EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104367/2020

Heard at Dundee on 21, 22 and 23 July 2021

Employment Judge J Young
Tribunal Member L Brown
Tribunal Member A Shanahan

Mr J Edens	**Claimant** **In person**
Tayside Public Transport Company Limited t/a Xplore Dundee	**Respondent** **Represented by:** **Mr J Boyle,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that:-

1. the claims presented to it under sections 13 and 26 of the Equality Act 2010 are dismissed; and
2. the claimant was not unfairly (constructively) dismissed in terms of section 98 of the Employment Rights Act 1996

REASONS

Introduction

1. In this case the claimant presented a claim to the Employment Tribunal complaining that he had been unlawfully discriminated against on the grounds of sexual orientation. The respondent lodged a response in which they denied the claims and made the preliminary point that many of the matters raised were time barred. Following case management hearings the claimant submitted further and better particulars of his claim which were responded to by the respondent.

2. A preliminary hearing was held on 31 March 2021 at which time the claimant made an application to amend his claim to include a claim of unfair (constructive) dismissal to which no objection was made and application to amend was granted.

3. The issue of time bar was also considered at the preliminary hearing and by Judgment issued 8 April 2021 the Tribunal found that it did not have jurisdiction to hear the claimant's claim of unlawful discrimination on the grounds of sexual orientation insofar as that related to matters which took place prior to 5 May 2020 and as the same were listed in paragraphs 1-18 of the claimant's further and better particulars.

4. At a subsequent preliminary hearing for case management purposes held on 26 April 2021 the claimant was ordered to lodge written details of the matters which he alleged amounted (whether individually or cumulatively) to a breach of the implied term of trust and confidence for the purposes of his claim of unfair (constructive) dismissal. The claimant lodged those written details and the respondent made a response.

Documentation and issues for the Tribunal

5. In line with the order made for the provision of documents the parties had helpfully liaised in lodging a Joint Inventory of Productions, paginated 1-163 (J1-163).

6. In addition, the respondent had lodged a draft List of Issues which had been intimated to the claimant. This had not been expressly agreed but

no objection was taken to any particular part of the draft list and the Tribunal were content that it accurately expressed the claims and issues arising as follows:-

1. Unfair Dismissal – s.95 and 98 Employment Rights Act 1996

Constructive Dismissal: Breach of the implied term of trust and confidence

1.1 At the time of the Claimant's resignation, had the Respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them, such as to indicate it no longer intended to be bound by the contractual relationship?

1.2 Do any of the allegations put forward by the claimant in his further specification of constructive dismissal claim dated 10 May 2021, either individually or cumulatively, amount to a breach of the implied duty of mutual trust and confidence?

1.3 Did the Claimant resign in response to any alleged breach of mutual trust and confidence?

1.4 Was there a delay in the Claimant's resignation and/or could it be said that the Claimant waived the Respondent's alleged breach?

2. Direct Discrimination on the basis of sexual orientation – s.13 Equality Act 2010 (para 19, 20, 21 and 22 further and better particulars)

2.1 In respect of each of the numbered paragraphs 19, 20, 21 and 22 of the Claimant's further and better particulars (dated 9 November 2020), did the Claimant suffer less favourable treatment?

2.2 If the less favourable treatment did occur, was the Claimant treated this way because of his sexual orientation?

2.3 If so, was the Claimant treated less favourably than an actual or hypothetical comparator?

3. Harassment – s.26 Equality Act 2010 (para 20 further and better particulars)

3.1 Did the Respondent engage in unwanted conduct in respect of the conduct described at paragraph 20 of the Claimant's further and better particulars?

3.2 Was this conduct related to the Claimant's sexual orientation?

3.3 Did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, offensive or humiliating environment for the Claimant?

4. Remedy

4.1 Has the Claimant shown the extent of his injury to feelings? If so, what injury to feelings award should the Claimant receive?

4.2 Has the Claimant suffered financial loss as a result of the dismissal? If so, what losses are these?

4.3 Interest? Should interest be awarded and if so at what rate?"

The hearing

7. At the hearing evidence was given by the claimant; Stewart Merchant, a Police Constable stationed at Lochee Police Station; Christine Edens, the claimant's mother; Callum McDonagh, the claimant's partner; Roy Adair, Assistant Operations Manager with the respondent for two years seven months at date of hearing and who had previously spent 16 years in the military; George King, Operations Manager with the respondent for approximately 3.5 years at date of hearing and prior to that in a similar position with another bus company. He had been in the transport industry for a total of approximately 30 years; Christine McGlasson, the Managing Director of the respondent for just over three years at date of hearing and who had previously been involved in McGill's Buses and National Express. There was also lodged a statement from Andrew Motion a former colleague of the claimant (J159/163).

8. From the documents produced, admissions made and relevant evidence led the Tribunal were able to make findings on the issues. Given the nature of the issues some rehearsal of the evidence is necessary.

Findings in fact

9. The respondent is a bus operator based in Dundee operating services mainly within Dundee city. At date of hearing they employed approximately 350 staff including 230 drivers. The claimant had continuous employment with the respondent from 2 June 2014 until 26 September 2020. He was trained by the respondent and drove various routes in and around Dundee. All the buses were one man operated. The drivers were subject to supervision by inspectors in ensuring routes were operated correctly and to time. Roy Adair in his role had responsibility for ensuring the proper conduct and behaviour of drivers. He was able to take disciplinary issues to "level 1" being investigation and final written warning; with his superior George King being responsible for any decision to dismiss.

10. The claimant is bi-sexual and "came out" on 26 August 2016. This became known within the workplace. He relied on certain incidents which took place to demonstrate he was discriminated against on the grounds of his sexual orientation.

Incident at Ninewells on 11 May 2020

11. Around noon on 11 May 2020 a passenger boarded the claimant's bus at Ninewells. The claimant had previous issues with this passenger attempting to use a false bus pass and on this occasion claimant noted the passenger was again seeking to use a false bus pass. Angry words were exchanged. The passenger left the bus and returned with a pair of small scissors and used them to stab the cab window and then scrape the scissors against the bus paintwork. The claimant advised he telephoned the "works traffic office" but got no reply. He telephoned 999 by which time the passenger had left and so he continued on his route. He returned to Ninewells approximately two hours later. He found the police waiting there. He agreed to return the bus to his depot to complete his duty and

was then taken by police car to Bell Street to give a statement. He left after giving that statement. Around 3pm that day a colleague of PC Merchant had phoned the respondent to advise of the matter. In the meantime, the individual who had attacked the bus was traced and apprehended.

12. After departing from the police station the claimant returned to the depot. When back at the depot the claimant completed a report on the incident (J148). That report was signed as being received by Roy Adair on 12 May 2020.

13. The respondent made no enquiry of the claimant as to his wellbeing subsequent to this incident. The position of Mr Adair was that if the claimant had felt uncomfortable "he could have called me". Mr King stated that he was informed of the incident but "nothing else".

14. The written response by the respondent to the Tribunal on this incident (J60) was:-

> "It is unclear whether this is an allegation regarding direct discrimination or harassment. The claimant's bus was taken off service after the incident, which was dealt with by the police, and then the claimant was relieved of the rest of his duty."

15. Further, in their response to the detail given of constructive dismissal the respondent stated (J70):-

> "Claimant was involved in an incident on 11 May 2020 while driving his bus. The claimant was requested to await the Police and report this incident. He was asked by Output if he was injured in any way and if he was able to continue with his duty after he had spoken to the Police. The claimant advised that he was capable of continuing."

16. In a subsequent interview with Ms McGlasson on 11 September 2020 (subsequent to resignation but which interview included this incident) Roy Adair stated:-

> "We didn't really need to do anything as he had already contacted the Police who were dealing with it directly."

and

> "We did view the CCTV and it seemed a minor incident. I have to say he seemed relaxed about the whole affair as he was sitting on the bus on his phone just waiting for the Police. I didn't think this one was a big deal, to be honest."

17. On being advised in this interview that the claimant felt he should have been asked about his wellbeing, Mr Adair's response was:-

> "I can't really remember what was going on at the time, but ok." (J127)

18. Those statements in their factual content were incorrect as regards this incident in that the bus was not taken off service and the claimant was not relieved of his duties; he was not told to wait and report the incident and he was not asked by the Operations Room if he was well after he had spoken to the police. Neither was he "sitting waiting for the police" as described by Mr Adair in his interview with Ms McGlasson.

19. In his evidence the claimant advised that this was a failure of duty of care by the respondent. He had been diagnosed with depression and had intimated this to the respondent by report dated 6 August 2019 (J149) advising that he had had a doctor's appointment and had been diagnosed with depression and placed on medication. The report stated "I was told to inform you to arrange a meeting." This report was not signed as received by the respondent.

Incidents of 1 July 2020

20. On 1 July 2020 the claimant was a "spare driver" and awaiting instruction within the driver's room. He was called into the traffic office for duty to drive a transfer bus into town. Roy Adair was in the room and according to the claimant "rudely informed me to take my hat off" in front of other people, "this was embarrassing". He was wearing a baseball cap at the time. He stated that this occurred during a lockdown period when he was unable to have his hair cut and that had an impact on his mental health. To hide his hair he wore a hat. His position was that he was singled out in being "taken up" about such matters. In any event if Mr Adair required

to speak to him on the issue he should have done so in private and not in front of others. His position was that Mr Adair had not spoken to him in a professional, polite manner but had adopted a rude tone in front of others and was part of the conduct of Mr Adair in targeting him on account of his sexuality.

21. Baseball caps were not part of the uniform supplied to drivers. They were supplied with a "beanie hat" for colder weather. The claimant had been told approximately seven times about wearing a baseball cap, the last occasion being about four months before this incident. He maintained that if he had had a discussion on his mental health subsequent to the report dated 6 August 2019 then this is a matter he would have raised and would have asked for permission to wear a baseball hat.

22. In a subsequent grievance raised by the claimant (which included this matter) he stated that given his view that he was being singled out on the issue of uniform he had started "doing a daily tally of people who were not wearing company issue items" and since December 2019 to September 2020 had tallied "421 instances of members of staff who do not wear company issue items". He refused to name any member of staff who he had seen not complying.

23. The rules on uniform were that drivers reported for work required to wear prescribed uniform and that extraneous items were not allowed. That commenced from the time the driver would arrive in depot for shift or picked up on a bus to be taken to the depot to commence a shift. On those occasions it was necessary that they wore the prescribed uniform. The policy was placed on the respondent intranet and a copy posted on the depot wall and given out on request. It would be policed by supervisors either when drivers reported for duty or in inspecting duties on drivers' routes.

24. It was explained that prior to the arrival of Mr King these rules "were lax". It was acknowledged that they needed to work on this matter over a period given the lax regime that had been in force. Accordingly, the rules were emphasised to supervisors who would remind drivers whenever they saw one improperly dressed that they required to wear the correct uniform.

The claimant amongst others had been spoken to on more than one occasion about uniform wearing. Mr King indicated that he had spoken to more than 20 drivers if he saw them without their appropriate uniform and some drivers more than once. Mr Adair had also spoken to drivers regarding the wearing of non-uniform items. There were a "handful" of drivers who did not wear uniform as prescribed. Ms McGlasson also indicated there were a few drivers who frequently were found wearing non-uniform items and they were always spoken to if seen. There were exceptions if there were medical or other reasons for not wearing particular items of uniform but those were rare.

25. The second separate incident on 1 July 2020 related to the behaviour of Saleem Ilahi who was based in the "traffic office" and who the claimant advised had "walked into the driver's room and said hello to everyone bar me. He was supposed to be professional. Not saying he had to like me but get along for the sake of being a professional."

26. He also stated that Mr Ilahi as he left the Driver's Room that day gave me "a look of disgust" as his "lips were curled as he left". There were approximately seven others in the room at the time. Neither Mr King nor Mr Adair were there. There was a background of dispute between the claimant and Mr Ilahi and the claimant considered that this incident was an act of harassment by Mr Ilahi related to his sexuality. The claimant made no protest at the time in relation to this incident.

Incident of 2 July 2020 and subsequent days.

27. On 2 July 2020 the claimant, whilst out cycling on his day off, spotted some colleagues in the town centre and stopped to speak to them. The group included an inspector named Stuart Samson who had been in the traffic office the previous day when the claimant was told to remove his baseball cap. He asked Mr Samson to tell Roy Adair that he was "getting his hair cut that afternoon" and stated that Stuart Samson said "Roy's out to get you. He's gunning for you." The claimant advised that there were another four people in the group namely Derek Lowe, Craig Fenwick, Wendy Coupar and Adrian McColl. The claimant made no comment at that time but later in the day decided that he would lodge a grievance in respect of

this matter. The claimant considered that this remark was evidence of Roy Adair discriminating against him due to his sexual orientation.

28. By email of 2 July 2020 (timed 12.54) the claimant advised Ms McGlasson (with a copy to Mr King) of this incident and being told by Roy Adair to take off his baseball cap the previous day (J76/77). Ms McGlasson advised in her response (timed 13.03) that she was unaware of the issues but that George King would take on the matters raised.

29. The claimant advised that in the three days following this incident the behaviour of Stuart Samson was "odd" in that he appeared to be "keeping an eye" on the claimant in his bus route. He was told by a traffic office supervisor "discreetly" that Mr Samson was timing his journey in the traffic office. The claimant made reference to an email exchange with a colleague (J154) relating to the information that Mr Samson was watching his route in the traffic office which he considered was strange given what he maintained was said by Mr Samson on 2 July.

30. He also noted that over the next 2/3 days Mr Samson was following his bus in the "minibus used for shuttling drivers". It was unusual for him to be followed. He did not think Mr Samson knew of his e-mail to Ms McGlasson of 2 July but his "suspicion" was that Roy Adair told Mr Samson to follow him to see if he could find some fault with him either in his behaviour or in his driving. On 4 and 5 July he noted that Mr Samson asked for his "timing board" which he acknowledged was part of his normal duties but that he had not gone to other vehicles to do the same. Also, he noted that Mr Samson had not "printed off a ticket" when on his bus which he normally did when coming on board a bus for the purpose of inspection.

Meeting on grievance lodged by claimant

31. By letter of 9 July 2020 the claimant was invited to attend a meeting with Mr King to discuss his email to Ms McGlasson of 2 July 2020 claiming that he was the victim of bullying and harassment by two members of staff. He was advised the meeting would take place on 15 July 2020 and that the claimant should bring along any information by way of statements or other

documents which might be of assistance. He was advised he could be accompanied by a union representative.

32. On 15 July 2020 a meeting took place with Mr King at which time the claimant was represented by Sandra Lawrie of Unite Union. Claire Gray, Operations Support manager also attended to take notes of the meeting (J79/84).

33. The claimant had prepared a written statement for this meeting (J96/110) which covered a number of matters including those which could not be canvassed in this hearing due to time bar and /or had not been identified in the claim for unfair (constructive) dismissal.

34. In essence at this meeting:-

(1) On the attitude of Mr Adair to the claimant it was pointed out by Mr King that Mr Adair had sought to assist the claimant when he had experienced financial difficulty. Also the claimant had been issued with a final written warning on 12 November 2019 in respect of an incident involving a customer which was to remain on his record for a period of one year. In February 2020 the claimant had been interviewed by Mr Adair as the claimant had decided “of his own accord” to take his bus out of service due to a loose interior mirror contrary to the procedure that a bus should only be taken out of service by the “output” department. In the note of that discussion (J74/75) Mr Adair had noted that the claimant was on a final written warning but did not “believe putting you through a disciplinary procedure is the best route for yourself” and did not take the issue of the bus being taken out of service to a disciplinary. Mr King believed these matters would not support the view that Mr Adair had targeted the claimant.

(2) As regards the relationship between the claimant and Mr Ilahi it was noted that “they did not get on with each other”. That apparently had been a matter that had been ongoing for some time and mediation had been attempted.

(3) The claimant initially did not advise Mr King who it was who had told him that Mr Adair was "gunning for him". Mr King emphasised that information was needed to obtain a statement. After a recess the claimant advised that he had been told by Stuart Samson that Roy Adair was "gunning for him". Mr King advised he would make enquiry of Mr Samson.

35. Mr King interviewed Mr Samson (J86/87). He stated that the claim he had made the remark was a "false accusation". He indicated that he was with Craig Fenwick (also a supervisor) at the time who could confirm matters and that this was the first time he had ever "been accused of anything like this".

36. Mr King then interviewed Craig Fenwick who indicated that at no time in the conversation with the claimant on 2 July 2020 was Roy Adair's name mentioned. Mr Fenwick stated that Derek Lowe (a driver) was also in this group and so Mr King also asked Mr Lowe of the matter. Mr King did not wish this matter to become a matter of discussion with drivers and so he asked Mr Lowe if he had heard "anything out of the ordinary" in the conversation with the claimant on 2 July rather than repeat the claimed comment that Mr Adair was "gunning for" the claimant. Mr Lowe responded that other than some remarks made about the claimant's bike he had no recollection of any memorable comment. Mr King had no further information as to who was present in this conversation.

37. The claimant's position was that Mr Samson had only identified Mr Renwick as a witness because he was friendly with him and he would be supportive. He questioned why Mr Samson would only mention a friend of his as being present and not the other individuals. The claimant also advised that Mr Lowe had not been asked the right question and that this was not a formal interview but simply a passing conversation "in the corridor". Mr King disputed the conversation was "by chance in a corridor". He had called Mr Lowe into his office to speak about this particular matter.

38. In support of the informality of the information from Mr Lowe the claimant advised that he and his partner had boarded a bus on 26 August 2020 when Derek Lowe was the driver. He had questioned Mr Lowe about this

matter and Mr Lowe stated that Mr King had asked him "in a corridor if anything stood out" in that conversation on 2 July 2020 and Mr Lowe had said he could not recall anything untoward. However when the claimant asked Mr Lowe if he recalled Mr Samson saying that Roy Adair was "gunning for me" he said "yes". This was overheard by Mr McDonagh, the claimant's partner.

39. The claimant also referred to a social media exchange between him and Wendy Coupar (J153) as regards the conversation. That exchange did not confirm any comment made by Stuart Samson to the effect that Roy Adair was "gunning for" the claimant.

40. Mr King prepared an outcome report on the grievance (J89/91) summarising the issues and investigation made. This was not sent to the claimant but was for his own purposes. His conclusion on the various matters raised was that there was no "hidden agenda" against the claimant because of his sexuality and that the complaints made were not well-founded.

41. By letter of 24 August 2020 (J93/94) Mr King (who spoke of same sex relationships within his family to emphasise his dislike of any form of discriminatory treatment) advised the claimant that having investigated the allegations he did not consider that the claimant had provided sufficient evidence to show he had been treated unfairly or discriminated against either by Roy Adair or Saleem Ilahi. He advised that he considered there was bad feeling between him and Mr Ilahi and in the past there had been an attempt at mediation. However the parties did not seem to like each other and there was a personality clash. Neither did he consider that the treatment of the claimant by Mr Adair and being asked to remove his baseball cap was bullying. Neither did he consider that there was sufficient evidence to show that Mr Adair was "gunning for" the claimant. The witnesses had denied any statement was made to that effect.

42. The claimant regarded the grievance hearing and outcome as a "waste of time". He did not consider the grievance meeting had properly considered the points being made. The day following the meeting the claimant was signed off with "acute stress reaction" for a period of two weeks (J85).

43. As regards the outcome he noted the letter from Mr King did not contain any reference to the possibility of an appeal. His union representative told him he could do that and he lodged an appeal as he did not feel the points were well considered. In the meantime his absence had been continued through "stress at work" until 11 August 2020.

44. In the claimant's claim for constructive dismissal he maintained that during the grievance meeting Mr King indicated that he (the claimant) was "not very well liked here. When I was in a place and I felt unliked I decided it was time for me to move on". The claimant maintained that this was a suggestion that he should leave.

45. Mr King denied that this comment had been made. He denied that he had ever been in a workplace where he "felt unliked and decided it was time to move on". There was no mention of this incident within the minutes of the grievance meeting. However the claimant maintained the minutes of meeting were inaccurate under reference to the section where it was stated that Mr King had called for a recess whereas it was Sandra Lawrie who had requested that recess after which the claimant identified the person he maintained made the comment that Mr Adair was "gunning for him".

46. There was no evidence from Sandra Lawrie the union representative who accompanied the claimant at this meeting as to whether she recollected that comment at the meeting. Mr King indicated that he did say to the claimant that "I know you think that people do not like you" but denied any suggestion that an inference could arise that he was suggesting the claimant move on. From the evidence the Tribunal could not make any finding that this comment as alleged by the claimant was made by Mr King and that he was being encouraged to leave.

Appeal against grievance outcome

47. By email of 26 August 2020 (J95) the claimant advised Ms McGlasson that he wished to appeal the grievance outcome. He made the point that the option for appeal was not stated in the letter from Mr King but that he had been advised by his union that he was allowed an appeal. He indicated

that “some evidence has come to light and I wish for the whole matter to be taken further as I don’t feel the grievance was dealt with and all the points and issues I made were not looked at”.

48. The grievance appeal hearing took place on 2 September 2020. The claimant was at this meeting represented by Brian Copeland the Branch Chairman of Unite. Dawn Laidlaw of the respondent’s Human Resources Department took notes of the meeting (J111/121).

49. The claimant again presented the statement he had prepared (J96/109) and the appeal considered the matters raised. Ms McGlasson indicated that she would wish to look into the points raised and come back to the claimant. In the course of the meeting it was indicated that the claimant may try “another mediation with Saleem Ilahi” if that could be arranged.

50. On 9 September 2020 Ms McGlasson sent an email to the claimant (J125) stating that she was still “working through the various points” discussed at the appeal and that she hoped to conclude investigation into the points raised early the following week. That was responded to by the claimant the same day (J124) who indicated that he thought it was “rather disrespectful of yourself to laugh when I told you what Roy had said to me. Rather like I had made the conversation up.” He also indicated that he wished to raise an issue that had taken place that morning with Mr Adair over the provision of management reports and indicated that he had resigned from his position as a driver. Ms McGlasson responded later that day (J124) to indicate that she was not aware of his resignation when she sent her email earlier in the day and wished that the claimant had “given me time to review all the details in advance of a decision” but that she would still follow up the various points. As regards the comment that she had laughed at something said “please can you advise at what point this is alleged to have happened as I have to say this is not something it is in my nature to do. You and I have had many conversations and I have never been anything but respectful and considerate of your needs and feelings, even when we have not agreed on things. I certainly would never have meant to cause you offence.”

51. The claimant's position was that Ms McGlasson had "laughed at him" at the point in the appeal proceedings when the claimant told her that Roy Adair had said to him that he had been in the army and "he knew what depression was and I do not have depression."

52. In evidence Ms McGlasson advised that she was "gobsmacked at the suggestion that laughed at him" and would "just not do it". She had asked the note taker Dawn Laidlaw and she had confirmed that she had not laughed at the claimant. She conceded that she may have made an expression of surprise about the comment that was indicated was made by Mr Adair but denied any laughter.

53. From the evidence on this matter the Tribunal did not consider that Ms McGlasson had laughed at the claimant during the appeal hearing.

Identification of witnesses to Stuart Samson comment at appeal

54. At the appeal hearing with Mr McGlasson the claimant refused to give the names of other people present on the day he maintained Stuart Samson had said that Roy Adair was "gunning for him". In the course of that hearing albeit not identifying anyone by name, the claimant referred to one of the witnesses being "she". As a consequence, Ms McGlasson made investigation of the wrong female driver. The complaint by the claimant was that Ms McGlasson said he had told her the person's name in the hearing and so was "lied to" by Ms McGlasson.

55. The minutes of the appeal hearing disclosed that in relation to this incident Ms McGlasson sought information on witnesses and the claimant said that he was not "bringing them into it" but could show Ms McGlasson a conversation "on my phone but with no names". It is noted (J118) that the claimant then "read out the message from his phone" being the message exchange at J153 with the claimant saying:-

> "Do you remember just before I left and Stuart said Roy's gunning for me. Then I said tell him I'm getting my hair cut today so you can go tell him that"

And the response being:-

> "I can remember u saying u were going for a haircut yeah as u were right beside me and Stuart saying that but i thought he was joking in regards to your hair cut not to u telling him to go tell him. Why whats happened?"

56. Ms McGlasson's comment on that is noted as "But even she thought he was joking".

57. The claimant had mentioned earlier in the meeting another female driver "Sue Craze" (J116). Ms McGlasson assumed that was the driver that had apparently witnessed the statement by Mr Samson. In the notes of her investigation subsequent to appeal there is attached to the record of a conversation with George King on 9 September 2020 (J122/123) the following note:-

> "Post meeting note: George checked Sue Craze's shift to see if she could have been in the area as Hugh had said she was also present. That day, 02/07/20, she was on a shift that started at 14:57 whereas this incident is alleged to have taken place at around lunchtime. Sue does not live locally so, unless she was at this stop for personal reasons, it would seem unlikely, although not impossible, she would be around at that time."

58. In evidence Ms McGlasson's position was that she assumed that Sue Craze was the person who was being referred to by the claimant and that was why she made that inquiry. She acknowledged that the claimant had not identified Sue Craze as the witness in the course of the appeal hearing so the note was not accurate in that respect.

The claimant's resignation

59. The claimant intimated his resignation by letter (J126). He stated:-

> "After 6 years 2 months I have decided for my own mental health that the way I have been treated by a supervisor and countless reporting that Xplore Dundee have failed to give me any support and failed to look into many reports I've made regarding the discrimination against me. Every day is a struggle to get out of bed and come to work not

> knowing what I could be pulled in for no matter how small, the threatening message we receive on the ticket machine, the way I am spoke to has left me with no other option but to tender my resignation. I will work a 3 week notice period, and my last working day will be Friday 26 September 2020.
>
> On completion of my shift I will hand back all items of uniform and leave Xplore Dundee with great regrets. Again reiterate the earlier points made for my resignation.
>
> Any outstanding holidays and lieu days I am willing to use or receive payment for. I wish everyone at Xplore Dundee a safe and successful future."

60. The letter was undated and there was lack of clarity as to when this resignation was intimated. The claimant's evidence was that he had a meeting arranged on 10 September 2020 with Claire Gray of Operations Support. This was a consultation meeting regarding his depression. The purpose was to discuss how best to make it easier for him to get back to work and work around his depressive condition. The claimant's position was this meeting was too late and that he did not really want to be with the respondent any longer. He told Claire Gray on 10 September he was going to leave and on 11 September 2020 handed his notice to her being the letter referred to above.

61. She advised him to go home and reconsider but he said he did not think he could do that as the pressure was too much. Claire Gray reiterated on 10 September 2020 to go home and think about matters and the next day he spoke to his union representative who went back and indicated that the claimant was still going to resign.

62. However that would not fit his email to Ms McGlasson of 9 September 2020 (J124) wherein he states that he had resigned and in that email refers to him still being an employee until 28 September 2020. On this being pointed out the claimant conceded that his letter may have been submitted on 7 September 2020.

63. In any event he did have a discussion with Claire Gray and there was some dispute about what took place at that time. The position of Mr Adair

was Claire Gray reported to him on the meeting. In that discussion the claimant had said that he had suicidal tendencies and that after the grievance appeal he had wanted to "take a chair off the Managing Director's head". So it was arranged that (1) the police go to the claimant's residence to ensure that he was safe and not contemplating suicide (2) that he was told he need not work his notice period and would be on paid leave until notice expired and (3) Roy Adair would speak to the Union Chairman to say that the claimant should not be on the premises until the paid leave period expired due to the comment about the Managing Director.

64. Ms McGlasson in her evidence confirmed that it had been reported to her that in the meeting with Claire Gray the claimant had said he "felt like throwing a chair in my face" and that the claimant felt suicidal. The latter comment was upsetting and she had no wish for him to leave in those circumstances.

65. When the police went to the claimant's resident he advised them that he was not in danger and they left. The claim made by the claimant in this respect in the further and better particulars was that "On September 11th I handed in my notice of resignation. I was asked to reconsider and sent home to think it over. An hour later I had 3 police men at my door as my work had called and claimed a cause of concern for my safety. A bit late for showing you care in my eyes. It was all because of this tribunal that they showed that desire of care. The next day after reading my resignation letter Claire placed me on paid leave for the 3 week notice period." The Tribunal did not find that the notice of resignation was handed in on 11 September or that the meeting with the HR representative was the following day. The Tribunal did not find that it was because of the tribunal case which had been lodged that there was a sudden concern for the claimant's safety but that was caused by reference to him making comment of suicidal tendencies at the meeting with the HR representative.

Requests for Manager's reports

66. In the further and better particulars lodged by the claimant relating to discriminatory treatment he states in relation to the meeting with Claire Gray placing him on paid leave:-

> "I thanked her for this decision as it gave me time to reset and get ready for my new job. I approached Roy Adair for my manager's reports to be copied for my records the same morning. He refused to do this and told me to get off the premises or he was calling the police. I was still an employee till September 28th 2020. I was still a paying member of the union. I had every right to approach my chairman should I wish to do so. I returned the next day to collect my manager's reports and was told I would have to wait outside the premises and have them brought out to me. Again felt treated differently as I was still an employee. The police were going to get called if I ever went near the depot. I would have to arrange to meet my union chairman off the site should I wish to do so. This was an inconvenience."

67. The claimant's evidence to the Tribunal was that he went to receive copies of his reports and "Adair refused" saying that it was necessary for a subject access request to be made which the claimant had not realised required to be put in place. He went to see his union on the matter and then Mr Adair came to "get me off the premises". Apparently Mr King asked him into his office to discuss matters. At that time the claimant asked if he would get the manager's reports he had requested and Mr King said he shouldn't come to the premises "as there may be confrontation" and that he should make a subject access request.

68. Mr Adair's evidence was that he spoke to the chair of the union to say that the claimant should not be on the premises after the comment regarding the "chair to the Managing Director". The claimant was asked not to come in but he "came in twice" and demanded the manager's reports and was asked to leave the premises and keep to the plan. The reports that he requested required to be collated. His recollection was that these were collated by Claire Gray who required to get some paperwork from the HR records.

69. This matter was referred to in an exchange of emails amongst the claimant, Christine McGlasson and George King of 12/14 September 2020 (J135/137). There were allegations made about the claimant being banned from the premises to Ms McGlasson. Mr King advised that he had told the claimant that it would be better if he arranged to meet with his union representative to obtain copies of the managers reports elsewhere as the claimant in conversation with him had told him that he was suffering from anxiety due to the way he was treated at work and that it was felt better he stayed away from the environment on paid leave. Mr King's attitude was he wanted to avoid any further confrontation.

70. For that reason the claimant was asked not to come in but was not told he was "banned" rather than it might have been in his best interests not to come in during the period of paid leave in all the circumstances.

71. Ms McGlasson interviewed Peter Lobban on 15 September 2020 as part of her investigation into matters raised by the claimant in the grievance appeal. In that statement (J139) it was confirmed that the claimant came to the office to request managers reports and was told by Mr Adair that he "couldn't do it then and there but if he wouldn't mind putting it in writing he would get it done, no problem. Hugh insisted he wanted them now and Roy said no again, not in an obnoxious way, just reinforced what he had already said. Hugh then said that he wasn't leaving until he got them. Roy then said look you don't work here any more, you don't need to be here, please leave the building. If you don't leave I will have to get the Police to escort you off and if you keep coming back, we'll call them again. Hugh said technically I still work here so you can't do that to which I gave a wee chortle as that is typical Hugh, winding up …." The statement from Mr Lobban indicated that Mr Adair was not speaking in raised tones but just "normal, putting across his message, he explained things …" and that "neither one changed their tone. If you'd come walking in you wouldn't have known there was an issue."

72. From this evidence the Tribunal considered that there was an issue between Mr Adair and the claimant about management reports. There was a discussion between them. The claimant was told that he should put the request in writing. Mr Adair did say that he would call the police if the

claimant did not leave the premises. Mr Adair did speak to the chairman of the union about the matter. The Tribunal accepted that Mr King reinforced the message that the claimant should stay away from the premises and was concerned about any further confrontation or exacerbation of the claimant's mental health.

73. The Tribunal found no evidence on this matter that there was any action taken against the claimant because of his sexual orientation. There were other reasons for the respondent wishing the claimant not to be on the premises until the end of his paid leave, it was not because of or related to his sexual orientation.

The Management reports

74. The claimant received manager's reports consequent upon his subject access request. He advised that he had not received with the reports recovered those dated 12 November 2019; 19 January 2020 (J150) and 6 August 2019 (J149). That last report related to the claimant advising that he had a doctor's appointment on 5 August 2019 and on attending was diagnosed with "depression and placed on medication. I was told I had to inform you to arrange a meeting". None of those reports were signed to acknowledge receipt by the respondent. They were produced as the claimant had copies of his own.

75. The reports recovered contained his resignation letter and report of 11 May 2020 on the incident at Ninewells.

Claimant's depression

76. The manager's report of 6 August 2019 referred to the claimant being diagnosed with depression. That matter was raised in the preliminary hearing on jurisdiction. The Judgment notes that the claimant had been prescribed Sertraline but did not take that until the beginning of 2020 and after some weeks noticed the benefits. In the meantime, the claimant had been required to attend a sickness absence meeting in September 2019 and he raised various matters relating to his treatment with his manager at that meeting.

77. The evidence from the claimant's partner referred to deterioration in their relationship and a split in mid-August 2019 with a subsequent reconciliation at the end of September/beginning October 2019. His partner considered that that breakdown related to the anxiety and agitation that the claimant felt in his workplace at that time. He did not know when it was that the claimant had commenced taking his medication and indicated that the claimant also had "bad image problems" and that allied to the workplace issues had contributed to his mood. The claimant advised that the breakdown with his partner had been a significant cause of continued depression and that his family had told him to take time off. His mother was more aware of the position when the claimant came to stay for a while at the family home and was very concerned when he heard from him of matters in the workplace. She also referred to the fact that he had been very upset when his grandmother had died in 2015. She referred to distressing phone calls when the claimant would indicate that he felt suicidal.

78. The statement from Andrew Motion which was lodged (J159/163) contained information that the claimant had advised Mr Motion of a photocopied report "he had handed in" relating to his depression and that he did not believe the respondent had taken this into account when dealing with ongoing investigation and no meeting had been arranged to discuss this matter. He advised that he had his own mental health problems and had received the same treatment in his diagnosis of mental health conditions. He had been dismissed by the respondent in around July 2020 due (the claimant believed) to attendance/sick absence issues.

Inquiry by Ms McGlasson subsequent to grievance appeal

79. Albeit the claimant had resigned Ms McGlasson continued her investigation into the matters raised by the claimant at his grievance appeal and events around his departure. She interviewed (as noted) Peter Lobban on 15 September 2020 regarding the claimant's communication with Roy Adair over his resignation and request for reports (J139). She also interviewed Dan Stewart, Financial Assistant on the same day (J138) but did not uncover any untoward behaviour by Mr Adair in his tone towards the claimant at that time other than that he was "assertive just like

a manager" and that there was no shouting when the claimant was asked to leave the premises.

80. She also interviewed Saleem Ilahi on 15 September 2020 regarding ongoing issues which had been raised by the claimant in the grievance meeting and appeal (J140). He denied there was any difference in treatment towards the claimant because of his bisexuality. He referred to other individuals who were in same sex relationships within the workplace with whom he had no issues. In relation to the allegation that he had said "good morning" to others in the mess room but not the claimant he advised that he had gone to the "mess room to fill up my water jugs and there were a few people there. I said good morning to the room and filled up the bottles, when I turned round he was in the corner near the door, I hadn't seen him when I came in but I didn't deliberately not say good morning to him or say hi individually to anyone else in the room."

81. Ms McGlasson also interviewed Roy Adair on 11 September 2020 (J127) which concerned the incident with the passenger who attacked the bus with scissors. He also gave information on the claimant's relationship with Mr Saleem Ilahi. In relation to that aspect of matters he indicated that he did not think Mr Ilahi and the claimant liked each other and that was the reason for discontent there.

82. Ms McGlasson also interviewed George King in relation to the allegations made by the claimant at the grievance appeal (J122/123). He also was of the view that Mr Ilahi and the claimant did not get on with each other. He had attended a mediation with them to try and resolve matters. He referred to the various warnings that the claimant had had about wearing proper uniform. In relation to the comment the claimant maintained had been made by Mr Samson that Mr Adair was "gunning for him" he advised that he had "interviewed those who he had been told were there". He had not been told of any other witnesses to interview.

83. Ms McGlasson wrote to the claimant on 16 September 2020 advising the claimant of the results of her investigation and in summary did not consider that she had found evidence of any bullying, harassment or discrimination

within the business or from the individuals cited (J142/145) and expressed disappointment to see the claimant leave the company.

Messages from Mr Adair on bus ipad

84. A complaint made by the claimant was that every message that he would receive by way of instruction from Roy Adair regarding operational matters would be in a threatening tone and always couched in terms that a failure to observe would result in disciplinary action. However it was clear to the Tribunal that this was not directed at the claimant individually and messages were sent to all drivers in the same terms. This was a matter also raised by Mr Motion in his statement there being "constant messages from Roy on the ticket machine threatening people with disciplinary action something which got a lot of people's backs up." He referred to individuals being on Mr Adair's "famous radar" including the claimant and that if individuals "spoke out against management they would immediately go against you" with management wanting to "sack people for the littlest things".

Exchange with Roy Adair

85. The claimant referred to a photograph of an exchange of text/social media message (J158) wherein the party to the exchange had been deleted but was intended to refer to the way that Mr Adair had spoken to him when he handed in his uniform after his paid leave expired. In the absence of any identification of the individual involved or context for that individual the Tribunal can make no finding about that production and its relevance to the issues. This issue had not been mentioned in the claim made by the claimant.

Alternative employment

86. The claimant had found alternative employment commencing 1 October 2020 as a driver of electric coaches. He was still engaged in that work. His employment with the respondent earned him £11.75 per hour and with his new employment he was paid £11.50 per hour. He made a calculation of loss in respect of wages confirmed in the schedule produced at J146/147.

87. His evidence of when he obtained the position was somewhat confusing. He explained that when he had been in lockdown he had been employed three weeks in work and three weeks on furlough and had made enquiry of the coach company he was now employed by in that period. At the beginning of August 2020 had a "interview" but he did not know that he had got the job until 27 September 2020. He explained that he had wanted to find out if he had been successful and emailed the company on 27 September 2020 and "that night" they had offered him the position. That conflicted with his account within the further and better particulars lodged (J55) when he explained that he had handed in his notice of resignation to Clare Gray on 11 September 2020 (later revised to 7 September 2020) and the next day (i.e.12 September in accord with the better particulars) after "reading my resignation letter Claire placed me on paid leave for the 3 week notice period. I thanked her for this decision as it gave me time to reset and get ready for my new job." This being pointed out he stated that he must have "got the job before 27 September 2020" but did "not recall the precise date". The Tribunal finding on this matter was that when the claimant resigned he knew he had alternative employment in place rather than accepting the timing of events in accordance with his statement at J55. The Tribunal did not consider it was likely that he waited until the end of his paid leave period before making enquiry as to whether his job application had been successful following interview at the beginning of August 2020.

Submissions

88. Each party made submissions and no discourtesy is intended in making a summary.

For the claimant

89. It was submitted for the claimant that he had been honest and factual in his evidence and he had shown areas where the respondent had been inconsistent.

90. He emphasised that his depressive episodes meant that he had been unable to get up in the morning or plan ahead and he did not consider that this disability had been taken into account.

91. Mental health issues were matters that built up and the respondent had failed in their duty of care. He had not had any risk assessment and there was clear adverse effects on the life of an employee if there were no adjustments made for that condition. It was a duty of an employer to remove issues which may affect a person who is depressed.

92. It was submitted by the claimant that if he had a consultation on his medical condition when he should have after being diagnosed with depression in August 2019 then he would have had a meeting to seek shifts swap to enable refreshed sleep and also requested the right to wear a hat which would have avoided any confrontation.

93. He maintained that Mr Adair had fabricated the issue of him making any threat against the Managing Director in the meeting with Claire Gray.

94. He had not been allowed to go in to the premises after he had intimated his resignation. He had to make steps to get paid and to return uniform.

95. So far as the discriminatory treatment was concerned he understood that no-one would ever admit to being homophobic but that Mr Adair had humiliated him in front of others; Mr Samson had made the comment about Mr Adair “gunning for him” and Mr King should have asked the right questions of the witness Derek Lowe.

96. Neither Mr King, Ms McGlasson nor Roy Adair were ever in the premises 24/7 and so they would not witness incidents with Saleem Ilahi but that did not mean they were not true.

97. His new position had given him better perspective about the treatment that he should have received from the respondent.

For the respondent

98. The respondent emphasised that the claims being pursued were direct discrimination on the basis of sexual orientation; harassment related to

sexual orientation and unfair (constructive) dismissal. The earlier hearing on jurisdiction had clarified that these issues were within paragraphs 19-22 of the further and better particulars (J54/56 of the documents) and the document submitted in relation to the constructive dismissal claim (J67/69). There was a degree of overlap.

99. Reference was made to the definition of direct discrimination within section 13 of the Equality Act 2010 prohibiting direct discrimination "because of a protected characteristic". Reference was made to the need for less favourable treatment and that could not be resolved without at the same time deciding the "reason why" (***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL***).

100. Claims brought under discrimination legislation presented problems of proof. If there was a prima facie case for a claimant then a Tribunal could conclude in the absence of other explanation that an act of discrimination has been committed by an employer (s136 Equality Act 2010).

101. The EHRC Code of Practice on Employment (2011) advised that it was enough for a worker to reasonably say that they would have preferred not to have been treated differently from the way the employer treated – or would have treated – another person to find less favourable treatment. For direct discrimination to occur the protected characteristic does require to have a "significant influence on the outcome" (***Nagarajan v London Region of Transport [1999] ICR 877***).

102. Albeit the burden of proof can shift it does not do so simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. That may only indicate the possibility of discrimination and was not of its own enough to provide the material on which a Tribunal "could conclude" that on the balance of probabilities an unlawful act had taken place.

103. Submission was also made on the definition of harassment within section 26 of the Equality Act 2010 and that for a harassment claim to succeed the unwanted conduct must be "related to a relevant protected characteristic"

104. The respondent submitted:-

(a) On the "Ninewells incident" (paragraph 19 of the further and better particulars) it was denied that there was any less favourable treatment. In evidence, both Mr Adair and Mr King as well as Christine McGlasson on a review of the position accepted that with hindsight they would have been better if someone had asked the claimant after the event if he had been disturbed or how he was feeling. That had not taken place but there was no evidence of the claimant's comparator namely someone who was not bisexual and who had had similar treatment and who was asked about his welfare.

(b) As regards paragraph 20 namely the request to remove the baseball hat and the behaviour or Mr Saleem Ilahi this was pled as direct discrimination and harassment. The evidence was that there was a policy that drivers required to wear uniform and others were picked up on this behaviour. The claimant did not dispute that he knew of the policy and that he was breaching the policy. It was not less favourable treatment to be asked to remove the hat.

The relationship between Mr Ilahi and the claimant was troubled in the past. There had been a mediation hearing with an instruction to keep out of each other's way. Any non-greeting to the claimant or "dirty look" was not to be considered as related to the claimant's sexual orientation. The interview with Ms McGlasson was one where Mr Ilahi denied any issue with the claimant's sexuality and that he got on well with others all in the same sex situation. The claimant stated he came out as bisexual in August 2016 but in his claim form lodged August 2020 stated that "a supervisor has treated me differently for the last six years" which would account for the full duration of his employment and pre-date his "coming out".

(c) Roy Adair "gunning for the claimant" and being followed by Stuart Samson was outlined in paragraph 21.

The witnesses who were disclosed to the respondent did not find any evidence that this had taken place. It was not less favourable

treatment. It was simply a comment by Mr Samson if it was said at all. There was no evidence to suggest it was said because of the claimant's sexual orientation. Mr Samson could have reached that conclusion by seeing Mr Adair ask the claimant to take his hat off because he was in breach of the uniform policy.

Any suggestion that Mr Adair had a "famous radar" contained no evidence that this was because of the sexual orientation of the claimant. Neither was there any evidence that Mr Samson was not simply performing his duties by inspecting the claimant's bus timetable. There was no evidence this was an act inspired by the claimant's sexual orientation.

(d) Criticism of the grievance hearing and appeal in paragraph 22.

It was stated by the claimant that he regarded the grievance meeting with Mr King as a waste of time. The claimant made no further mention of any witnesses at the time he maintained the comment was made by Mr Samson. A failure to ask a leading question of a witness subsequently disclosed by others was not less favourable treatment. Mr King interviewed three witnesses and none of them indicated that this event had taken place. He believed them. It was not because of the claimant's sexuality but because of lack of evidence. Mr King had given evidence that both of his children were in same sex relationships and it was more than reasonable to conclude that those circumstances would rule out less favourable treatment to the claimant on account of his sexuality.

105. The primary submission for the respondent was that the claimant had failed to shift the burden of proof to the respondent and had failed to establish the prima facie case.

Constructive dismissal

106. The Tribunal were reminded of the statutory definition of constructive unfair dismissal within section 95(1) of the Employment Rights Act (ERA) and the cases which established the elements which required to be

established in such a claim (***Western Excavating (ECC) Limited v Sharp [1978] ICR 221*** and ***Waltham Forest v Omilaju [2004] EWCA civ 1493***.)

107. It was denied that there was any breach of the implied term of mutual trust and confidence in that:-

(a) The respondent had not allowed Mr Ilahi to treat the claimant differently. They had sought to mediate the position between him and the claimant. In any event given the statement by the claimant that he had been treated differently over the last six years then he would have acquiesced.

(b) It was accepted that the respondent should have asked after the claimant subsequent to the Ninewells incident but the circumstances suggested that the claimant was none the worse for the incident.

(c) The respondent were entitled to ask the claimant to wear the correct uniform. They did this with others. He was not singled out.

(d) Only the claimant said that Mr Samson had made any comment about Mr Adair "gunning for him". Mr Adair had assisted the claimant in a financial difficulty in the past. He had not dismissed him when he might have taken further disciplinary action against him for taking a bus off service when he was on a final written warning. There was no evidence he was "gunning for" the claimant.

(e) Mr Samson was an inspector and his job was to observe drivers. That was not a material breach of contract.

(f) There was no evidence that Mr King said that the claimant was not well liked. That did not happen.

(g) Mr King did not mention that the claimant had a right of appeal in his refusal of the grievance but it was accepted as an error and there was no prejudice because the union rep provided advice and an appeal was held.

(h) The questions asked by Mr King were appropriate. He approached Mr Lowe differently to the other witnesses because of his different position and the need to prevent any gossip arising amongst the drivers.

(i) The claimant was not laughed at by Ms McGlasson and there was no substance to this allegation.

108. Either in isolation or in cumulo was there a material breach of the contract. It was not certain what had caused the claimant's resignation. He had been searching for another job. He had said in the grievance meeting he would try mediation with Mr Ilahi.

109. The events subsequent to resignation were not relevant to the issue of constructive dismissal.

Remedy

110. Even if there was success in his discrimination claim the injury to feelings was at the lower end of the Vento scale. The claimant had obtained further employment and stated to be much happier.

111. There was no tangible loss in wages. The claimant had failed to follow through his appeal and so any compensation should be reduced in any event by 25%.

112. Essentially any award should be restricted to basic award and loss of statutory rights.

Discussion and decision

Relevant law

113. Section 13 of the Equality Act 2010 prohibits direct discrimination "because of a protected characteristic". That applies to the protected characteristic claimed in this case of sexual orientation. An employer directly discriminates against a person if:-

- it treats that person less favourably than it treats or would treat others, and
- the difference in treatment is because of a protected characteristic

114. In many cases the "less favourable treatment" cannot be resolved without at the same time deciding the reason why (***Shamoon v Chief Constable of The Royal Ulster Constabulary [2003] ICR 337 HL***).

115. As was observed in ***Glasgow City Council v Zafar [1998] ICR 120*** claims brought under the discrimination legislation present special problems of proof since those who discriminate "do not in general advertise their prejudices: indeed they may not even be aware of them". For that reason the burden of proof rules that apply to claims of unlawful discrimination in employment are more favourable to the claimant than those that apply to claims brought under other employment rights and protections. If a claimant shows *prima facie* evidence from which the Tribunal could conclude in the absence of any other explanation that an employer has committed an act of discrimination the Tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate – s.136 Equality Act 2010.

116. However the Supreme Court in ***Royal Mail Group v Efobi [2021] UKSC 33*** in considering s136(2) of the Equality Act advised that at the first stage of the two-stage test, all the evidence should be considered, not only evidence from the claimant. The court noted that applying a basic rule of evidence, in civil cases (including employment disputes), the general rule is that a tribunal may only find that "there are facts" for the purposes of s136 if the tribunal concludes that it is more likely than not that the relevant assertions are true. If that is done, then at the second stage, the burden shifts to the respondent.

117. The Supreme Court also observed that the EAT had been wrong in this case to hold that s136(2) meant that a respondent could not submit that there was no case to answer at the end of the claimant's evidence, but noted that it would seldom be safe to do so until the end of the hearing, after hearing all the evidence.

118. It is possible to construct a purely hypothetical comparator. It is not necessary for a claimant to point to an actual person who has been treated more favourably in comparable circumstances. In this case in respect of the claim of discrimination on the ground of the protected characteristic of sexual orientation the claimant's comparator would be a person in the same position who was not bisexual.

119. It is necessary for a Tribunal to be satisfied that a claimant was treated less favourably. It is for the Tribunal to decide as a matter of fact what is less favourable. The fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment. However, a claimant's perception of the effect of treatment upon him or her has to be weighed in the balance.

120. Also in ***Chief Constable of Gwent Police v Parsons and Roberts UKEAT/0143/18/DA*** (a pension case related to the protected characteristic of disability), the EAT referred to the Supreme Court decision in ***Swansea University*** where "Lord Carnwarth sums up the position succinctly" as follows:

> "…. Section 15 appears to raise two simple questions of facts: what was the relevant treatment and was it unfavourable to the claimant?"

121. A complaint of direct discrimination will succeed where the Tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment. That would require a Tribunal to focus on the reason why in factual terms an employer acted as it did.

Harassment

122. Section 26 of the Equality Act 2010 states:-

> "(1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

123. A claim based on "purpose" requires an analysis of the alleged harasser's motive or intention. That in turn requires a Tribunal to draw inferences as to what that true motive or intent was. In such cases the burden of proof may shift from accuser to accused as it does in direct discrimination.

124. Where the claim simply relies on the "effect" of the conduct in question then motive or intention which could be entirely innocent is irrelevant. This test has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view ("the subjective element"); and to ask whether it was unreasonable of the complainant to consider that conduct had that requisite effect ("the objective element"). The fact that the claimant is peculiarly sensitive to the treatment accorded to him or her does not necessarily mean that harassment would be shown to exist.

125. Neither is it enough that a claimant believes the conduct to be related to the relevant characteristic. To find that the conduct is "related to" a relevant characteristic it is necessary for a Tribunal to "find some feature or features of the factual matrix which properly leads to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged in the claim". It is not the case that s26 "bites on conduct which although unwanted and has the proscribed purpose or effect is not found for some identifiable reason to have been related to the characteristic relied upon…" ***(Tees Esk and Wear Valleys NHS Foundation Trust v Aslam UKEAT0039/19)***.

Unfair (constructive) dismissal

126. The claimant claims that he has been constructively dismissed as described in section 95(1)(c) of ERA which states that there is a dismissal where the employee terminates the contract in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

127. ***Western Excavating (ECC) Limited v Sharp*** makes it clear that the employer's conduct must be a repudiatory breach of contract; "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 terms of the contract". It is clear that it is not sufficient if the employer's conduct is merely unreasonable. It must amount to a material breach of contract.

128. The employee must then satisfy the Tribunal that it was this breach that led to the decision to resign and not other factors.

129. Finally, if there is a delay between the conduct and the resignation the employee may be deemed to have affirmed the contract and lost the right to claim constructive dismissal.

130. The term of the contract that the claimant relies on is that commonly called trust and confidence defined in ***Malik v Bank of Credit and Commerce International SA (in liquidation) [1997] IRLR 462*** where Lord Steyn said that an employer shall not "without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

Incidents relied on for discrimination claim

131. The claimant's case on direct discrimination and harassment was made out at paragraphs 19-22 of his further and better particulars (J54/55). Paragraphs 19,21 and 22 were claims of direct discrimination with paragraph 20 being a claim of direct discrimination and harassment.

132. The first incident which he maintained was an act of direct discrimination was the respondent not seeking him out in the aftermath of the "Ninewells incident" on 11 May 2020 to find out how the incident might have affected him. It would appear that there was no consideration given to that aspect of matters by the respondent. The evidence from Ms McGlasson was that she had not heard of the incident. Mr King was not sure of the detail. The evidence of Mr Adair who should have known of the incident seemed dismissive. The Tribunal were not convinced he had as he stated viewed the CCTV to see the claimant speaking on his phone to the police and appearing unconcerned. He made no particular enquiry of the incident or how it might have affected the driver or indeed passengers. At the same time it was clear that the claimant himself was not affected in the sense that he required to take time off or be counselled in any way. He attended with the police to make a statement and submitted a report to the respondent and took the matter no further.

133. It was acknowledged by Ms McGlasson, Mr King and Mr Adair that on reflection they should have been more concerned as to any impact of this incident on the driver.

134. However, the Tribunal could not find any connection between that and the claimant's sexuality. There was no evidence that any other driver in the same position who was not bisexual would have been counselled or spoken to about the effect on him/her. In the view of the Tribunal the lapse was one of management rather than discriminatory treatment on account of the claimant's sexuality and it did not find that this was an act of discrimination.

135. The incidents of 1 July 2020 with Roy Adair and Mr Saleem Ilahi were stated to be acts of discrimination and harassment.

136. The Tribunal found that there was a uniform policy for drivers. They were expected to wear the respondent uniform when clocking in for duty either at the depot or in boarding one of the respondent's buses to take them to the depot to commence duties. At the time of this incident the claimant was wearing a baseball cap contrary to that policy. He had been spoken to on several occasions about uniform and that he should be complying with the rules.

137. His assertion was that he was the only person picked on in this respect but the Tribunal did not find that to be the case. They accepted the evidence from Mr King, Mr Adair and Ms McGlasson that they spoke to various individuals about the uniform policy and the need to be appropriately addressed when on duty. Mr King recognised that the rules had not been rigorously applied before his arrival but the respondent now wished to ensure these rules were enforced. That was a gradual process. No disciplinary action had been taken against any individual on this aspect of policy and the claimant was one of only a handful of drivers who seemed reluctant to comply.

138. While the claimant may have counted a number of people who were not appropriately dressed there was no evidence that they were actively on duty. It would not appear that once a driver had left duty and was "in the

town" he had to wear driving uniform. The position was that when reporting for duty (either at depot or being collected by bus) it was necessary for the uniform to be worn. If a baseball cap had been worn "in town" when the claimant was off duty then there could have been no complaint but that was not the case on 1 July 2020 as the claimant was in the depot reporting for duty.

139. In the circumstances the Tribunal did not find that Mr Adair telling the claimant to remove the cap was anything other than the respondent seeking to enforce these rules.

140. His further complaint was that the manner in which he was told to remove the cap by Mr Adair was rude and it should not have been said in front of others in the room but he should have been taken into Mr Adair's office and told in private to remove the cap. The Tribunal were not satisfied on the evidence that Mr Adair had spoken to the claimant in rude or discriminatory terms. There was no evidence that he was other than firm in stating that the baseball cap should be removed. Neither did the Tribunal consider that it was more appropriate to have taken the claimant into a separate room to advise him to remove the offending article. The policy for the uniform was displayed on the wall of the traffic office. The rules were apparent to everybody.

141. The claimant's position was that he had to wear the cap because his hair was long due to lockdown and he was conscious of self image. He made no protest at the time that that was the situation. He had not asked previously for permission to wear a cap because of this issue. Mr Adair was unaware that there was any particular reason for the claimant to want to wear a cap on this occasion. He was entitled to ask the claimant to remove it.

142. The fact that others had been told about uniform issues undermined any claim that those who were not bisexual would have been excused from being asked to remove items of clothing which did not comply with the uniform policy. The Tribunal did not consider this matter could support a prima facie claim of direct discrimination or harassment.

143. The further issue was whether the claimant was ignored by Mr Ilahi when he came into the office and said “good morning” to all apparently excluding the claimant. The further allegation was that when he left the office Mr Ilahi gave the claimant a “dirty look”. The Tribunal were not satisfied on the balance of probability that there was such demeaning conduct by Mr Ilahi on the day. Mr Ilahi was interviewed in the course of the grievance appeal and gave his position that the claimant had been in the corner of the room at the time and he had not seen him when he entered and said “good morning” to all. Looks between individuals who clearly have not got on well in the past can be misinterpreted. The Tribunal were not satisfied that they had sufficient to find that there was any particular expression made by Mr Ilahi at the time which would account for less favourable treatment of the claimant. They were unable to find from the factual matrix the unwanted conduct which would relate to the protected characteristic.

144. Accordingly, they did not consider that these acts were made out either as discriminatory treatment or harassment by unwanted conduct related to the claimant’s protected characteristic of sexual orientation.

145. The incident of 2 July 2020 referred to the claimant’s assertion that Mr Samson an inspector had said that Roy Adair was “gunning for him”.

146. Again the Tribunal were not satisfied that on the balance of probabilities this had happened. It may be that the investigation by the respondent was hampered by lack of information on witnesses who were there at the time but through the process of investigation it did appear that Mr King had interviewed both Mr Samson and Mr Fenwick who denied such a comment was made. The Tribunal accepted that Mr King had spoken with Mr Lowe. He asked him if anything untoward had happened that day in the conversation that had taken place and was told that there was nothing memorable. A failure to ask a direct question is not one that the Tribunal would consider to be necessary or essential or indicative of Mr King lacking in a desire for the truth or to infer discriminatory treatment. He gave reasons as to why he did not wish to approach the matter as directly with Mr Lowe as he had done with more senior personnel.

147. The claimant did not produce or name the other witnesses that he claimed were there at the time. There was no opportunity for the respondent to check with them whether this incident had taken place. The text/social media exchanges which were exchanged and produced did not appear to the Tribunal to support the claimant's view that another witness had heard such a statement. There was no direct evidence of that. Again therefore, on the balance of probability the Tribunal were not satisfied that the facts had been made out by the claimant who could have called his other witnesses and Mr Lowe (who he claimed had given a different account to him) to speak to the matter if he had wished. He knew the process as he had called PC Merchant by witness order and was aware that he could bring evidence of this incident which he knew well was disputed.

148. Additionally, the Tribunal did consider there was force in the submission made that even if the comment was made it came the day after the claimant had been told to remove a baseball cap by Mr Adair as it was not uniform compliant. That might lead the reasonable onlooker to consider that his superior was taking an interest in the claimant's behaviour and not infer that there was discrimination behind the treatment.

149. The further matter that was outlined by the claimant was that Mr Samson in his duties as Inspector seemed more interested in the claimant over the next few days by way of examining his timetable and following progress made and also in boarding his bus for inspection purposes. He found this "suspicious". His theory was that Mr Adair had asked "his friend Mr Samson" to check up on the claimant. The evidence fell far short of making out that proposition and the Tribunal could not make that finding on the theory expressed by the claimant.

150. Mr Samson was an Inspector. It was part of his duties to supervise drivers and the Tribunal did not consider that there had been any evidence of behaviour beyond the norm which would lead to a prima facie claim or inference of discriminatory treatment and thus require the respondent to give further explanation.

151. The matters referred to under paragraph 22 commenced with the meeting with Mr King on the claimant's grievance of 15 July 202 which he indicated

was a “waste of time”. Although the claimant in evidence was reluctant to ascribe direct discrimination to Mr King it is part of his case. He was critical of Mr King only interviewing two witnesses to the meeting in the town on 2 July 2020 which he says was “bizarre as there were five of us there”. However the claimant had never indicated who was there at the time and refused to mention their names. The investigation by Mr King established from Mr Samson that Mr Fenwick was a witness. The investigation with Mr Fenwick established that Mr Lowe was a witness. No further witnesses were established. If the claimant had advised the respondent of all the people that were there so that an appropriate investigation could take place with all the witnesses and that the respondent had refused to speak to two who might support the claimant that might be a different matter. But that was not the case. They did not know who these additional two witnesses were. Ms McGlasson made an assumption from what the claimant had said about witnesses as to who was there and it turned out she was wrong but given the lack of information the Tribunal could not see that Mr King or indeed Ms McGlasson could be blamed on that aspect of the investigation.

152. It was also stated that Mr Lowe was asked the wrong question in the investigation. Again as indicated Mr King had reasons as to why he had gone about the enquiry of Mr Lowe in the way he did. The Tribunal were not able to make any inference that this was motivated by discrimination or he had engaged in unwanted conduct related to the claimant’s sexual orientation.The Tribunal were unable to make the inference that Mr King did not want to investigate the grievance by not including witnesses who he did not know were there or by not asking a direct question of Derek Lowe.

153. It was a mistake by Mr King not to advise the claimant of the right of appeal against the grievance outcome which was intimated. Again, the Tribunal were unable from the evidence to make any connection between that and direct discrimination or harassment of the claimant due to his sexual orientation. He was advised by his union representative of his right to appeal and he made that appeal. The Tribunal accepted the evidence of Mr King that he had same sex relationships within his family and easily

accepted their orientation. That made it even less likely that there was any discriminatory treatment. Neither did the Tribunal consider that the failure to intimate the right of appeal would have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, offensive or humiliating environment for him.

154. As regards the assertion that Ms McGlasson had laughed at the claimant in the course of the appeal hearing the Tribunal did not find this substantiated on the balance of probability. There was nothing in the minutes about this matter. The Tribunal accepted the evidence from Ms McGlasson that she was "gobsmacked" that this allegation had been made. She conceded that she may have been surprised at being told by the claimant that Mr Adair had said that "he had been in the army and he knew what depression looked like and he (the claimant) didn't have depression" and that exclamation of surprise might have occasioned the claimant to consider that he was being "laughed at". However, the Tribunal were of the view that this was a misinterpretation of events and not satisfied that this assertion was made out. and so no discriminatory treatment or harassment could arise.

155. Insofar as events after the claimant submitted his resignation are concerned then again the Tribunal were satisfied that each of the witnesses Roy Adair and Ms McGlasson spoke of the claimant's statement that he "felt like putting the chair to the MD" and that he had raised the issue of suicidal tendencies within his meeting with Claire Gray. That would explain why the respondent thought it best that the police attended his house to ensure all was well. The Tribunal accepted that explanation rather than making an inference that that action by the respondent was a continuation of any discriminatory treatment on account of his sexual orientation or indeed harassment.

156. Additionally, on the issue of management reports there did seem to be some element of confrontation over this issue. It was felt that the claimant should be on paid leave until his notice expired. He seemed grateful that that was the case as expressed in his email to Ms McGlasson. The evidence from the investigation by Ms McGlasson into that matter suggested that there had been words exchanged between Mr Adair and

the claimant over whether he should be in the building at all; but there was no suggestion from the witnesses spoken to by Ms McGlasson that Mr Adair had been other than firm without shouting or being overly abrupt. He had indicated to the claimant that if he didn't go off the premises then he would have to call the police but had thought better of it. The Tribunal accepted that these events had an underlying explanation other than being motivated by discriminatory treatment on account of the claimant's sexual orientation.

157. Much stress was made by the claimant in his submission that there was a failure by the respondent in their duty of care to him because of his depression. That of course is a very different case than the one made out of discriminatory treatment on account of sexual orientation. Various comments made in the submission by the claimant seemed to relate more to a case of disability discrimination. However that was never a case that was put to the Tribunal and not one that could be considered. Additionally, given the previous Judgment on jurisdiction a number of incidents had been ruled out of time and so the Tribunal require to consider only those matters brought forward by the claimant within the further and better particulars at paragraph 19/22. On those matters the Tribunal did not find there to be a discriminatory treatment either under section 13 or harassment under section 26 of the Equality Act 2010.

Constructive dismissal

158. The claimant's case of constructive dismissal is outlined within his further and better particulars (J67/69). The majority of the incidents relied upon have been covered within the conclusions on direct discrimination/harassment and are not repeated here. In short, in respect of those matters the Tribunal did not find there to be discriminatory treatment or harassment under the Equality Act. The letter of resignation stated that the reason for resignation was because of failure to respond to reports of "discrimination against me". Without that element there could be no breach of the implied term of trust and confidence in relation to these issues.

159. The resignation letter also mentioned that the claimant had a concern about being "pulled in" for small issues and "threatening messages on his ticket machine" Reference has been made to messages from Mr Adair and that the claimant received the same messages in the same terms as others. The claimant was not being singled out in this respect. No examples of "threatening messages" were produced and the Tribunal could not consider this was conduct likely to breach the implied term. So far as being "pulled in" for small issues the Tribunal considered that the respondent was entitled to insist on compliance on uniform and there were no other examples of the claimant being picked up on small issues. The final written warning received on 12 November 2019 was elderly and not appealed and the surrounding circumstances suggested it was not disproportionate such that it could found breach of the implied term.

160. The further issues related to Mr King allegedly indicating that the claimant was "not very well liked here, when I was in a place and felt unliked I decided it was time for me to move" being what the claimant believed to be a hint that he should resign his employment. Mr King denied that he had ever said this. There was nothing in the minutes which would indicate that such a comment was made. The Tribunal believed Mr King when he said that he had never been in a position where he was not liked and felt that he required to move on. The Tribunal did not consider that this was again made out as a fact on the balance of probability.

161. Again, the failure to intimate a right to appeal the grievance outcome did not in the Tribunal's view amount to an act to which would breach the implied term of trust and confidence. The claimant was advised of his right of appeal by his union representative and he took that right. He did not await the outcome before resigning but that appeal was heard thoroughly by Ms McGlasson.

162. A further matter related to Ms McGlasson "laughing at" the claimant in the appeal hearing which the Tribunal have found not to have been substantiated.

163. Neither did the Tribunal consider that Ms McGlasson had "lied" about the claimant identifying Sue Craze as the additional witness at the meeting in

town with Mr Samson. The position was that the individual identified (Sue Craze) had been mentioned by the claimant earlier in the appeal and when the claimant indicated that the additional witness was a "she" Ms McGlasson made a wrong assumption that this was the person being identified. She was wrong about the person concerned but again the Tribunal were not satisfied on the balance of probability that Ms McGlasson had deliberately lied to the claimant. In any event that follow up with Mr King on whether Sue Craze could have been part of the group took place on or after 9 September 2020 (J122/1230) and the Tribunal found the resignation of the claimant took place on 7 September 2020 and so this matter could not have been part of the reason for resignation.

164. The same is true of the events around management reports and being asked to leave the premises subsequent to resignation. They could not form part of the reason for resignation. All events after 7 September 2020 are irrelevant as regards reasons for the claimant's resignation.

165. The Tribunal accepted the claimant's upset and distress. However in all the circumstances there was no material upon which the Tribunal could base a finding that the respondent had acted in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them and the claimant. There was simply insufficient factual basis to make that conclusion.

Employment Judge: **J Young**

Date of Judgment: **17 August 2021**
Date sent to parties: **18 August 2021**