no medical information about the claimant's condition. The only indication by occupational health was that the claimant was improving. Yet they took no regard of that comment and gave him no opportunity to try and improve so that they could have a proper discussion about his ongoing employment. The respondent decided only to consider alternative employment and, once no alternative employment was available, they decided to dismiss him within a week of their initial search.

66. The procedure adopted was poor. The meetings were short - less than fifteen minutes in each case - for an employee who had been employed for over twenty years and who had a good record having only recently received an excellence award. There were no notes of the meeting at all of the final meeting when the claimant was dismissed. The appeal did not rectify those errors. The tribunal does not criticise the respondent for holding the appeal hearing on paper or indeed delaying it, as both were at the request of the claimant. However, the appeal officer could have considered conducting a telephone hearing, but did not do so. Further the errors in the original process were not rectified by the appeal, as there was no proper consultation with the claimant about his medical condition nor was there any attempt to obtain any further medical information. In dealing with the appeal, Mrs Connell made no attempt to establish details about the claimant's condition nor did she obtain any further information from occupational health or the claimant's GP. She based her decision solely on the fact that she had checked whether there was alternative employment which there was not.

67. The tribunal also has some serious concerns about whether the decision to dismiss the claimant was in fact made before the meeting. The documentary evidence would suggest that it was made prior to the final meeting. The P45 appears to have been issued before the meeting to dismiss the claimant. Further, there was a leaving collection organised for him prior to his dismissal.

68. The tribunal do not consider that the union properly represented the claimant fully at those meetings. It looks on the face of it as if there was a tacit agreement between the union and the manager that, as there was no alternative employment available, they would dismiss the claimant and that, if he managed to get his licence within the twelve months, he could apply for his job back under the union agreement. It almost looks like both the respondent and the union were simply going through the process

69. The tribunal has found the reason for dismissal was capability, which is the reason stated in the letter of dismissal.

70. The alternative reason relied upon of dismissal for some other substantial reason, because the claimant did not have the legal requirement to drive a bus is not found to be the reason for dismissal. In any event, the tribunal finds that the

respondent did not again act fairly in dismissing the claimant for that reason for all the reasons referred to above.

71. Dismissal was not a reasonable response in all circumstances of this case. This was an employee with almost twenty years' service who was a very well experienced bus driver. He was a well-respected and well regarded employee; having only the previous year received an excellence award for customer service out of 1750 drivers. Bearing in mind, how long it takes to train up bus drivers, the tribunal would have thought that the respondent would have wanted to retain him.

72. This tribunal does however consider that there was a chance that the claimant would have been fairly dismissed at the end of six months as no alternative employment was available. It was possible that he might have been put on furlough scheme at that point, but unlikely that the respondent would have put him on that scheme if he was not able to undertake his role. The tribunal therefore concludes that there is at least a fifty percent chance that, after six months, the claimant would have been fairly dismissed.

73. This tribunal finds that the claimant would have been entitled to six months' pay under the company sick policy, but that there was no evidence that he would have been entitled to another six months half pay. The tribunal prefer the respondent's evidence that the only entitlement is to SSP after the six month period. The claimant was unable to produce any viable evidence to the contrary.

74. The tribunal consider that the claimant would be able to obtain new employment within the next 6 months at a similar level to that which he earned with the respondent. This is taking account of the fact that he is now doing a course to do a taxi driving qualification and will get work with his son in law when he has completed that course. We also think that with the opening up of the economy and reduction in restrictions during the Pandemic, the claimant could obtain driving work either as a bus driver or some other driving job if he pursued other alternative work within the next 6 months.

75. The tribunal went onto to consider the complaint of disability discrimination:

76. Firstly the tribunal finds that, by dismissing the claimant for capability, he was treated less favourably. However, this tribunal does not believe that he would have been treated differently than a non-disabled person. The tribunal finds that, based on the respondent's evidence, any employee who lost their PCV licence for twelve months would have been dismissed. To some degree, the respondent and, it appears the union were relying upon the union agreement that such employees could apply for their job back on the same terms and conditions if they obtained their licence back within twelve months. This tribunal does not find that there is any evidence that the less favourable treatment was because of the claimant's disability. It finds that any employee losing their licence would have been treated in exactly the same way as the claimant.

77. Next, the tribunal went on to consider the complaint of unfavourable treatment because of "something arising in consequence of the claimant's disability". This tribunal finds that the claimant was treated unfavourably. The unfavourable

treatment was his dismissal with payment in lieu of notice. The other unfavourable treatment relied upon by the claimant are largely consequences of that unfavourable treatment of terminating his employment with pay in lieu of notice. As a result of doing so, he was not able to obtain further and future medical evidence or receive his full entitlement to pay company sick pay, nor was he provided with private physiotherapy treatment or offered opportunities for any alternative duties.

78. The "something arising in consequence of the claimant's disability" was the revocation of his PCV licence as a result of his stroke which the respondent accepts amounted to a disability.

79. The legitimate aim relied upon by the respondent was the requirement for drivers capable of performing driving duties.

80. The respondent did not dispute that they knew the claimant had a disability.

81. The issue therefore which the tribunal had to consider was the question of proportionality. Neither party addressed this matter in any detail. This tribunal had to do a balancing exercise between the needs of the business and the effect on the claimant. The treatment itself of dismissing the claimant did not really achieve the respondent's stated legitimate aim of having drivers capable of undertaking driving duties. In any event, it is difficult to see how I could be proportionate when the respondent itself did not address its mind to the question at all. There is no reference in their response form to the matter of a legitimate aim or proportionality. Further, the legitimate aim relied on would not have retained more drivers, but in fact it would have retained less drivers by dismissing the claimant.

82. Further, it was not proportionate for the respondent to dismiss the claimant to achieve their legitimate aim because when one weighs the needs of the respondent with the effect on the claimant, the latter substantially outweighs the former. The claimant had spent almost twenty years with the respondent, been trained up by them as a bus driver, was close to retirement and had been an excellent employee. His dismissal had a devastating effect on him. Yet, if one weighed that up against the cost to the respondent at that stage, the cost to then was almost negligible. At that stage, rather than dismissing him with pay in lieu of notice, they could have given him his 3 months' notice and/or put the claimant on the company sick pay scheme, which allowed employees six months full sick pay. By the time, he was close to exhausting his notice and/or entitlement to company sick pay, they could have properly considered the matter and kept it under review. The respondent did not replace the claimant nor did they indicate that they needed to do so. They had a policy in place allowing for six months full sick pay. They had therefore already effectively budgeted for such costs. Indeed, shortly after the respondent dismissed the claimant, their actual need for bus drivers to drive buses had substantially reduced, bearing in mind the Coronavirus pandemic. They may well have been able to anticipate that possibility at that stage if they addressed their minds to it. When one weighs up the effect on the claimant, their aim was not proportionate, bearing in mind the provisions which enabled them to budget to pay notice pay and budget for sick pay. Further, the position regarding the claimant's licence may have changed over that period - he might have

appealed or asked for a review of the DVLA decision. Equally further opportunities might have arisen. The claimant might have been able to assist in undertaking the cleaning duties for which other drivers were redeployed during the pandemic.

83. Therefore, when one looks at the question of proportionality taking account of the case law, and particularly looking at the weight of evidence, the impact on the claimant considerably outweighs the needs of the respondent in this case.

84. Finally, the tribunal went on to consider whether the respondent had failed to consider reasonable adjustments:

85. It seems to us that the circumstances of employee V are not dissimilar to the circumstances of the claimant. We do not accept Mr Edmundson's evidence in that regard to the extent that we think it contradicts the documentary evidence. It appears on the face of the letter to employee V that he was possibly a bus driver initially. If he was already an existing shuttle bus driver, it was not clear why they would need to accommodate him at all. Further, there would be no need for reviews or a requirement for him to obtain his PCV 2 licence. No evidence was given by Mr Edmondson as to why that was required. The suggestion is that the respondent may have created a vacancy for him, albeit that clearly there may have been a vacancy available at the time. The respondent in that case also refer to additional and reasonable additional costs if that employee was unable to drive a PCV 2 vehicle and that they may need to reconsider his continued employment given the lack of a PCV2 driving licence. This all suggests that employee V was effectively originally employed as a bus driver and like the claimant had suffered a stroke and lost his PCV licence. In that case the respondent did consider reasonable adjustments. However, we do not consider that they did so in this case. We consider that they failed in their duty in that regard.

86. The provision criterion or practice (PCP) relied upon by the claimant was termination with pay in lieu of notice in circumstances where a driver loses his/her PCV licence after it is revoked by DVLA for a twelve month period.

87. The substantial disadvantage to the claimant of his dismissal with pay in lieu of notice is the loss of his contractual benefits over that period, including private physiotherapy and company sick pay and any potential opportunities for alternative employment during that time.

88. The tribunal find that there were reasonable adjustments which the respondent could have considered: - namely allowing the claimant his full notice period; and/ or to allow him to remain on sick leave and pay him his six months entitlement to full pay whilst keeping matters under review, which may have given him the opportunity to recover over that period and/or avoid dismissal. The suggestion by the claimant that would have meant he could potentially have put on the furlough scheme is less likely, bearing in mind the purpose of that scheme.

89. Therefore, the tribunal finds that the claimant succeeds in relation to two of his claims of disability discrimination namely: - discrimination arising from disability

and his claim for a failure to consider reasonable adjustments. To that extent, his complaint of disability discrimination succeeds.

90. The Tribunal considered what injury to feelings the claimant had sustained as a result of the discrimination. We heard evidence about the effect of the respondent's actions on him, taken in the context of the timing of their actions whilst he was still recovering from a stroke. We also took account of the claimant's character. He did not strike us as someone who would necessarily seek medical intervention, but that, in our minds, does diminish the impact on him and the injury to his feelings. The respondent's representative suggested any award should be in the lower band, but we do not agree. The claimant's representative suggested the top of the middle band / bottom of the higher band. We reminded ourselves of the purpose of these awards and for what it was supposed to compensate the claimant. We think the award should be in the middle band. This was a serious act of discrimination, but we do not think it was so serious to be in the higher band or the top of the middle band. Albeit, it was dismissal, it was still an isolated incident and there was no sustained campaign or previous concerns about discrimination. With that in mind, we are awarding the claimant somewhere in the region of the middle band and have decided to award him the sum of £18,000.

91. The claimant is therefore entitled to compensation as follows:-

Basic Award £417.87 x 48.5 weeks (19 years' service)	**£**	**£** 11,909
Compensatory Award (1) 29th February 2020 – 21st June 2020 - 4 months sick pay at full pay 15.14 x 363.23 Less pay in lieu of notice received over that period - £4226.20. Subtotal	5928.08	£1701.88
(2) 22nd June 2020 – 21st December 2020 SSP at the rate of £93.65 x 26 weeks		£2434.90
(3) December 2021 – April 2021 SSP - 16 weeks SSP x 93.65 (4) 11th April – 11th May 4 weeks		£1498.40

@ 352.18		£1408.72
Pension loss 15.04 x 47		706.88
Loss of statutory rights		350.00
Future loss 6 months @ 367.23		£9547.98
Subtotal		£17648.76
Less 50% Polkey @ 50% Subtotal	8824.38	 £8824.38
Total compensatory award		£20733.38
Injury to feelings		£18,000
Total award		£38,733.38
Interest 437 days x 8% x 18,000 437 days x 4% x 20,733.38 1033.68 Subtotal interest	1724.05 992.93 £2716.98	
Total Award on Compensation		£41,450.36

EMPLOYMENT JUDGE MARTIN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 7 July 2021