THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Daniel Williams**

Respondent: **Royal Mail Group Limited**

Heard at: **Teesside Justice Hearing Centre**
On: **Monday 21st to Thursday 24th March 2022**

Before: **Employment Judge Johnson**

Members: **Mr S Mee**
Mr S Wykes

Representation:

Claimant: **In Person**
Respondent: **Mr R Chaudhry (Solicitor/Advocate)**

RESERVED JUDGMENT

The unanimous judgment of the employment tribunal is as follows:-

1. The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

2. The claimant's complaints of unauthorised deduction from wages (failure to pay accrued holiday pay) is not well-founded and is dismissed.

3. The claimant's complaints of unlawful disability discrimination are not well-founded and are dismissed.

REASONS

1. The claimant, Mr Daniel Williams, conducted these proceedings himself and gave evidence himself. The respondent was represented by Mr Chaudhry, who called the following witnesses to give evidence:-

   (i) Mr Peter Pugh (Assistant Delivery Office Manager)
   (ii) Mr Darren Kidman (Delivery Office Manager)

(iii) Mr Ashley Taylor (Delivery Office Manager)
(iv) Mr Simon Walker (Independent Casework Manager)

2. There was an agreed bundle of documents marked R1, comprising an A4 bundle containing 222 pages of documents. The four witnesses for the respondent had all prepared typed and signed witness statements which were taken "as read", subject to cross examination by Mr Williams and questions from the employment tribunal.

3. At a private preliminary hearing by telephone which had taken place on 27th May 2021, Employment Judge Pitt made certain case management orders, the purpose of which was to ensure that the case was fully prepared for today's final hearing. The orders made by Employment Judge Pitt included the following:-

17. The claimant and the respondent must prepare witness statements for use at the hearing. Everybody who is going to be a witness at the hearing, including the claimant, needs a witness statement.

18. A witness statement is a document containing everything relevant the witness can tell the tribunal. Witnesses will not be allowed to add to their statements unless the tribunal agrees.

21. The claimant and the respondent must send each other copies of all their witness statements by the 9th September 2021.

At the beginning of this hearing, enquiry was made of the claimant as to whether he intended to call any witnesses (apart from himself) to give evidence and, if so, whether he had any witness statements for those people. The claimant was also asked whether he had prepared a witness statement for himself. The claimant stated that he had intended to call Laura Cook, Adam Darcy, Paul Ward and Michael Taylor to give evidence. The claimant had sent in very brief letters from those 4 witnesses, one of which comprised 2 lines, another of which comprised 5 lines, another of which comprised 6 lines and the last of which comprised 22 lines. The claimant explained that he had not asked any of those witnesses to attend today's hearing to give evidence and be cross examined. The claimant's explanation was that he did not initially consider it necessary to do so and further that he did not wish to involve former colleagues whom he still regarded as friends in a dispute between himself and the respondent. The claimant went on to explain that he had not realised that it was necessary for him to prepare a witness statement containing all the evidence which he wished to give to the tribunal. The claimant's attention was drawn to paragraph 17 of the order made by Judge Pitt at the hearing on 27th May 2021. The claimant referred the tribunal to his letter dated 21st February 2022, which comprises no more than 28 lines of evidence. The claimant asked that this document stand as his evidence in chief, but that he be permitted to cross examine the respondent's witnesses, so as to establish his case. The claimant was reminded that it is for the respondent to establish that its reason for dismissing him was one of the potentially fair reasons in Section 98 of the Equality Act 2010, but that it was for him to prove his case with regard to the allegations of unlawful disability discrimination, which would involve him proving facts from which the tribunal could infer that there may be a discriminatory reason

for his treatment, at which point the burden would pass to the respondent to show that there was a non-discriminatory explanation. Similarly, it was for the claimant to establish that he was owed unpaid wages and that, to do so, he must provide some form of calculation as to what was owed, and why. The tribunal was satisfied that the claimant understood what had been explained to him and what was required of him.

4. By a claim form presented on 21st November 2020, the claimant brought complaints of unfair dismissal, unlawful disability discrimination and unauthorised deduction from wages (unpaid holiday pay). The respondent defended the claims. In essence, they arise out of the claimant's dismissal on or about 14th November 2020, for reasons which the respondent says related to the claimant's conduct. The claimant was employed by the respondent as a postman. Part of his duties involved driving a delivery van on certain occasions. The claimant was required to wear a seat belt when driving the van. The claimant was dismissed for misconduct when the respondent found that he had been driving the van whilst not wearing a seat belt and because the claimant had lied when asked to give an explanation about the allegation of not wearing a seat belt. The respondent has conceded that the claimant is and was at all material times a disabled person as defined in Section 6 of the Equality Act 2010 because of a physical impairment relating to a back injury/condition and a mental impairment relating to stress, anxiety and depression. The claimant's case was that his dismissal was unfair because the penalty was too harsh in all the circumstances and because the respondent failed to take into account his length of service, previous good record and mitigation relating to his disability. The claimant further alleged that other employees who had committed a similar offence were not dismissed and that this inconsistency of treatment made his dismissal unfair. The claimant alleged that the respondent had failed to comply with its duty of care owed to him in respect of his disability, that the respondent's failure to implement recommendations made by its occupational health department amounted to direct discrimination contrary to Section 13 of the Equality Act and failure to make reasonable adjustments, contrary to Sections 20 and 21 of the Equality Act. The claimant further alleged that he was subject to victimisation by being dismissed after he had done a protected act relating to his disability.

5. This was one of those cases where there was little disagreement about what had actually happened, or what had actually been said. Where there was a difference between the parties about what had happened or what had or had not been said, the tribunal made its findings of fact on the balance of probabilities, having heard the evidence of the claimant, the witnesses for the respondent and having examined the documents to which it was referred.

Findings of fact

6. The claimant's employment with the respondent began on 8th August 1995, when he was aged 19 years. He was employed as a postman, undertaking usual duties associated with that position. Nothing was put before the tribunal to suggest that the claimant was anything other than a loyal, devoted and competent postman, with an unblemished disciplinary record throughout his period of service.

7. In or about February 2011, following recommendations from the respondent's occupational health specialist, it was acknowledged that the claimant suffered from a back complaint which was adversely affecting his ability to undertake his normal tasks. As a result, adjustments were made to his duties including driving only short distances, using a high-velocity trolley or using a "delivery pouch" to carry items of mail for delivery. In the occupational health report dated 11th June 2019 which appears at page 76 in the bundle, it clearly states that the claimant was then not fit for driving duties, due to the side effects of the pain killers he was taking and that this should be a permanent adjustment for him. However, by 2011 (page 78) the occupational health report states, "He should only drive very short distances for work. The business may wish to seek further medical advice from a doctor in respect of this." In October 2011 occupational health advised that the claimant should only drive very short distances for work. In September 2012 the report states, "He tells me that he prefers walking delivery duties to using a trolley as this tends to aggravate his back pain. The issue of the trolley aggravating his lower back should be taken into consideration as this could have an affect on his work attendance record."

8. The claimant's evidence to the tribunal was that it had been agreed between him and his managers that he would not be required to drive a delivery van. The respondent's evidence was that there was no such agreement and that there were frequent occasions when the claimant himself asked if he could use a van to assist him in his duties. The tribunal preferred the evidence of Mr Pugh and Mr Kidman in this regard and found that no agreement had been reached which meant that the claimant would not, and could not, be required to use a delivery van. The tribunal found it more likely that the claimant had, on occasions, asked to be allowed to use a van to assist him in his duties. The tribunal found that other adjustments had been made so as to assist the claimant in his duties, because of his back ailment. Those included him being allocated a specific delivery round and that he be allowed to use a bag/pouch instead of a trolley. Either the claimant or another member of staff would drive the delivery van to a point which marked the beginning of the claimant's delivery round, after which he would undertake his deliveries. There were times when the claimant would retain the use of the van throughout his deliveries.

9. On 24th June 2020 the delivery office manager, Darren Kidman, was performing routine checks in the yard area of the Coulby Newham depot. Mr Kidman noticed that two of the vehicles had their driver`s seatbelts already plugged into the clip. Mr Kidman was concerned that those vehicles may have been driven with the seatbelt fastened behind the driver, rather than in the correct fashion. Mr Kidman's enquiries revealed that vehicle CN1 had been driver by the claimant and that the other vehicle CN3 had been driven by someone known as "individual A".

10. On 25th June 2020 Mr Neil Harris asked the claimant for an explanation as to why the seatbelt was plugged in. Mr Harris' note of his discussion with the claimant at page 104 in the bundle states as follows:-

> "Dan pulled up to the barriers and got out, as his ID does not open the gates. He got out of the van and went around to press the button to release the gate. When he had done this, he returned to the van, only to

be confronted by a customer who was complaining about the CSP being shut. Dan couldn't hear the customer, so he plugged the seatbelt in to stop it beeping. He explained to the customer why it was closed. He then replied saying that he didn't think it would be a problem as he was helping a customer out. He then mentioned he would never just plug a seatbelt in, in case he did have an accident and it could lead to a change in lifestyle due to his back."

11. Mr Kidman decided to invite the claimant to a fact-finding meeting (an investigatory meeting) which took place on 1st July. Minutes of the meeting appear at page 108. The claimant was accompanied by his trade union representative. When asked for his explanation as to why the driver's seat belt was plugged in to the clip, the claimant's explanation was as follows:-

> "As I pulled up to the gate my pass doesn't open the barrier. I had to get out and open the barrier and press the button. When I got back to the van there was a customer there. The beeping was annoying and I could not hear the customer so I plugged the seat belt in."

When asked if he had driven the van without the seatbelt the claimant's reply was, "I never drive without my seat belt on".

12. On 2nd July 2020 Peter Pugh and Dan Kidman conducted a seat belt alarm test on the vehicle CN1. Mr Kidman found that the seat belt alarm would only sound if no seat belt was worn and the vehicle was travelling at over 15 miles per hour, or when no seat belt was worn, the handbrake was applied and the driver's door was closed. Mr Kidman concluded that if the driver's door was open and the vehicle was stationery, the seat belt alarm would not sound. Mr Kidman was suspicious about the claimant's explanation as to what had happened and decided to refer the matter for a formal disciplinary hearing. Mr Kidman's concerns were, firstly, that the claimant had not been wearing his seat belt when he was required to do so and, secondly, that he had been untruthful when asked for an explanation.

13. By letter dated 15th July 2020 (page 116) the claimant was informed that he had to attend for a formal conduct interview (disciplinary hearing) on 27th July, which meeting was to be conducted by Mr Ashley Taylor. The letter states as follows:-

> "Following the fact-finding interview on 1st July 2020, I am now charging you with gross misconduct;
>
> Deliberate disregard of health, safety and security procedures or instructions.
>
> - On 23rd June 2020 it is alleged that you did not wear your seat belt at all times on your delivery
>
> - On the same date it is alleged you plugged in the seat belt to silence the warning alarm
>
> Dishonesty.

- At the initial seeking and explanation conversation and also at the fact-finding interview, you stated you plugged the seat belt in immediately outside the delivery office on return to the unit. It is alleged that this is untrue.

The letter continues:-

> "You should be aware that if the charge against you is substantiated then one possible outcome could be your dismissal. This is your opportunity to answer the charge and provide reasons why you should not be dismissed, should the charge be substantiated."

14. The claimant attended the disciplinary hearing on 28th July and was again accompanied by his trade union representative. Minutes of the meeting appear at pages 117 – 121 in the bundle. The claimant was subsequently sent a copy of these minutes for his approval and, having made certain amendments, sent them back approved and signed.

15. The claimant accepted that he had undertaken driving duties on a fairly regular basis since Christmas 2019 "in order to help out". The claimant was asked why the seat belt had been found already plugged in on the vehicle when it was examined on 21st June. The claimant's reply was as follows:-

> "I took the seat belt off as I pulled off Stokesley Road into Ridgeway, it's the short road leading up to the office. I knew I would have to stop my van as I reached the office barrier. My own car beeps when I get out so I presumed the van would also beep when I got out. That really annoys me and I didn't want that to happen."

When asked if the van had beeped when he reached the barrier the previous day, the claimant replied, "I don't know because I always do this – I always plug the seat belt in on my approach to the office on Ridgeway."

When asked if he had taken the seat belt off and plugged it in behind him when he was still driving, the claimant replied "Yes - I've been doing that for ages. Just after I turn off Stokesley Road - it will be about 100 yards from the gate."

The claimant was asked why his pass wasn't working and his reply was, "I don't know – I have three passes or maybe it's two."

The claimant was asked to explain about the customer to whom he had referred in his explanations to Mr Harris and Mr Pugh. The claimant replied, "I added the bit about the customer, because no-one believes me when I tell the truth." The claimant was asked if he had made up that story and replied, "Yes. My anxiety and the year I have had makes me panic when I get asked a question. I was sick of not being believed when I tell the truth. I told Darren Kidman repeatedly about my workload and he just ignored me."

16. The claimant and his trade union representative were asked to set out any mitigation which they wished to be taken into account. There are twenty separate matters listed as mitigation:-

    (1) The whole Aga situation (previously documented) has really impacted on Dan.

    (2) My anxiety makes me panic when I am challenged.

    (3) I was not getting help either outside of work or at work over the last twelve months. I had nowhere to turn. I had no return to work interview after a sick absence.

    (4) Dan is covered under the Equality Act. He should only be using the van for short trips. He shouldn't have been using the van for his full duty due to his chronic back condition covered under the Disability Discrimination Act.

    (5) Dan only used the van to help out during the CV19 crisis. If he had said "no", we wouldn't be sitting here now.

    (6) In general the CV crisis has been a very difficult time and has really impacted on Dan.

    (7) Parcel volumes put pressure on Dan and his ability to finish within his duty time, there was a ban on pressure overtime in Coulby.

    (8) Twenty years have passed since Dan's changeover. He has never had safety breach, HIT training, licence check, security rules for drivers.

    (9) Dan is a single parent with three children, two of whom live with him.

    (10) The last ten months have resulted in Dan's competence being shattered, he has suffered a breakdown.

    (11) Dan drove his full delivery wearing his seat belt, he would not risk a fine from the police.

    (12) Dan has 26 years clean service.

    (13) There are rumours Darren Kidman wants to get rid of Dan.

    (14) I am taking medication which says I shouldn't drive – Methocarbamol/Codeine/Citalopram/Diazepam/Morphine.

    (15) I only use a CV 19 circumstances to take the opportunity to see if I was capable of driving duty in the new revision.

    (16) Every revision in the unit causes me stress as I am very much limited as to what I can do.

(17) I was asked to work booking in on afternoons in the RLE. It was stressful because it is such a mess. No-one would listen to me when I told a manager.

(18) Dan was asked to lock up the building a few weeks ago, proving the manager's trust in him.

(19) UK law states that a goods vehicle driver can drive up to 50 metres without a seat belt while delivering.

(20) What about corporate manslaughter bill, allowing Dan to drive without checking he was allowed and following your own rules as stated in point 8 above.

17. The claimant was asked to clarify whether he should have been driving when taking medication and said that he adjusted his medication to make it possible for him to drive for short journeys. The claimant was asked if he had anything else to add and stated that he did not.

18. Mr Taylor then undertook further investigations by speaking to Darren Kidman and Peter Pugh and also contacted David Phelp,s one of the claimant's previous managers. Mr Taylor, himself, attempted to remove a seat belt and plug it in behind him whilst the vehicle was moving and found they could only be done by taking both hands of the wheel.

19. By letter dated 4th August (page 127) Mr Taylor wrote to the claimant sending him copies of the further information he had obtained as a result of those additional enquiries, asking if he had any comments on the outcome of those further enquiries. The claimant was then invited to a further meeting at which the claimant would be given Mr Taylor's decision on the proceedings. A meeting took place on 24th August 2020. At that meeting the claimant was informed that Mr Taylor's decision was that the claimant should be summarily dismissed for reasons of gross misconduct. Mr Taylor's reasons are set out in his letter dated 24th August, which appears at page 138 – 144 in the bundle. Mr Taylor sets out in extensive detail the investigation, disciplinary hearing, further investigation and mitigation. Mr Taylor concluded that the claimant had removed his seat belt and plugged it in behind him whilst he was on the approach road between Stokesley Road and the delivery office. The claimant had said that he had been doing this "for ages" and that he knew it was a criminal offence to drive without a seat belt. Mr Williams had admitted deliberate for disregard for the respondent's health and safety procedures. Furthermore, Mr Taylor was satisfied that the claimant had repeatedly lied about his conversation with a customer at the barrier at the gates to the office.

20. Mr Taylor confirmed to the tribunal that he had considered alternatives to dismissal, but took the view that the claimant had deliberately disregarded the respondent's health and safety policies and procedures and had done so on a number of occasions. The claimant had then tried to avoid responsibility by deliberately lying during the investigation. Mr Taylor concluded that the claimant could no longer be trusted and that dismissal was the appropriate sanction.

21. Mr Taylor was asked about what had happened about the driver of the other vehicle CN3. Mr Taylor confirmed that he had also undertaken the disciplinary hearing in respect of that employee, who had been given a "suspended dismissal", which is the equivalent of a final written warning. Mr Taylor explained the difference between that outcome and the decision to dismiss the claimant. Employee "A" had immediately admitted that there had been one occasion when he had failed to wear his seat belt and he had shown genuine remorse and apologised for his behaviour and assured Mr Taylor that it would not happen again. That employee had co-operated throughout the investigative process. Mr Taylor concluded that there was a difference in circumstances between employee A and the claimant which justified the difference in treatment.

22. The claimant was advised of his right of appeal against his dismissal and did so by letter dated 24th August.

23. The appeal was heard by Mr Simon Walker, Independent Casework Manager, based at the Bradford delivery office. Minutes of the appeal hearing appear at pages 156 – 163 in the bundle. The claimant has not challenged the fairness of the procedure followed by Mr Walker. It is clearly apparent from the minutes of the meeting, the subsequent interviews and related documents that Mr Walker carried out a fair, thorough and reasonable appeal hearing. The appeal hearing was a complete re-hearing of the original disciplinary hearing. The claimant's grounds of appeal were:-

    (i) that the conduct process had not been applied fairly;
    (ii) his length of service had not been considered;
    (iii) dismissal was too harsh;
    (iv) new evidence since the dismissal had arisen which needed to be considered.

    The claimant also provided additional mitigation evidence:-

    (i) he should not have been driving whilst taking medication for his back condition;

    (ii) his anxiety caused him to provide false accounts in the fact-finding interview and conduct interview;

    (iii) the claimant believed that his sickness absence record was incorrect because he had not been regarded as sick when he should have been and this was linked to his dismissal.

24. The tribunal was satisfied that Mr Walker properly addressed each of those grounds. Mr Walker interviewed Paul Ward, Katie Renahan (whom the claimant said loaned him her pass, but which she denied ever doing), Darren Kidman and Peter Pugh. More importantly, Mr Walker referred the claimant to occupational health for a further assessment. In particular, Mr Walker wanted to know whether the claimant's prescribed medication for anxiety and lower back pain may have made him unfit for driving duties or may have impacted upon his behaviour with

regard to the seat belt or contributed in some way to his dishonesty. Occupational health's replies to those queries appear at page 200 in the bundle. Occupational health concluded that the claimant's medications would not be a significant contributory factor to the actions taken by the claimant on the day in question. Those medications should not have affected the claimant's probity or ability to distinguish between fact and falsehood.

25. The claimant also complained that his dismissal, when compared to the final written warning given to employee A, meant that there had been such inconsistency between the two that it amounted to an unfair dismissal.

26. The tribunal was satisfied that Mr Walker took all of these matters into account. Mr Walker concluded that there were no grounds or reasons for him to overturn Mr Taylor's decision to summarily dismiss the claimant. Mr Walker's decision was confirmed by letter dated 14th October 2020 which appears at page 206 in the bundle.

27. The claimant presented his complaint to the employment tribunal on 21st November 2020.

The law

28. The claimant's complaints of unfair dismissal and unauthorised deduction from wages engages the provisions of the **Employment Rights Act 1996.** The relevant provisions are set out below.

Section 13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless--

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised--

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages

properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Section 94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.
(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 98 General

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

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

(2) A reason falls within this subsection if it--

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), 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.

29. The claimant's complaints of unlawful disability discrimination engage the provisions of the **Equality Act 2010.**

Section 13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex--

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

Section 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to--

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to--

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	Applicable Schedule
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

Section 21 Failure to comply with duty

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

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Section 27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Section 39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)--

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)--

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)--

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)--

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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

Unlawful deduction from wages

30. The claimant alleges that he was entitled to 30 days paid leave each year in respect of the holiday year which begins on 1st April and ends on 31st March each year. The claimant insists that he is owed 10 days holiday pay. The claimant has failed to provide any evidence as to the dates upon which holiday was taken or any calculation as to the sum allegedly owed to him The claimant makes no mention of his claim for unpaid holiday pay in his "witness statement" comprised in the letter dated 21st February 2022.

31. The respondent's defence to that claim (paragraphs 51 – 54 of the Response) maintains that between 1st April 2019 and 31st March 2020 the claimant used 34 days of annual leave and between 1st April 2020 and his dismissal on 24th August 2020, he used a further 24 days of leave. The claimant has not challenged any of those figures.

32. The tribunal found that the claimant had failed to prove that he was entitled to payment for holiday pay in the relevant period and the complaint of unlawful deduction from wages is dismissed.

Unfair dismissal

33. The case law on the interpretation and application of Section 98 of the Employment Rights Act 1996 is vast. The relevant principles established by that case law are as follows:-

(i) The reason for dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss the employee.

(ii) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee, to establish that the "real reason" for

dismissing the employee was one of those set out in Section 98, or was of a kind that justified the dismissal of the employee holding the position he did.

(iii) Once the employer has established before an employment tribunal that the "real reason" for dismissing the employee is one of those within Section 98 (1) (b), ie that it was a valid reason, the employment tribunal has to decide whether the dismissal was fair or unfair.

(iv) That requires, first and foremost, the application of the statutory test set out in Section 98 (4) (a).

(v) In applying that subsection, the employment tribunal must decide on the reasonableness of the employer's decision to dismiss the employee for that "real reason". That involves a consideration, in misconduct cases, of 3 aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in all the circumstances of the case. Secondly, did the employer believe that the employee was guilty of the misconduct complained of. Thirdly, did the employer have reasonable grounds for that belief.

(vi) If the answer to each of those questions is "yes", the employment tribunal must then decide on the reasonableness of the response of the employer and, in doing that exercise, the employment tribunal must consider by the objective standards of the hypothetical reasonable employer, (rather than by reference to its own subjective views), whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same things as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it shown to be perverse.

(vii) The employment tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The employment tribunal must determine whether the decision of the employer to dismiss the employee fell with the band of reasonable responses which "a reasonable employer might have adopted."

(Orr v Milton Keynes Council – 2010 EWCA-CIV-62)

34. The tribunal found that the respondent had discharged the burden imposed upon it by Section 98 (1) of establishing what was its reason for dismissing the claimant. The tribunal accepted that the reason why the claimant was dismissed was a reason related to his conduct. (Section 98 (2) (b)). The claimant eventually admitted that the had driven the respondent's van on more than one occasion without using the seat belt in a manner which he knew it ought to be used. That was a clear and obvious breach of statutory obligation to use a seat belt and further was a clear and obvious breach of the respondent's own policies. Furthermore, the claimant admitted being untruthful during the early stages of the

investigation, in which he gave an explanation which was designed to deceive those conducting the investigation. The tribunal found that the respondent had conducted a reasonable investigation into each of those allegations. The tribunal found that, at the end of the investigation and disciplinary process, both the dismissing officer, Mr Taylor and the appeal officer, Mr Walker, genuinely believed that the claimant had committed those acts of misconduct.

35. Taking into account the serious nature of both acts of misconduct, the tribunal was satisfied that the respondent's decision to dismiss the claimant because of that misconduct was a decision which fell within the range of reasonable responses open to a reasonable employer in all the circumstances.

36. The claimant has alleged that his dismissal was unfair because he was treated differently to employee A, who was also found to have used a van without using a seat belt appropriately, but who was not dismissed. It is trite law that the phrase "having regard to equity and the substantial merits of the case" in Section 98 (4) comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment. Where that is not done, and one man is penalised much more than heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating what the offence is as a sufficient reason for dismissal. (**Post Office v Fennel – 1981 IRLR221**). Similarly, in **Hadjioannou v Coral Casinos Limited – 1981 IRLR 352**, the Employment Appeal Tribunal recognised the importance of consistency of treatment, but placed more emphasis on the employer's ability to be flexible in such matters. In the facts of that particular cas,e it was found that there had been no evidence of consistent treatment. Nevertheless, the employment tribunal accepted the argument that a complaint of unreasonableness by an employer based on inconsistency of treatment would only be relevant in limited circumstances:-

- Where employees have been led by an employer to believe that certain conduct will not lead to dismissal

- Where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason

- Where decisions made by an employer in truly parallel circumstances indicated that it was not reasonable the employer to dismiss.

37. In the claimant's case, the tribunal found that there were no truly parallel circumstances between himself and employee A. The difference was explained by both Mr Taylor and Mr Walker. Employee A had committed a single offence of driving without using the seat belt appropriately and, when challenged, immediately admitted his guilt and expressed his genuine remorse. The claimant's circumstances were substantially different. On his own admission he had driven without appropriate use of the seat belt on a number of occasions and, when challenged, he dishonestly invented an explanation which was designed to deceive the investigating officer. The tribunal was satisfied that, in the claimant's case, there had been no inconsistent treatment.

38. Accordingly, the tribunal found that the claimant's complaint of unfair dismissal is not well-founded and is dismissed.

Unlawful disability discrimination

39. The claimant alleges that his dismissal was an act of victimisation, contrary to **Section 27 of the Equality Act 2010**. The tribunal found that the claimant had failed to show that he had done a "protected act" as defined in Section 27 (2). The claimant's evidence was that "the protected act" was when he was refused a return to work meeting some considerable time prior to the seat belt offence. The tribunal found that this alleged failure by the respondent could not amount to a protected act by the claimant. "Victimisation" effectively means retaliatory action by the employer, by the imposition of a detriment because of that protected act. Without a protected act by the employee, there cannot be retaliatory action by the employer because of that protected act. The complaint of victimisation, contrary to Section 27 is therefore not well-founded and is dismissed.

40. The claimant accepted before the tribunal that the reason for his dismissal was not because he is disabled, and thus an act of direct disability discrimination, contrary to Section 13 of the Equality Act 2010. The claimant alleges that the respondent ignored recommendations made by its own occupational health specialist between March and April 2020, by requiring him to drive the delivery van. The claimant alleges that this was an act of direct disability discrimination because the claimant was being treated less favourably than other delivery men, by being required to drive a van. The tribunal found that there had been no requirement for the claimant to drive the van. If anything, the claimant had asked to use the van as a means of assisting him with his deliveries. There was no "less favourable" treatment and accordingly the complaint of direct disability discrimination, contrary to Section 13 is not well-founded and is dismissed.

41. The claimant accepted in his evidence that his dismissal for misconduct was not "something" which arose as a consequence of his disability. Accordingly there is no complaint of unfavourable treatment because of something arising in consequence of his disability, contrary to Section 15 of the Equality Act 2010.

42. The remaining complaint is one of a failure to make reasonable adjustments, contrary to Sections 20 – 21 of the Equality Act 2010. The claimant alleges that the respondent applied to him the following provision, criterion or practices (PCPs):-

    (i) requiring him to complete an increased workload from March/April 2020 until his dismissal within his normal hours;

    (ii) requiring him to drive a van;

    (iii) requiring him to complete his duties without overtime.

43. For the reasons set out above, the tribunal found that there was no PCP which required the claimant to drive a van. The claimant was allowed to drive a van

when he requested one to assist him in the completion of his duties. The tribunal found that there was no PCP of requiring him to complete his duties without overtime. The respondent accepted that, during the Covid pandemic, overtime was not permitted. As a result, employees who were unable to complete their deliveries within their normal working hours would simply return those undelivered items to the depot, so that they could be scheduled for delivery the following day. The tribunal found that the respondent did not apply to the claimant a PCP of increasing his workload. The claimant's position was that he was required to complete his delivery without overtime and that this effectively meant increasing his workload so that he could complete the deliveries within the normal allocated time. Again, the tribunal found that no such PCP was applied to the claimant. The evidence of the respondent's witnesses was clear and unequivocal. The tribunal found that the claimant had failed to prove facts from which the tribunal could infer that any treatment of him was a breach of the duty to make reasonable adjustments where a PCP placed him at a substantial disadvantage because of his disability. Accordingly, the complaints of failure to make reasonable adjustments, contrary to Sections 20 – 21 are not well-founded and are dismissed.

G Johnson

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EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
19 April 2022