EMPLOYMENT TRIBUNALS

Claimant: **Mr E Carrieles**

Respondent: **North Tyneside Council**

Heard at **Newcastle Employment Tribunal** **On:** **4 and 5 April 2022**

Before: **Employment Judge Martin**
Members: **Ms L Jackson**
Mr R Grieg

Representation

Claimant: **In person**
Respondent: **Ms A Rumble (Counsel)**

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is not well founded and is hereby dismissed.
2. The claimant's complaint of breach of contract (notice pay) is not well founded and is hereby dismissed.
3. The claimant's complaint of disability discrimination is also not well founded and is hereby dismissed.

REASONS

Introduction

1. Mr D Hogg, Team Leader, Mrs W Brown, Operational Manager Waste and Recycling, Mrs K Alexander, HR business Partner and Mrs S Begg, Human Resources Business artner all gave evidence on behalf of the respondent. The claimant gave evidence on his own behalf. The Tribunal were provided with an agreed bundle of documents marked appendix 1

The law

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

Section 98(1) of the Employment Rights Act 1996

"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:-

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

Section 98(2) ERA 1996

"A reason falls within this subsection if it:-

(b) relates to the conduct of the employee"

Section 98(4) ERA 1996

"The determination of the question whether the dismissal is fair or unfair having regard to the reason shown by the employer:-

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

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

Section 15(1) of the Equality Act 2010

"A person (A) discriminates against a disabled person (B) if:-

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

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

Section 15(2) EA 2010

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

Section 136(1) EA 2010 section burden of proof?

This section applies to any proceedings relating to a contravention of this act.

Section 136(2)

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

"Section 136(3) but subsection 2 does not apply if A shows that A did not contravene the provision."

3. The case **of British Homes Stores Limited v Burchell** [1978] IRLR 379 where the EAT held that where an employee is dismissed because the employer suspects or believes that the employee has committed an act of misconduct there are three elements to be considered. Firstly there must be established by the employer the fact of that belief. Secondly it must be shown

that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly the employer carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

4. The case of **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439 where the EAT held that the function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band it is unfair.

5. The case of **Igen Limited v Wong** [2008] IRLR 258 where the court of appeal held there is a two stage process in complaints of discrimination but the Tribunal should not divide hearings into two parts. The first stage requires the claimant to prove facts from which the Tribunal could conclude in the absence of an adequate explanation from the respondent that the respondent has committed, or is to be treated as committed, the unlawful act of discrimination against the complainant. The plain purpose of which is to shift the burden of proof at the second stage. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act.

The issues

6. In respect of the complaint of unfair dismissal the Tribunal had to consider the reason for dismissal. It was pleaded as conduct.

7. In that regard the Tribunal had to consider whether the respondent had a reasonable belief that the claimant had committed an act of misconduct, whether that was based on reasonable grounds and whether the respondent had undertaken a reasonable explanation.

8. The Tribunal then had to consider whether the respondent had followed a fair procedure, in particular regarding the fact finding and disciplinary hearing.

9. The Tribunal had to then consider whether dismissal was a reasonable response in the circumstances of the case.

10. The Tribunal had to then consider whether, if a fair procedure had not been followed, the claimant would have been fairly dismissed in any event and/or what was the chance of that happening.

11. The Tribunal also had to consider whether the claimant had contributed in any way to his dismissal.

12. In respect of the complaint of breach of contract (notice pay), the Tribunal had to consider whether the claimant was in breach of contract and whether the respondent was entitled to dismiss the claimant without notice. If not, the Tribunal would have to consider what sums would be due and owing to the claimant and in what amount.

13. In relation to the complaint of disability discrimination the Tribunal noted that the respondent conceded that the claimant was a disabled person under the provisions of section 6 of the Equality act 2010 in relation to his mental impairment of depression.

14. The Tribunal had to consider whether the respondent had treated the claimant unfavourably. In that regard the Tribunal had to consider what was the unfavourable treatment complained of. No draft list of issues had been agreed between the parties. In discussing this with the claimant at the outset and during the course of his evidence he asserted that it was the manner of dismissal and not being able to explain what happened.

15. The Tribunal had to then consider whether the respondent treated the claimant unfavourably in that regard because of "something arising" in consequence of the claimant's disability. In discussing with the claimant at the outset of the hearing and during the course of the hearing, he indicated that the "something arising" in consequence of his disability was not being able to properly explain things during the fact find process which he said was due to his disability.

16. The Tribunal then had to consider whether the treatment or a proportionate means of achieving a legitimate aim. The respondent indicated that the legitimate aims relied upon were to manage employees in accordance with their disciplinary procedures and policies and further to comply with their duty of care to all staff and the local public.

17. The Tribunal also had to consider whether the respondent could show that it did not know or could not reasonably have been expected to know the claimant had a disability. The respondent indicated that knowledge was not an issue in this case.

Findings of fact

18. The claimant suffers from depression. The respondent admits that this mental impairment amounts to a disability under section 6 of the Equality Act 2010.

19. The respondent is a Local Authority in the North East of England. The claimant was employed by the respondent as a HGV team driver/co-ordinator. His employment with the respondent commenced in August 1991.

20. In his declaration to the respondent in December 2019, he declared that he would notify the respondent of any illness, condition or event which affected his ability to drive - page D16. The conditions of the respondent's driving policy are set out at pages D20 to 21. The claimant has signed a declaration to confirm that he is aware of and agrees to abide by those conditions which include that he will not allow any unofficial drivers to drive the vehicle - page D20-21.

21. In his evidence, to the Tribunal the claimant indicated that on 25 June 2020, he went to the doctor and allowed Billy Woods, who was the banksman accompanying him in the vehicle, to drive the vehicle whilst he went to see the doctor. Mr Woods was not authorised to drive the vehicle. He does not hold the CPC licence which is required to drive the vehicle. He is therefore not within the pool of authorised drivers to drive the vehicle. Mr Daniel Hogg, the claimant's line manager, said that he was not aware the claimant had gone to see the doctor or that Mr Wood had driven the vehicle on that occasion. Mr Hogg said in his evidence that if he had been aware of that he would have taken action at that time. When he was questioned about this by the claimant on cross-examination, Mr Hogg said that he had no reason to look at the CCTV footage for that day as he was not aware of any incident on that particular day.

22. An incident occurred on 26 June 2020, namely the following day. On that occasion, the claimant allowed Mr Woods to drive the vehicle, albeit that Mr Wood was not qualified to do so, having no CPC license. The claimant said in his evidence that he was not aware that Mr Woods did not have a CPC license. He initially suggested that Mr Woods did have a licence, but he conceded on cross-examination that he did not know whether Mr Woods had the appropriate CPC license.

23. In his ET1, the claimant indicated that he was unwell on 26 June 2020 and unable to drive the vehicle. He said he therefore asked his colleague Mr Woods to take over the driving for him which Mr Woods did. In his fact find meeting, Mr Woods indicated that he did the claimant a favour and took over the driving because the claimant was feeling unwell - pages D90-D92.

24. An accident occurred whilst Mr Woods was driving the vehicle. He drove into a wall which collapsed and caused substantial damage to the building and damage to the vehicle itself. If any other property or people had been present at the time of the accident, then a very serious incident could have occurred.

25. The claimant drove the vehicle back to the respondent's site and reported the incident. Mr Hogg then followed the claimant back to the accident site. He then asked the claimant to take the vehicle to the depot, which the claimant did. The claimant drove the vehicle on both of those occasions.

26. When the claimant returned to the respondent's site, Mr Hogg asked him to complete an accident report form. This was the usual procedure. Mr Hogg asked Mr Woods to produce a statement because he was a witness.

27. The accident report form which was completed and signed by the claimant on 26 June is at pages D81 and D82. It states that he was the driver of the vehicle and that Mr Woods was a witness. Under where it says driver statement, he has indicated that he was reversing and the sun blinded him. A sketch was drawn of the incident. In the form he states that he considers that the sun was at fault. In his evidence to the Tribunal, the claimant admitted that he had written the accident report form and signed it. He indicated that Mr Woods had produced the drawing.

28. Mr Woods' statement is at page D83. It states that he was the banksman at the rear of the wagon and the wagon hit the wall. He says that to his thinking the sun blinded the driver. The statement is said to be true to the best of his knowledge and is signed and dated 26 June 2020.

29. Mr Hogg said that the claimant seemed to be in shock and he suggested that he go home. In his evidence, the claimant said that it was him who had asked to go home. Mr Hogg indicated that Mr Woods said that he was OK, but he too was sent home.

30. After both the claimant and Mr Woods left, Mr Hogg said that he then viewed the CCTV footage in the vehicle. He noted that Mr Woods was driving the vehicle. In his cross examination of Mr Hogg, the claimant appeared to be suggesting Mr Hogg had viewed the CCTV footage when he was at the depot and that he knew that he was driving. Mr Hogg's evidence was that he viewed the CCTV footage afterwards.

31. Mr Hogg said he then contacted HR and on their advice suspended both the claimant and Mr Woods.

32. The letter of suspension is dated 26 June 2020. It states that the claimant is suspended from all duties. It sets out details of the allegations of misconduct which are being investigated namely:- that on 26 June being in the use of a council vehicle which caused damage to property and on the same day providing a false statement about the incident. It stated that the period of suspension is to enable an investigation to be undertaken. Mr Hogg also states that a fact find manager will be appointed shortly and will be in touch with the claimant to confirm the next steps. It advises that the claimant will be invited to an investigatory interview and may be accompanied at that meeting. The letter is at page D84 to 85.

33. During his fact find investigation, Mr Woods said that he had withdrawn his original statement. He wanted to withdraw it because he said he and the claimant had got their heads together, he then panicked and he wanted to now take the blame. He said that they were both in shock. He said that he was doing the claimant favour. He said the claimant had been off sick a lot and was scared of being sacked. The notes of his fact finding meeting are at pages D88-D94.

34. The claimant was invited to an investigation meeting on 14 July. He was informed that the allegations being investigated were those relating to the incident on 26 June. Page D95-D96.

35. The meeting was due to take place on 21 July 2020.

36. On 20 July 2020 the claimant's solicitor contacted the investigating officer to indicate that she had been asked by the claimant to write on his behalf in advance of the investigation meeting the next day. She stated that the claimant was suffering from stress and anxiety, since he was suspended from work on 26 June 2020 with the threat of disciplinary action. She said that he was awaiting a letter from his GP confirming that he was not well enough to attend the investigatory meeting tomorrow, which he will provide shortly. The solicitor asked whether it would be possible to reschedule the meeting and conduct it over the telephone and/or in writing instead. She went on to indicate that the respondent was aware the claimant suffered from long term depression and that the decision to suspend him had exacerbated his condition. She also said that he would be submitting a formal written grievance about the company's decision to suspend him for an accident which was caused by a colleague for which he initially took the blame as he was in shock and confused which she said was a symptom of his mental condition - pages D97-D98.

37. As a result, the respondents referred the claimant on to their occupational health advisors - pages D99-D101.

38. In the meantime, the respondent's HR manager contacted the claimant's union's branch officer to discuss the option of sending the claimant the questions which were intended to be asked at the investigatory meeting by post or email.

39. In his evidence to the Tribunal, the claimant indicated that he was for a period of time being represented by the GMB. He had been in contact with Mr Miley, GMB branch officer.

40. On 23 July 2020 the claimant's GP sent in a letter to the respondent in which he refers to seeing the claimant since the end of June. He started him on

anti-depressants. He said he was been having problems with low mood and poor motivation. He refers to a background of previous depression and stress and indicates that his mood started to drop prior to the incident at work and had significantly deteriorated since then. He indicates that he had provided the claimant with a sick note.

41. In his evidence, the claimant said he was being supported during this time by another manager Mr Mick Hewlish. He said that Mr Hewlish contacted him to provide support to him. He said in evidence that a discussion took place about how the investigatory meeting might proceed and he agreed with Mr Hewlish that he would answer questions that were sent to him.

42. It appears that information was then passed on to Mr Rogan, who was the investigating officer. The claimant's solicitors had already suggested dealing with the preliminary fact find in that way by written questions – page D97-98.

43. On 24 July 2020, Mr Rogan sent an email to the claimant which was copied to the GMB, who the respondent said in evidence had agreed through the GMB representative previously contacted by them to be an appropriate way to proceed. This email is at page D11. In that email Mr Rogan indicated that as the claimant was unable to attend a face to face interview, he had agreed through his line manager to have finding questions forwarded on to him for him to answer by email. Mr Rogan indicated that there may be further questions depending on the answers received. He also indicated that if any assistance or support was required in relation to the questions he should contact Donna Walker from the GMB who had agreed to represent him. In his evidence to the Tribunal the claimant confirmed that the GMB were representing him.

44. The claimant provided written answers to those questions, which are at pages D112-D113. He signed the document which was completed on 27 July 2020. He indicated that he could not recall the incident and stated that he was not driving the vehicle. He said that the reason he was not driving the vehicle was because he did not feel well. In answer to the question about why he said he was driving, he said that he was in shock and confused - page D112. He said that he allowed Mr Woods to drive the vehicle because he did not feel well. He thought Mr Woods had a HGV license and CPC license to drive the vehicle. He said that he could not remember if he had allowed Mr Woods to drive the vehicle before. He said he could not remember why he was at the back of the wagon and Mr Woods was driving. He said that he considered it was an accident and that there was no one to blame and apologised.

45. Prior to completing the investigation report Mr Rogan emailed the claimant to check whether he had any other answers he wanted to provide to the questions. The claimant responded by indicating that he had answered as best as he could - page D126.

46. After Mr Rogan had interviewed both the claimant and Mr Woods he completed an investigation report. The report is at pages D115-D125.

47. On 11 August 2020, the claimant's solicitor raised a formal grievance on behalf of the claimant. This is at pages D127-D128. In the grievance he indicated that he was raising a grievance about the events which occurred immediately following the accident on 26 June. He said that he felt unwell on

the day and that he was not responsible for the accident because he was not driving the vehicle. He referred to the statement which he was asked to complete on the accident report form and referred to being sent home and thereafter being told that he was suspended. He said that he took the blame for the accident because he was in shock and confused. He referred to the fact that he was suffering from depression and felt unwell. He said that the company should have known who was driving the vehicle as the cameras were there. The respondent's responded to the grievance by providing him with details of how to complete a formal grievance. By 13 August 2020, the claimant indicated that he did not want to pursue a grievance as such that his solicitor would deal with the matter if it proceeded any further. He was referred to the GMB union whom he said were representing him at the time.

48. On 14 August 2020, the claimant was advised the investigation was now completed. He was informed the outcome was to refer him to a disciplinary hearing. He was informed that the allegations were that: - Firstly he failed to inform management he felt unwell to drive and allowed the refuse vehicle to be driven by a colleague without authorisation which was considered to be a breach of the respondent's code of values and behaviours, in particular a failure to promote a safe and healthy working environment. Secondly, that he falsely completed an accident form saying that he was the driver of the refuse vehicle involved in the accident which was also considered to be a potential breach of the respondent's code of values and behaviours. The claimant was informed that both of these allegations were potentially allegation of gross misconduct. He was informed that he had the right to be accompanied by a trade union representative or work colleague to the disciplinary hearing. That letter is at page 143-144 and was hand delivered to the claimant's home address.

49. In that letter, Mr Rogan indicated that he had investigated the grievance raised and dismissed it making it clear that he understood Mr Hogg had not viewed the CCTV until after the statement had been made by the claimant - page D144 of the bundle.

50. On the same day, namely 14 August 2020, the claimant emailed Mr Rogan principally to indicate that he would like a trade union representative at the disciplinary meeting - Donna Walker and asking if the respondent could contact her for him - page D140.

51. He then sent a further email on the same day asking why he should go to a disciplinary hearing. He suggested the respondents knew the outcome and that they should get on and dismiss him - page D141.

52. He sent a further email to Mr Rogan on the same date. He refers to his mental health and suggests that he thinks he will just be dismissed anyway and that the decision has already been made.

53. He also writes to the respondent on 16 August indicating that he does not wish to pursue a formal grievance - page D145.

54. On 17 August 2020, Mr Rogan replies to those various emails. He informs the claimant that it was up to him to make contact with his GMB representative. With regard to his mental health, he refers him to the employee assistance programme and provides the contact details - page D149.

55. The claimant then emails again 17 August 2020 suggesting that the respondent should simply dismiss him now - page D150.

56. On 4 September 2020, the claimant was invited to a disciplinary hearing which was scheduled to take place on 10 September 2020. The claimant was advised that he could be accompanied to that disciplinary hearing. The allegations to be considered at the hearing are set out in the letter and relate to the incident on 26 June 2020 being effectively twofold:- Firstly the failure to inform management about being too unwell to drive and allocating his vehicle to another colleague without authorisation; Secondly falsely completing an accident report saying that he was the driver of the vehicle involved in the accident. He was advised that these were potentially acts of gross misconduct. He was provided with the investigation report and the accompanying documentation. He was offered the opportunity for the meeting to be held via Teams and the opportunity to provide a written statement. That letter is at pages D155-156 of the bundle. It was hand delivered to his home address.

57. In his evidence to the Tribunal the claimant said that he went on holiday on 4 September 2020. He was receiving counselling through the respondents and said his counsellor advised him to do so. In his evidence to the Tribunal, he said he had a holiday booked which had been cancelled in 2020 due to COVID which he then re-booked. The claimant has produced copies of his tickets, which show he appeared to re-book the holiday on 27 August 2020; albeit that he was by then aware there was to be a disciplinary hearing. Those tickets are Page C1 of the bundle. The claimant was on holiday from 4 September to 5 October 2020. In his evidence to the Tribunal, he confirmed that he did not tell his line manager or anyone at the respondent that he was going on holiday or going to be out of the Country.

58. The claimant failed to attend the disciplinary hearing on 4 September. No explanation was given to the respondent for his non-attendance.

59. The respondent then re-arranged the disciplinary hearing to 16 September 2020. A letter inviting the claimant to the reconvened disciplinary hearing is at pages D157-158 of the bundle. That letter was hand delivered to the claimant's address in exactly the same way as the earlier invite to the disciplinary hearing. The respondent notes the claimant failed to attend the disciplinary hearing on 10 September and did not contact the respondent with any reason for his non-attendance. The disciplinary meeting was reconvened to 16 September 2020. The allegations were again set out in the letter. The respondent indicated that they were potentially allegations of gross misconduct. The claimant was advised that, if he failed to attend the meeting, it would go ahead in his absence.

60. Mrs Alexander, the HR representative from the respondent who was assisting with the disciplinary hearing, rearranged the disciplinary hearing to the Riverside Centre which was closer to the claimant's home and within walking distance. She was not sure whether the venue had been an issue. She also said she had contacted the GMB TUC representative, Donna Walker, regarding the disciplinary hearing with Mr Woods on 10 September. Mrs Walker had indicated that neither employee namely, neither the claimant nor Mr Woods had asked her to attend any disciplinary hearing. Ms Alexander said Mrs Walker had suggested that the respondent check with the local

branch secretary. Mrs Alexander said that she was unable to contact him. Mrs Walker then spoke to Mr Woods and his disciplinary hearing went ahead without the GMB in attendance. The claimant failed to attend his disciplinary hearing on 10 September.

61. Mr Woods' disciplinary hearing was heard by Mrs Brown, who was also scheduled to hear the claimant's disciplinary hearing. Mr Woods was dismissed by the respondents for gross misconduct.

62. The claimant failed to attend the rescheduled disciplinary hearing on 16 September 2020. No explanation was given to the respondent for his non-attendance. Ms Alexander stated that she contacted Mr Rob Miley, the GMB branch secretary, who indicated that he had had no contact from the claimant in relation to the matter. He was content for the hearing to proceed in the absence of the claimant.

63. The disciplinary hearing proceeded in the claimant's absence.

64. Mrs Wendy Brown chaired the disciplinary hearing. She reviewed the documentation, including the investigation report and fact finding notes of the interviews with the claimant and Mr Woods, the occupational health referrals and various work standards fleet drivers.

65. Mrs Brown determined that the claimant should be dismissed for gross misconduct. She found that the allegations were proven. In her evidence to the Tribunal, she stated that she specifically considered the fact finding notes from the interviews with the claimant and Mr Woods, the accident report form and CCTV footage. She noted that the claimant had allowed Mr Woods to take over the driving responsibilities without management authorisation and that Mr Woods was not a valid driver with a certificate of professional competence (CPC) license. She noted that the claimant had falsely stated he was driving the vehicle. She considered the misconduct to be a breach of the respondent's code or values and behaviours and that it amounted to a fundamental breach of trust and confidence. She believed that the claimant could and should have informed management that he was feeling unwell, so that alternative arrangements could have been made. She noted the substantial damage to the building, which was estimated to be over £20,000. Mrs Brown said that she did consider the claimant's mitigation, even though he did not attend the disciplinary hearing. She noted his length of service and apology but considered that the appropriate sanction was summary dismissal.

66. On 17 September 2020, Mrs Brown, wrote to the claimant to inform him of the outcome of the disciplinary hearing and his dismissal for gross misconduct. She noted his non-attendance and failure to submit any statement or ask for trade union representative to attend the meeting. She confirmed that the meeting had proceeded in his absence. She informed him she had considered the documentation and evidence and concluded that he should be dismissed for gross misconduct. She stated that his actions resulted in a fundamental breach of trust and confidence. She noted that he allowed one of his colleagues to take over his driving responsibilities without authorisation and without appropriate qualifications. She also noted he falsely completed a statement claiming that he was driving the vehicle at the time of the accident and conspired to give false information. She confirmed that, although he did not attend the meeting, she did consider his length of service and concluded that summary dismissal was the appropriate remedy. Mrs Brown stated in the

letter that the claimant had the right to appeal against the decision but he had five working days from receipt of the letter to appeal. The letter of dismissal is at pages D164-D166 of the bundle. It too was hand delivered to the claimant's home address.

67. The claimant said in his evidence that he did not become aware of the disciplinary hearing outcome until early October 2020. He said the contents of his dismissal letter were brought to his attention by his son. He said that he did not appeal the decision because he believed that he was out of time in which to appeal the decision.

68. Mrs Alexander said in evidence that the claimant had contacted her by telephone on 6 November stating that he had not received the letter informing him of his dismissal until 1 October when his son had given it to him. She said that she informed him of the timescales for an appeal. He told her he did not want to appeal and did not want his job back. She said he told her that all he wanted was a reference for another job. He suggested that Mr Woods had been given a reference. She said that the claimant advised her that he had engaged a solicitor and the solicitor would be dealing with the case and request for a reference. She said that she told him that any reference given by the respondent would be factual and suggested his solicitor contacted the respondent. Ms Alexander said that she did not hear anything further from the claimant or his solicitor. The claimant did not dispute the evidence given by Mrs Alexander. He did not refer to in his own witness statement nor cross examine the witness on those matters.

69. The claimant issued proceedings in the Employment Tribunal on 7 February 2021. At the time he issued the proceedings, he was represented by a solicitor, who issued the proceedings on his behalf. Subsequently, he proceeded to represent himself.

70. The claimant did not produce a witness statement to the Tribunal in accordance with the directions made for exchange of witness statements. He use the detailed grounds of complaint attached to his ET1 as his witness statement with certain small amendments.

71. In evidence to the Tribunal and in his cross-examination, the claimant suggested he had never indicated that he had been driving at the time of reporting the incident. He acknowledged that he had in fact driven to the depot at the respondent's site but insisted that he had never actually verbally told the respondent that he had been driving. Mr Hogg in contrast indicated that the claimant had said that he had been driving but in any event referred to the accident report form, in which the claimant indicated in writing that he had been driving.

72. In his evidence to the Tribunal, the claimant indicated that other employees had allowed people to drive but provided no details. Initially he had suggested in evidence that Mr Woods had a CPC licence, but acknowledged that he did not know whether he had one or not. He accepted that Mr Woods himself accepted that he did not have the appropriate qualification.

73. In his evidence to the Tribunal, the claimant indicated that he could not respond to the allegations because he was not feeling well on the day and was in shock and did not recall the incident. He said that his disability impacted on his ability to be able to complete the accident report form and on

his ability to respond to the written questions sent by way of the fact find. However he has produced no evidence supporting his contention by way of medical evidence.

74. In his evidence to the Tribunal, and on cross-examination, the claimant suggested on several occasions that he had not in fact been unwell on the day of the incident prior to asking Mr Woods to take over the driving. That was in contrast to what was stated in the claim form suggested that he was unwell and had asked his colleague to take over the driving. The latter is consistent with what Mr Woods said in his preliminary fact find namely that the claimant had been feeling unwell and had effectively asked him to take over the driving.

75. In his evidence in response to questions from the Employment Judge regarding his disability discrimination claim and in particular in trying to identify the unfavourable treatment relied upon and "something arising" in consequence of his disability, the claimant sought to clarify what he meant in that regard. In his evidence, he said on several occasions that he was not able to explain things properly during the fact find because he did not want to land someone in it. He talked about it not being in his nature to do so and that he felt guilty. When he was cross-examined and asked further questions about this, he iterated that he was not able to explain things further because he did not want to drop his colleague in it. He said that he believed that the CCTV footage would be relied on and that that would show who was driving. In summary he seemed to be saying that he expected the respondent to look at the CCTV footage and that show them who was driving and explain what had happened. He said he could not tell them in essence because he did not want to get someone else in trouble

Submissions

76. The respondent's representative submitted that the dismissal was a fair dismissal. She submitted that the respondent had reasonable grounds to believe that the claimant had committed an act of gross misconduct and that they undertook a reasonable investigation into the matter. The respondent submitted that the procedure was fair; albeit that the claimant did not attend the disciplinary hearing because he had been given the opportunity to do so and failed to attend of his own volition. They further submitted that dismissal was a reasonable response in the circumstances of the case. She said the respondent had lost trust and confidence in the claimant because of his actions. She submitted that in his role he was responsible for the vehicle and had allowed someone unauthorised to drive it. She said the respondent was concerned of the risk to health and safety for both employees and members of the public. She said the respondent was a public authority and had to ensure the protection of the public. She submitted that there was a fundamental breach of contract on the part of the claimant in the actions he took which resulted in a breach of their trust and confidence in him.

77. The respondent submitted that the claimant had failed to show that he had been treated unfavourably because of "something arising" in consequence of his disability. Their representative submitted that the burden of proof did not shift to them. She said there was insufficient evidence for the actions to amount less favourable treatment. She further submitted that in any event the response was a proportionate means of achieving the legitimate aim of

managing employee's conduct and protecting the health and safety of staff and members of the public.

78. The claimant submitted that his dismissal was unfair and that he had been discriminated against on the grounds of his disability.

Conclusions

79. The claimant was dismissed for gross misconduct for allowing one of his colleagues to drive the vehicle assigned to him without authorisation and the appropriate qualification and for falsely completing an accident report stating that he was the driver of the vehicle at the time of the accident which caused significant damage to property.

80. Conduct is a fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

81. The Tribunal finds that the respondent undertook a reasonable investigation into the allegations. The respondents visited the accident site, viewed the CCTV footage and reviewed the documents, in particular the accident report form completed by the claimant and written statement provided by the claimant's colleague. Both the claimant and his colleague were interviewed by way of a preliminary fact find and given the opportunity to respond to the allegations. In the case of the claimant those responses were at his request provided in writing.

82. The Tribunal consider that the respondent had reasonable grounds to believe that the claimant had committed an act of gross misconduct. They had sufficient evidence to reach that conclusion based on the accident report form which contradicted the CCTV footage and the subsequent admission by Mr Woods that he had represented that the claimant was driving the vehicle at the time of the accident.

83. The Tribunal therefore concludes that the respondents did have a reasonable belief that the claimant had committed an act of gross misconduct.

84. The Tribunal considers that the procedure adopted was fair. The claimant was warned and advised of the outcome of the investigatory meeting and of the referral to a disciplinary hearing on 14 August 2020. He sent three emails following receipt of that letter to the respondent; initially suggesting that he would be attending the disciplinary hearing as he asked the respondent to contact his GMB representative. He then subsequently decided to re-book a holiday and went off abroad for a month without notifying the respondent, in the knowledge that he was due to called to a disciplinary hearing. The respondent rescheduled the disciplinary hearing to give the claimant a further opportunity to attend the hearing. The claimant not only did not attend, but gave no explanation whatsoever for his failure to attend nor did he provide any indication that he was out of the country. Prior to scheduling and rescheduling the disciplinary hearing, the respondent had also been in touch with the claimant's GMB representative who indicated that they were content for the respondents to proceed in the absence of the claimant.

85. The claimant was given the opportunity to appeal, but never sought to exercise that right albeit that he was by then out of time.

86. The Tribunal finds that dismissal was a reasonable response in the circumstances of the case. The respondent had quite rightly lost trust and

confidence in the claimant, as he had effectively conspired with a colleague to falsely represent that he was driving at the time of the accident in question. He was in a position of responsibility, being the team leader and responsible for the vehicle. He had allowed an unauthorised person to drive that vehicle. The respondent, as a public authority, have a duty to protect the health and safety of both their employees but also members of the public. Bearing in mind, the claimant had falsely misrepresented the situation, they were entitled conclude that they had lost trust and confidence in him.

87. Accordingly the claimant's complaint of unfair dismissal is not well founded and is hereby dismissed.

88. This Tribunal finds that the claimant was in breach of contract. He had committed an act of gross misconduct. He had falsely completed an accident report form stating that he was driving the vehicle in question. He allowed a colleague to drive who was not qualified or authorised to do so and who had caused significant damage to property. The Tribunal consider that sufficient to amount to a fundamental breach of contract on the part of the claimant.

89. Therefore his complaint of breach of contract is also not well founded and he is not entitled to any notice pay.

90. In relation to the complaint of disability discrimination the Tribunal note the respondent accepts that the claimant was suffering from two mental impairments which both amounted to disabilities under section 6 of the Equality Act 2010.

91. The Tribunal reminded itself that the burden of proof at the initial stage in a complaint of discrimination is on the complainant.

92. During the course of the hearing, the Tribunal tried to ascertain from the claimant on several occasions what was both the unfavourable treatment which he relied and the "something arising" in consequence of his disability. These are difficult concepts for a lay representative, but even though the tribunal tried to provide some assistance to the claimant, he was very unclear as to exactly what he was asserting was the unfavourable treatment. He did ultimately say that it was the manner of his dismissal and not being able to explain what happened.

93. The claimant did not lead any evidence on this issue, but when questioned by the Tribunal and on cross examination, he said in evidence that he was not able to explain things at that time, because he said he did not want to land someone else in it. He said that he could drop someone else people in it and talked about guilty .It seems from his evidence that he did not want to effectively blame Mr Woods. He said in his evidence that the respondent would know what happened through the CCTV footage.

94. The Tribunal find that, contrary to that assertion by the claimant, he was given the opportunity to explain things at the time. He was given the opportunity in the accident report form which he completed. Further was allowed to give written answers to questions as part of the preliminary fact find; the latter at the suggestion of both him and his solicitors. He had the opportunity to explain things in the manner suggested by him, so that could not amount to unfavourable treatment,

95. The claimant was also unclear as to what he asserted was the "something arising" in consequence of his disability. He ultimately said it was being unable to properly explain things during the fact find due to his disability. That appears to overlay with the unfavourable treatment. The claimant's own evidence contradicts that claim. His evidence was that he couldn't explain things because he did not effectively want to get someone else in trouble. That cannot have any anything to do with either of his disabilities. Therefore, the evidence led by the claimant contradicts his assertion that it was "something arising" in consequence of his disability.

96. The Tribunal does not consider that the claimant has proved facts from which the tribunal could conclude that the difference in treatment was because of the claimant's disability. The claimant therefore fails to shift of proof to the respondent.

97. As it was unclear what the unfavourable treatment was, the Tribunal did consider whether the unfavourable treatment could have been proceeding with the disciplinary hearing in the claimant's absence. However the Tribunal does not consider that that would have been unfavourable treatment bearing in mind that the claimant was advised on 14 August that there was to be a disciplinary hearing. He clearly received that correspondence as he sent a number of emails in one of which he suggested that he wanted his union rep to be contacted to attend the disciplinary hearing. He was clearly aware that there was to be a disciplinary hearing and yet he then proceeded to a holiday without notifying the respondent that he was going to be on holiday. Therefore, on those facts that it not amount to unfavourable treatment either.

98. As indicated above, this tribunal find that the claimant's claim of disability discrimination does not get past the first stage as noted in **Igen v Wong.** However, the Tribunal went on to consider the legitimate aim put forward by the respondent. The Tribunal accept that there is a legitimate aim for the respondent to manage their employee's conduct and that undertaking an investigatory fact find is part of that process. It was proportionate to allow the claimant to proceed to provide answers in writing as suggested by his solicitor and agreed by him. Further, it also a legitimate aim to arrange a disciplinary hearing to manage an employee's conduct. It was a proportionate response to proceed with that disciplinary hearing in the claimant's absence in circumstances where he had failed to notify the respondent he was out of the Country and was aware of a pending disciplinary hearing being arranged.

99. Accordingly the claimant's complaint of disability discrimination is also not well founded and is hereby dismissed.

_____

Employment Judge Martin

Date **29 April 2022**