



# EMPLOYMENT TRIBUNALS

**Claimants:** Mr R Stephens

**Respondents:** Denholm Logistics UK Ltd

## REASONS

**following a request from the Claimant after promulgation of the Judgment**

1. The Claimant has been employed by the Respondent since 22 January 2018 as an HGV Driver. In or around December 2020 he was diagnosed as suffering from prostate cancer. He informed the Respondent of his diagnosis on 19 January 2020. He relies upon prostate cancer as a disability for the purposes of these proceedings. The Respondent operates a well-established logistics business. At the time under consideration in these proceedings the Respondent operated from 10 sites and employed 230 employees. The Claimant was based at the Respondent's Southampton site. A decision was made by the Respondent to cease operations from the Southampton site in or around November 2020 which briefly placed the Claimant's employment at risk of redundancy. The Claimant's employment was transferred to the Respondent's site at Tilbury in circumstances which will be described below. The Claimant was on furlough at this time and at the time of the hearing it was confirmed that he would remain on furlough until 30 September 2021 after which, if his health allowed, he would return to work operating from the Respondent's Tilbury depot.
2. The Claimant pursues claims of direct disability discrimination (contrary to s.13 Equality Act 2010 ("the Act")) relying on incidents in which he alleges that he was subject to less favourable treatment by the Respondent because of his disability which on 25 and 26 March 2020 and 2 December 2020. The Claimant also asserts that he was subject to harassment related to his disability by the Respondent (contrary to s.26 of the Act) on 3 February 2020, 18 February 2020 and during a redundancy consultation meeting held with him on 2 December 2020. The Respondent denies that it has discriminated against the Claimant by reason of his disability as he has alleged.
3. There was an Agreed Bundle of Documents (Exhibit R1). The Tribunal received evidence from the Claimant who gave evidence in chief by written statement (Exhibit C1). The Respondent also received evidence from Mr Hall, the Respondent's Managing Director who gave evidence in chief by written statement (Exhibit R2); and from Mr Moran, who was at the time the Respondent's Transport Planner, who gave evidence in chief by written statement (Exhibit R3). The Respondent had also provided a Chronology

(Exhibit R4) and Miss Graydon submitted written submissions to the Tribunal (Exhibit R5). The majority of factual matters are not in dispute. However the reason for them is very much an issue between the parties. The Tribunal made the following findings of fact after careful consideration of the oral and documentary evidence presented to it by the parties and receiving Mrs Waite's oral submissions and Miss Graydon's oral and written submissions.

4. Mr Hall confirmed that the Respondent values the work which the Claimant has undertaken for the Respondent and its predecessors over many years and the Respondent has made no criticism of the Claimant's standards of work during the course of these proceedings. In the course of cross-examination, it was also confirmed that the Claimant had sought no adjustments to his working arrangements in what is a demanding job( which requires him to be away from home and to sleep in his cab during the course of the working week) when he returned to work on 3 February 2020 and that Mrs Moulds, the Respondent's Operations Supervisor, was very aware that the Respondent might have to make adjustments to work arrangements for him and that the Respondent had been prepared to consider any adjustments suggested by him.
5. The Claimant commenced sickness absence on 24 December 2019 and during the course of that absence advised the Respondent that he had received a diagnosis that he was suffering from prostate cancer. The Respondent was not alerted until 30 January 2020, by receipt of a GP's Fit Note, that the Claimant intended to return to work on 3 February. Mr Leath, the Respondent's Southern Region Operations Manager was assigned to conduct a return to work interview with the Claimant on 3 February and no driving duties were assigned to him on that day for that reason. A return to work interview was a standard procedure which was required by the Respondent's Health & Safety policy. It applied to all its lorry drivers. Furthermore, Mr Leath was required to complete a standard form which set out a number of questions which had to be answered by a returning lorry driver. The relevant correspondence read by the Tribunal confirms that Mr Leath was concerned to ensure that the temporary driver who had been covering the Claimant's job was advised of his return and was supported by the Respondent in seeking new employment.
6. At the return to work interview the Claimant informed Mr Leath that he was required to have an injection every Friday which was likely to lead to some tiredness. Mr Leath was satisfied, as was the Claimant, that as he would have the weekend to recover these after effects, this would not present any difficulties for the Claimant during his working week. Mr Leath held the return to work meeting in his office which was a converted container. This was the usual practice because there were no private rooms to use for such meetings. There were three desks in the container. The Claimant did not inform Mr Leath that he was uncomfortable with the location for the meeting. He did not suggest that the discussion should take place in his own vehicle and accepted in cross-examination that he had not asked John Leath to conduct the meeting elsewhere as he had previously alleged during the proceedings. The Tribunal is satisfied that the discussion between Mr Leath

and the Claimant was held as privately as possible given the limited resources available to the Respondent.

7. Mr Leath was required to note any medication used by the Claimant. He was told that the Claimant now had four sets of tablets but could not recall details of them. It was agreed that he would collect his bag of medication from his lorry so that Mr Leath could note the medication he was taking. The Claimant came back with a bag which contained the four labelled boxes provided his chemist. Mr Leath emptied the bag onto his desk and noted details of the medication from the labels on those boxes before returning them to the bag and returning it to the Claimant who had raised no objection to collecting the boxes from his vehicle. The Claimant had made no complaints as to Mr Leath's conduct of this meeting until issuing these proceedings.
8. The Tribunal accepts the Respondent's evidence that the question of medication is asked of every employee in any similar situation. This is because the Claimant and others operate 44 tonne vehicles and it is essential, as the Claimant accepted during the course of his evidence, that a driver behind the wheel of a lorry is fully fit to drive it and for the Respondent to satisfy themselves of that fact because of its duty of care to its drivers and the public.
9. There is no evidence before this Tribunal that the Claimant did not want to support the Claimant's return to work and the evidence provided to the Tribunal by both the Claimant and Respondent confirms that it wanted to support him in his return to work. At this time the Respondent's understanding was that approximately seven weeks after the Claimant's return to work it was intended that the Claimant would commence chemotherapy for which he intended to take sick leave. The Tribunal is satisfied that the return to work meeting did not, as the Claimant has alleged, have the purpose, or effect, of creating an intimidating, hostile, degrading, humiliating or offensive environment for him. As already stated, the Tribunal finds that he was supported in resuming work after ensuring that he was fit to do so and that the medication he was receiving would not prevent him from doing so.
10. Mr Moran was at this time the Respondent's Transport Planner. This is a demanding job in which the daily responsibilities include allocating jobs to the Respondent's drivers, planning routes for those drivers, managing their arrivals at customer sites, or other locations, and notifying them of arrival times. The management of each day's route will involve him in contact with between 15 and 20 drivers by telephone. Therefore, in the Respondent, and in the industry, because it is necessary for a transport planner to be in contact with HGV drivers all lorries are fitted with Bluetooth to enable such calls to be made and received safely. The Claimant accepted that he had a good working relationship with Mr Moran prior to taking sick leave and that up to that point he was used to receiving telephone calls from Mr Moran during journeys as were all other drivers working for the Respondent. It was not alleged by the Claimant that he was treated any differently than other drivers in this regard.
11. Mr Moran reported to the Respondent's Operations Manager. Mr Hall

explained that in circumstances where Mr Moran had concerns about a driver he was required to report those concerns to the Operations Team by whom the driver was managed. On 18 February 2020 a job scheduled for the Claimant was cancelled which meant that he had to return to the Southampton depot. The relevant documentation in the Agreed Bundle confirms that it was the Claimant who telephoned Mr Moran on 18 February because he was delayed by a substantial traffic jam caused by major roadworks on the M271 leading into Southampton Docks, and that he then had to call Mr Moran again when he reached the Dockyard gates because of a substantial queue of lorries waiting to enter the Dockyard. It was the Claimant's recollection that this delayed his arrival at Southampton Docks by around two hours.

12. Mr Moran was concerned about the Claimant's long delay in arriving at Southampton Dockyard and queried whether he could have been delayed on the M271 as he said he was because Mr Moran had already factored in delay at the roadworks when planning the required journey and advising the relevant location in the Dockyard of the Claimant's expected time of arrival. Mr Moran was further disadvantaged because there had been no tracker in the Claimant's lorry for some time which prevented him analysing the course of his journey. It was for this reason that he referred his concerns by email to the Operations Team at 14:44 on that day after the Claimant had completed the journey. The reply from the Operations Team to Mr Moran confirmed that the Claimant had been held up as he had explained to Mr Moran and that no action was necessary in respect of the matter. The important point about this situation is that, on the evidence before the Tribunal the Claimant was not aware of this exchange of emails between Mr Moran and the Operations Team in which he questioned the accuracy of the reason given by the Claimant for the long delay in arriving in Southampton. It also confirms that the concern expressed by Mr Moran was a genuine concern based on his reasonable analysis of journey times and was only related to whether or not there had been such a substantial delay as the Claimant had described and was not in any way related to the Claimant's disability. It also confirms that there is no basis for the Claimant's assertion that the telephone contact between him and Mr Moran on that day, which was initiated by him, was harassing him as a result of his illness.
13. The Tribunal also had to consider the circumstances in which Mr Moran contacted the Claimant on 18 March 2020. There was contact between them via Bluetooth in the course of a journey undertaken by the Claimant on behalf of the Respondent from Bristol / Avonmouth to Southampton. The Claimant lives in the Bristol area and had been unable to return to a depot in Avonmouth on the previous evening which meant that he had to travel to Avonmouth on the next day which would extend the length of his journey to Southampton. This additional work was known to Mr Moran and the dispute of fact between the Claimant and Mr Moran concerns who phoned who when, and whether Mr Moran continually phoned the Claimant during the second half of his journey to the Southampton depot. It is not disputed that Mr Moran was concerned at the time estimate which the Claimant had provided to him for this journey. The Claimant had estimated that the journey would take four and a half hours and if this estimate was correct then it

severely disrupted Mr Moran's plans to provide a second job to the Claimant and his lorry on that day, and arrangements he had to make for the entry of the Claimant's lorry into Southampton Docks and what the customer required from the Respondent. As it turned out, the Claimant arrived at Southampton far earlier than he had estimated and conceded that the time estimate he had given to Mr Moran was incorrect. He says that he made that error because of constant telephone calls being made to him by Mr Moran during the course of the journey.

14. Unfortunately, for the Claimant, this mitigation of the error he made in the time estimate is unsustainable. This is because whoever contacted whom first there is no dispute that the time estimate given by the Claimant must have been during the first call either made by him to Mr Moran or from Mr Moran to him at the start of the working day. This means that any error could not have been caused by constant calls from Mr Moran. Furthermore, as the hearing progressed and during the course of Mr Moran's cross-examination, the Claimant's case was that after that first call, three or four further calls were made by Mr Moran rather than a continuous stream of calls as had been alleged by him. Mr Moran told the Tribunal that only one call had been made by him after he had spoken to the Claimant at the start of the working day and, that when he pressed the Claimant about the time estimate, it was the Claimant who became annoyed because he asserted that Mr Moran was questioning his judgement and at that point ended the call abruptly.
15. The Tribunal does not have to make a finding of fact as to who ended the call and accepts that there had been frustration on both sides during the course of that call but the Tribunal has concluded that Mr Moran's genuine and reasonable concern was about a time estimate which he was entitled to challenge, and on which he was proved to be correct, and which was unrelated to the Claimant's disability. As already stated there was considerable frustration on both sides. This is demonstrated by the fact that both Mr Moran and the Claimant complained to others about how they had spoken to each other during the call.
16. The Tribunal concludes that there were two calls between them during this journey. The first was at the start of the working day after Mr Moran realised that the Claimant had the additional task of having to collect a trailer in Avonmouth on that morning and wanted to check what effect that extra journey might have on his journey times. The second call was made in the middle of the journey when the Claimant was around Swindon on the M4 which is when Mr Moran challenged the Claimant as to his original time estimate and it was that challenge to which the Claimant took exception and responded angrily to Mr Moran. Subsequently, Mr Moran's challenge was proved to be a reasonable one because, as the Claimant conceded, he arrived at Southampton far earlier than he had estimated but the reason for his miscalculation of the time for this journey was not due to him facing continuing calls from Mr Moran.
17. The next sequence of events which the Tribunal has to deal with involves the Claimant's request for holiday, the introduction of the first lockdown as a result of the Covid pandemic and the Government's introduction of the

furlough scheme. The Claimant submitted a request for holiday for 25, 26 and 27 March followed by the next two weeks when he expected to commence chemotherapy. Those at the Respondent were unaware that he had agreed this holiday request with his former Operations Manager, Mr Sussex, who no longer worked at the Respondent when the written request for holiday was submitted by the Claimant. This meant that from the Respondent's point of view he had given short notice of the holiday request under the relevant terms of the Respondent's Handbook. This meant that his holiday request was a matter of management discretion and there was a concern that the Claimant had only accumulated three days holiday by that date. Before being overtaken by other events the Respondent's position was that the Claimant could take 25, 26 and 27 March as holidays but would not be able to take the other two weeks because of work demands in the business. It is unclear as to whether the Respondent was aware of the purpose of this absence which, of course, if not allowed as holiday, would have been sick leave. The Respondent had also received notice from ACAS at this time that the Claimant was intending to pursue employment tribunal proceedings against it.

18. As a result of the Government's response to Covid, the Claimant then decided that, as a vulnerable person, he would self-isolate for 12 weeks. This meant that the ongoing issue of whether he would be allowed to take the further two weeks holiday he had requested was overtaken by events and never finally resolved until considered by Mr Hall when he investigated the grievance submitted by the Claimant. The Government also introduced the innovative, and complex, furlough scheme which added further complexity to a number of issues involving the Claimant which the Respondent had to deal with. There was considerable uncertainty as to the terms of the furlough scheme and how it would operate in certain circumstances and the Respondent was not alone in having to address such issues. The Tribunal is satisfied that the Respondent's approach to this situation was measured pragmatic and certainly caused no prejudice to the Claimant. The correspondence between the Respondent's HR Director and Mrs Waite also confirms the issues which they were addressing, that she knew of them, and that they gave careful consideration to the information which she provided to them.
19. The Respondent faced two issues. The first was whether an employee who was on sick leave could qualify for furlough. The second was whether they should discuss this point with ACAS who had contacted the Respondent as to the Claimant's intention to pursue employment tribunal proceedings against them on grounds that were yet to be clarified. The Tribunal is satisfied that these were genuine and reasonable concerns which the Respondent did its best to address as quickly as possible. When they were resolved, the Respondent moved quickly to make an offer of furlough to the Claimant. He received that offer at 10.47 on 27 March, the day after the same written offers of furlough had been handed to his colleagues when he had been absent from the workplace because of shielding. The Respondent also ensured that the Claimant's furlough was backdated to the earliest possible date that it could be.

20. The Claimant also pursued internal grievance procedures. These grievances were given very careful consideration by Mr Hall and the Tribunal compliments him on his diligence in doing so. He concluded that the Claimant should have been allowed the fortnight's holiday that he had requested and so the previous decision in that regard was reversed. This would still have been of benefit to the Claimant because if he had chosen to take that holiday he would have been in receipt of 100% of pay for those two weeks rather than the reduced rate of 80% of pay on furlough for those two weeks. The Tribunal was advised that the Claimant chose to continue accruing his holiday entitlement rather than taking up that two week holiday period. The introduction of the furlough scheme and the Respondent's decision to put the Claimant on furlough meant that he did not have to take the two weeks under consideration as sick leave and at the end of the grievance procedure could have had the benefit of additional pay for that period if he had chosen to take it as holiday.
21. The Tribunal has accepted that the Respondent was reacting to Government guidelines and needed time to establish whether or not the Claimant was entitled to join the furlough scheme. They always intended to place him on furlough if he was eligible for that course of action. The correspondence in the Agreed Bundle confirms that drivers who were on site on 26 March received their letters placing them on furlough and explaining its terms on that day and that the Claimant received his letter on the following morning by email. The Claimant was the first employee within the Respondent's group of companies to be furloughed and his furlough was backdated to 24 March 2020 which was the Claimant's first day of absence and was the earliest possible date for him to receive furlough. The Tribunal has found that the Respondent had already agreed to grant holiday to the Claimant as he had requested on 25, 26 and 27 March but that was also overtaken by events because he was placed on furlough with effect from 24 March.
22. In or around November 2020 the Respondent concluded that it would cease operations at three of its ten sites, one of which was Southampton where the Claimant was based. The reason for this decision was a downturn in container work and the Respondent's shift of business towards general haulage. Those at risk of redundancy as a result of the decision to cease operations at Southampton had the opportunity of considering whether or not they wanted to apply to transfer their base to either Felixstowe or Tilbury to avoid redeundancy.
23. The Respondent's HR Department made arrangements for the Claimant to attend a redundancy consultation meeting on 2 December 2020 which took place by telephone conference on that day. The meeting was chaired by Mr Hopkins, the UK Operations Manager, and the Claimant attended with Mrs Waite, his partner, as his representative. The Claimant indicated that he wished to transfer to Tilbury. After he had done so, Mr Hopkins raised concerns around the practicality of a transfer for him when he lived in the West Country and would have a journey time to work of around four to four and a half hours to Tilbury. The Claimant was a Trumper which meant that he would usually travel to his base depot once a week and thereafter have the facility to stay overnight in his lorry. Mr Hopkins also explained the

redundancy package on offer and agreed to investigate the position in respect of furlough which at that time had been extended to March 2021 by the Government. Mrs Waite made clear in the meeting and in correspondence afterwards that as soon as his health condition / treatment allowed, the Claimant was keen to get back to work. On 15 December Mr Hopkins wrote to the Claimant to confirm that during consultation with him he had elected to take up alternative employment at the Respondent's Tilbury depot to continue in his job as an HGV1 driver and that he had been transferred to that position with immediate effect with all other contractual terms remaining unchanged. His letter also confirmed that the Claimant was no longer at risk of redundancy. Mr Hopkins' covering letter to Mrs Waite sent with the letter confirming the transfer to Tilbury clearly sets out the matters that he had wanted to consider, and the further information he reasonably required from the Claimant before making that decision. Mr Hopkins had also been assisted in the intervening period by the involvement of the Claimant's Trade Union representative.

24. The Claimant has remained on furlough since his employment was transferred to Tilbury. The expectation at the time of the hearing was that furlough would end on 30 September 2021 and at that time if the Claimant's health / treatment allowed him to do so, he would be resuming his employment and travelling to and from Tilbury to do so working as a Trumper on the same terms as before which was the transfer which the Claimant had sought when his position at Southampton became redundant. The Respondent did not exclude the Claimant from that option. However, it wanted to ensure that it was a viable option for him and that he had taken into account the various demands the new site would present to him and satisfy itself that the transfer was practical for him and for the business. After doing so, it had transferred him to that new job based at Tilbury. The other lorry drivers based at Southampton had been involved in consultation to consider the potential alternative sites of Tilbury and Felixstowe. There has been no evidence placed before the Tribunal that the actions taken by the Respondent to consult with the Claimant were related to, or influenced by his disability. Furthermore, there is no evidence to support the suggestion that the Respondent was acting in an obstructive or unsupportive way towards the Claimant in these circumstances and, on the Tribunal's findings, the opposite is the case as the outcome of the consultation clearly demonstrates. These are the facts which the Tribunal has found.
25. The Tribunal has to consider whether the Claimant has shown a prima facie case, that is, are there findings of fact from which a Tribunal could determine that, in the absence of any other explanation, the discrimination alleged by the Claimant has occurred? If the Tribunal finds that he has not done so then the Claimant's claims must fail. If it decides that he has disclosed a prima facie case in one or more of the claims he makes, then the burden shifts to the Respondent to provide an explanation sufficient to show that it did not discriminate against the Claimant.
26. The Tribunal's findings of fact do not establish a prima facie case that the Respondent discriminated against the Claimant. He was not treated any differently to the HGV drivers he has named at the meeting on 3 February



2020. Mr Leath was following an established and necessary procedure for this return to work meeting with the Claimant. Mr Leath was not treating him differently at this meeting.

27. Telephone calls between Mr Moran and the Claimant on 18 February and 18 March 2020 were concerned with matters relating entirely to the journeys which the Claimant was undertaking on those days. The understandable concerns which Mr Moran had on 18 February were shared with those he reported to who confirmed matters to him which meant that matters did not have to be taken any further and that the Claimant had no knowledge that Mr Moran had raised such concerns at the relevant time. Furthermore, the Claimant did not allege that he had been harassed by Mr Moran during the two calls which he made to him on that day to explain the delay in his arrival at Southampton Dockyard.
28. The Claimant's version of events on 18 March is for the reasons the Tribunal has set out above unsustainable. Mr Moran's actions in contacting the Claimant did not amount to harassment as the Claimant has alleged.
29. The actions taken by the Respondent in respect of his application for leave made in March 2020, and then as to furlough, and subsequently in dealing with a potential redundancy in December 2020 were all necessary, appropriate and reasonable taking into account the circumstances of the Respondent and the Claimant at the relevant times. Furthermore, they were not taken by the Respondent because of the Claimant's disability. He was not treated unfairly. There are documents in the Agreed Bundle that confirm that his requests were properly considered and the courses of action which he wanted to be taken were agreed by the Respondent which continued to support him by agreeing to them.
30. Therefore, the Tribunal has found that on 25 and 26 March 2020 and 2 December 2020 the Claimant was not treated less favourably than the HGV drivers he named and all other HGV drivers because of his disability. The Tribunal has also found that the Claimant was not subject to unwanted conduct related to his disability by the Respondent which had the purpose, or effect, of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. This means that the Claimant's claims of disability discrimination must fail and are dismissed.

Employment Judge Craft  
Date: 9 October 2021

Reasons sent to parties: 21 October 2021

FOR THE TRIBUNAL OFFICE