EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114505/2019

Held via Cloud Video Platform (CVP) on 10, 11, 12, 13 and 14 January; 2, 3 and 4 March 2022; Members Meeting (In Person) on 4 April 2022

Employment Judge R King
Lay Members L Millar and J McCaig

Mr C Bannan	**Claimant** **Represented by:** **Mr Byrom - Solicitor**
Turners (Soham) Ltd T/a Lewis Tankers	**Respondent** **Represented by:** **Mr Newman - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

(1) The claimant was unfairly constructively dismissed; and

(2) The respondent failed to make reasonable adjustments for the claimant's disability, contrary to section 21 of the Equality Act 2010.

(3) The respondent is therefore ordered to pay the claimant:

a. A basic award for unfair dismissal of £6,300.

b. A compensatory award of £37,492;

c. An award for injury to feelings of £12,500.

(4) The total award made to the claimant is therefore £56,292.

REASONS

Introduction

1. The claimant has presented claims of unfair constructive dismissal, direct disability discrimination contrary to section 13 of the Equality Act 2010, discrimination arising from disability contrary to section 15 of the Equality Act 2010 and a failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010.

2. At a previous preliminary hearing, it was determined that while the claimant's allegations of disability discrimination had been presented out of time, it was just and equitable to allow them to proceed and to be determined on their merits.

Anonymisation

3. In his claim the claimant has made numerous allegations against a former fellow employee; the respondent's alleged failure to address those allegations lying at the heart of his unfair constructive dismissal claim. The disputed issues relate not to the conduct of that colleague *per se*, but rather to the alleged failure of the respondent to deal with that conduct. As that individual was not called to give evidence and had no opportunity to state his own position in respect of his alleged conduct, the Tribunal has determined that the interests of justice require him to remain anonymous and to be referred to at all times by the letter 'A'.

Relevant law

Constructive dismissal

4. The relevant law is contained in the Employment Rights Act 1996. Section 94 (1) of this act provides an employee with the right not to be unfairly dismissed by his employer.

5. Section 95 (1)(c) provides that an employee is to be regarded as dismissed if –

"the employee terminates the contract under which he was employed (with or without notice) in circumstances which he is entitled to terminate it without notice by reason of the employee's conduct."

6. The leading case relating to constructive unfair dismissal is ***Western Excavating (ECC) Limited v Sharp [1978] ICR 221*** in which Lord Denning held that:

''If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.''

7. Unlike the statutory test for unfair dismissal, there is no band of reasonable responses test. It is an objective test for the Tribunal to assess whether, from the perspective of a reasonable person, in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and to refuse to perform the contract. (***Tullet Prebon plc v BGC Brokers LP 2011 IRLR 420***).

8. In ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*** the Court of Appeal stated that in the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in ***Waltham Forest v Omilaju [2004] EWCA Civ 1493***) of a course of

conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a previous affirmation, because the effect of the final act is to revive the right to resign.)

(5) Did the employee resign in response (or partly in response) to that breach?

9. In the present case the claimant relies on an alleged breach of the implied term of trust and confidence. As established in ***Malik v BCCI 1997 ICR 606***, this is a requirement that an employer must not –

"without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee".

10. There is no rule of law that a constructive dismissal is necessarily unfair. If it finds there has been a constructive dismissal a Tribunal must also consider whether that dismissal was fair or unfair having regard to section 98(4) of the Employment Rights Act 1996, which provides –

"(4) Where the employer has fulfilled the requirements of sub-section (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''

11. The Tribunal must therefore consider whether the respondent had a potentially fair reason for the breach (***Berriman v Delabole Slate 1985 ICR 546***) and whether it was within the range of reasonable responses for an

employer to breach the contract for that reason in the circumstances. When making this assessment, the Tribunal must not substitute its own view of what it would have done but consider whether a reasonable employer would have done so, recognising that in many cases there is more than one reasonable response.

Discrimination claims

Burden of Proof

12. The Burden of Proof in proceedings relating to contravention of The Equality Act 2010 is governed by Section 136 of that Act, which provides -

> *"(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.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

13. The Court of Appeal has repeatedly stressed that judicial guidance on the burden of proof is no more than guidance and that it is no substitute for statutory language.

14. The Tribunal takes into account the well know guidance given by the Court of Appeal in ***Igen Ltd v Wong 2005 ICR 931***, which was approved by the Supreme Court in ***Hewage v Grampian Health Board 2012 ICR 1054***.

15. First, the claimant must prove certain essential facts and to that extent faces an initial burden of proof. The claimant must establish a *"prima facie"* case of discrimination which needs to be answered. If the inference of discrimination could be drawn at the first stage of the enquiry then it must be drawn at the first stage of the enquiry because at that stage the lack of an alternative explanation is assumed. The consequence is that the claimant will necessarily succeed unless the respondent can discharge the burden of proof at the second stage. However, if the claimant fails to provide a *"prima facie"* case

then is nothing for the respondent to address and nothing for the Tribunal to assess.

16. The following principles can be derived from ***Igen Ltd v Wong, Laing v Manchester City Council 2006 ICR 1519 EAT, Madarassy v Nomura International Plc 2007 ICR 867 CA*** and ***Ayodele v- Citylink Ltd 2018 ICR 748***, which reviewed and analysed many other authorities:

17. At the first stage a Tribunal should consider all the evidence, from whatever source it has come. It is not confined to the evidence adduced by the claimant and it may also properly take into account evidence produced by the respondent when deciding whether the claimant has established a prima facie case of discrimination. A respondent may, for example, produce evidence that the allegedly discriminatory acts did not occur at all or that they did not amount to less favourable treatment in which the case the Tribunal is entitled to regard to that evidence.

18. There is a vital distinction between “facts” or evidence and the respondent's “explanation”. While there is a relationship between facts and explanation, they are not be confused. It is only the respondent’s *explanation* which cannot be considered at the first stage of the analysis. The respondent's explanation become relevant if and when the burden of proof passes to the respondent.

19. It is insufficient to pass the burden of proof to the respondent for the claimant to prove no more than the relevant protected characteristic (or protected act) and a difference in treatment. That would only indicate the *possibility* of discrimination and the mere possibility is not enough. Something more is required. See paragraphs 54 to 56 of the judgment of Mummery LJ in ***Madarassy***.

20. However, it is not always necessarily to adopt a rigid two stage approach. It is not necessarily an error of law for a Tribunal to move straight to the second stage of its task under section 136 of The Equality Act 2010 (*see for example* ***Pnaiser -v- NHS England 2016 IRLR 170 EAT*** *paragraph 38*) but it must then proceed on the assumption the first stage has been satisfied. The claimant will not be disadvantaged by that approach since it effectively

assumes in their favour that the first stage has been satisfied. The risk is to a respondent which fails then to discharge a burden which ought not to have been on it in the first place.

21. In a similar vein, the Supreme Court in Hewage observed that it was important not to make too much of the rule of the burden of proof provisions. They required careful attention when there was room for doubt as to the facts necessary to establish discrimination, but they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Direct discrimination

22. Section 13 of the Equality Act 2010 provides:

> *(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.*

23. Section 23 of the Equality Act 2010 provides –

> *(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*

24. A claimant claiming direct discrimination must therefore show that they have been treated less favourably than a real or hypothetical comparator. The less favourable treatment must be because of a protected characteristic. This requires the Tribunal to consider the reason why the claimant was treated less favourably; what was the respondent's conscious or subconscious reason for the treatment. The Tribunal will therefore need to consider the conscious or subconscious mental processes which led A to taking a particular course of action in respect of B and to consider whether a protected characteristic played a significant part in the treatment.

25. For A to discriminate directly against B, A must treat B less favourably than it treats or would treat another person. The Tribunal must compare like with like

except for the existence of the protected characteristic and so there must be no material differences between the circumstances of B and the comparator. In practice it is not always possible to identify an actual comparator and therefore it is common for a Tribunal to be invited to consider how a hypothetical comparator would have been treated.

26. Since there must be no material difference between the circumstances of B and the comparator the Tribunal must establish the relevant "circumstances" in ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285*** Lord Scott of Foscote expressed the principle in the following terms:

"The comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

Discrimination arising from disability

27. Section 15 of The Equality Act 2010 provides:

"(1) 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."

28. In ***Basildon & Thurrock NHS Foundation Trust -v- Weerasinghe UK EAT 0397/14*** Mr Justice ***Langstaff*** held that there were two distinct steps to the test to be applied by Tribunals in determining whether discrimination arising from disability has occurred: -

(1) Did the claimant's disability cause, have the consequence of or result in "something"?

(2) Did the employer treat the claimant unfavourably because of that "something"?

29. In ***Pnaiser – v – NHS England and another 2016 IRLR 170***, the EAT summarised the proper approach to claims for discrimination arising from disability as follows:

I. The Tribunal must identify whether the claimant was treated unfavourably and by whom.

II. It then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought process of that person, but keeping in mind that the motive of the alleged discriminator and acting as he or she did is irrelevant.

III. The Tribunal must then determine whether the reason was "something arising in consequence of the claimant's disability" which could describe a range of causal links. That stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

IV. The knowledge required is of the disability; not knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

Reasonable adjustments

30. Section 20 and Schedule 8 of the Equality Act 2010 impose a duty on employers to make reasonable adjustments to help disabled job applicants and former employees in certain circumstances. The duty can arise where a disabled person is placed at a substantial disadvantage by:

- An employer's provision criterion or practice (PCP);
- A physical feature of the employer's premises; and
- An employer's failure to provide an auxiliary aid.

31. However, an employer will not be obliged to make reasonable adjustments unless it knows or ought reasonably to have known that the individual in

question is disabled and likely to be placed at a substantial disadvantage because of their disability. It is for an Employment Tribunal to objectively determine whether a particular adjustment would have been reasonable to make in the circumstances. It should consider matters such as:

- The extent to which the adjustment would have ameliorated the disadvantage.
- The extent to which the adjustment was practicable.
- The financial and other costs of making the adjustment, and the extent to which the step would have disrupted the employer's activities.
- The financial and other resources available to the employer.
- The availability of external financial or other assistance.
- The nature of the employer's activities and the size of the undertaking
- The EHRC employment statutory code of practice, which Tribunals must take into account if it appears relevant, contains a non-exhaustive list of potential adjustments that employers might be required to make.

Issues

32. The issues for the Tribunal were agreed between the parties in advance of the hearing and were as follows:

Constructive unfair dismissal

1. Did the Respondent do the following things:

    - Provide an unsafe working environment in that the Claimant was exposed to bullying, harassment and death threats, specifically involving A and Jemma Deans on 16 July, 28 August, 5 September, 19 September and 6 December 2018.
    - Fail to deal with the Claimant’s grievance of July 2019 against Ms Deans.

- Fail to conclude the Claimant's grievance against A dated July 2018.
- Fail to facilitate the Claimant's return to work following his absence?
- Discriminate against the Claimant contrary to section 13, section 15 or section 20/21 of the Equality Act 2010?

2. If so, did the Respondent breach the implied duty of mutual trust and confidence in the Claimant's contract of employment by:

- Behaving in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; or
- Without reasonable and proper cause for doing so?

3. If so:

- Was such breach (or breaches) sufficiently important to justify the Claimant tendering his resignation?
- Has the Claimant resigned in response to such breach (or breaches, if the Claimant is relying on a "last straw" event)?
- Has the Claimant waived or affirmed any such breach (or breaches)?

Remedy for Constructive Unfair Dismissal

4. The Claimant seeks compensation only.

5. If there is a compensatory award, how much should it be? The Tribunal will decide:

- What financial losses has the dismissal caused the Claimant?
- Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

- If not, for what period of loss should the Claimant be compensated?
- Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- If so, should the Claimant's compensation be reduced? By how much?
- Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- Did Claimant unreasonably fail to comply with it by raising the issues with the Respondent by way of grievance or appeal?
- If so it is just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
- If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
- If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
- Does the statutory cap of fifty-two weeks' pay apply?

6. What basic award is payable to the Claimant, if any?

7. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

Disability discrimination

Direct Disability Discrimination (Equality Act 2010 section 13)

8. Did the Respondent do the following: retain the Claimant on the INEOS contract?

9. Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant will confirm the identities of the relevant comparators.

10. If so, was it because of disability?

Discrimination Arising from Disability (Equality Act 2010 section 15)

11. Did the Respondent treat the Claimant unfavourably by: retaining the Claimant on the INEOS contract after the Claimant had informed the respondent of his condition in August 2017?

12. Did the following things arise in consequence of the Claimant's disability: the Claimant was retained on the Ineos contract despite the pain doing so causing him harm?

- Was the unfavourable treatment because of any of those things?
- Was the treatment a proportionate means of achieving a legitimate aim?

13. The Tribunal will decide in particular:

i. was the treatment an appropriate and reasonably necessary way to achieve those aims;

ii. could something less discriminatory have been done instead;

iii. how should the needs of the Claimant and the Respondent be balanced?

14. Did the Respondent know or could it reasonable have been expected to know that the Claimant had the disability? From what date?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

15. Did the Respondent know or could it reasonable have been expected to know that the Claimant had the disability? From what date?

16. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

- the requirement to stand/be on his feet for significant periods of time during a shift whilst working on the INEOS contract; and
- the requirement for the Claimant to work on the INEOS contract, which regularly required him to stand/be on his feet whilst working for significant periods of time during a shift.
- Did the Respondent apply the PCP to the Claimant?
- Did the PCP put the Claimant at a substantial disadvantage compared to someone with the Claimant's disability by causing pain to the Claimant's hip?
- Did the Respondent know, or could it reasonably have expected to know, that the Claimant was likely to be placed at a disadvantage?
- What steps could have been taken to avoid the disadvantage?

17. The Claimant relies upon the Respondent's alleged failure to:

- provide the claimant with a chair.
- transfer the Claimant onto another contract which did not have the requirement to regularly stand/be on his feet whilst working for significant periods of time during a shift.

18. Was it reasonable to have taken those steps and when?

19. Did the Respondent fail to take those steps?

Remedy for disability discrimination

20. Is the Claimant entitled to compensation for general financial loss and/or pension loss arising as a consequence of the prohibited acts?

- If so, what sum should be awarded?
- Is the Claimant entitled to an award for Injury to Feelings?
- If so, taking into account the Vento guidelines, what sum should be awarded?

Witnesses

33. On behalf of the claimant the Tribunal heard evidence from: -

- The claimant.
- Anne Bannan (his wife).
- James Differ (a former driver with the respondent).
- John Dougan (Occupational Health Nurse, Clarity Healthcare).
- Henry Cowan (a driver with the respondent);
- Alex McCrae (Terminal Manager INEOS, Grangemouth).
- James Gavin (a driver with the respondent).

On behalf of the respondent the Tribunal heard evidence from: -

- Rachel Maclaren (Head of HR).
- Jon Price (General Manager).
- Garry Blades (former manager/driver and Operating Licence Holder for Grangemouth).
- Jemma Deans (former Operations Manager at Grangemouth).

- Luciana Santos (former HR Officer).
- Simon Holdway (Operations Manager).
- Allan Hunter (General Manager).
- Shaun Leonard (General Manager).

34. A joint bundle of documents was lodged and both parties provided helpful written submissions at the conclusion of the hearing.

Findings in fact

35. Having heard evidence, the Tribunal makes the following findings in fact. Where there was a dispute it reached a conclusion on the balance of probabilities, having regard where appropriate to the burden of proof where necessary. It is not the Tribunal's intention to recite or make findings in fact on every piece of evidence that it heard, since that would include facts that were ultimately irrelevant to its conclusions on the disputed issues to be determined.

Background

36. The respondent is a logistics and transportation company operating throughout Scotland and England. It employed the claimant as a driver from 3 May 2011 until 27 September 2019 when he terminated his employment without notice. At this point he was 54 years old and had completed eight full years of continuous service.

37. Prior to the termination of his employment his average working hours were 48 hours per week and his average weekly net pay, according to bank statements he produced for the months between May 2018 and April 2019, was £535.59 per week. He was a member of the respondent's pension scheme to which it contributed 3% of his gross pay each week in the sum of £21.63. His gross pay was on average £721 per week for that same period.

38. During his employment, the claimant worked out of the respondent’s Grangemouth premises at Midthorn Yard, Laurieston Road, Grangemouth,

FK3 8XX. At all material times in relation to the disputed issues in this claim, he reported to Jemma Deans, Operations Manager, who commenced employment with the respondent in February 2017 and was also based in Grangemouth. Miss Deans was line managed at the relevant time by Simon Holdway, Operations Manager who in turn reported to Jon Price, General Manager.

39. At the relevant time, Garry Blades was the respondent's Operating Licence holder at Grangemouth and Allan Hunter and Shaun Leonard were general managers within the respondent's Bulk Powder and Temperature Control divisions respectively. The respondent's human resources function at the material time included Rachel Maclaren, head of HR, and Luciana Santos, HR officer. Out of all those individuals, only the claimant and Miss Deans were based at Grangemouth.

The claimant's duties

40. Generally, the claimant's duties as a driver involved the collection and delivery of liquid fuel to the respondent's customers throughout Scotland. A typical day would involve his going to the Grangemouth office in the early morning, collecting his paperwork, driving his tanker to either the Inter Terminal or INEOS loading refineries, both of which are situated in Grangemouth, loading liquid fuel onto his tanker, and then delivering that fuel to the respondent's customers throughout Scotland.

41. As part of the government's green strategy, petrol producers are required to inject ethanol into unleaded petrol. The ethanol used by petrol producers operating out of Grangemouth is brought by ship into the Inter Terminal from where they or their hauliers collect it.

42. During his employment the claimant was one of the respondent's drivers who were required to collect ethanol from the Inter Terminal and deliver it to a number of customer sites, including the nearby INEOS Terminal and the Greenergy site at Clydebank.

43. Loading and unloading of ethanol at these locations is managed from a control point from where the delivery is controlled electronically. Each control point is equipped with a computer, a telephone and an Emergency Shut Down (ESD) button, which will be deployed in the event of an emergency, such as a spill or a fire. Drivers are required to stay close to the control point for the entire duration of each delivery, in order that in an emergency they can reach the ESD button quickly, close down the valves, shut down the system and make the area safe

44. As drivers are not permitted to sit in the cabin of their tankers during these operations and there is no seating available they are required to stay on their feet for the duration of each loading or unloading operation. There is no requirement however that drivers must stand in the same place at all times beside a control point during a delivery. Rather they are permitted to walk around an area close to the control point during the delivery so long as they remain close enough to it to ensure they are able to monitor the delivery and react quickly in the event of an emergency.

Loading and unloading times on the INEOS contract

45. During his employment the claimant was one of the respondent's drivers who were required to work on a particular contract that involves, in the course of a single day, four collections of ethanol from the Inter Terminal and four deliveries of that ethanol to the INEOS Terminal ("the INEOS contract").

46. The loading of ethanol at Inter Terminal takes approximately 35 minutes and the unloading at INEOS takes approximately 50 minutes. Each job can take longer if there are computer faults or if the pumps are not operating at full capacity. Between loading and unloading there is a 15-minute drive through Grangemouth between the terminals. Overall, the INEOS contract results in an almost 11 hour working day for the driver, 6 hours of which they will spend on their feet.

47. While the loading area at the Inter terminal is reasonably well sheltered, the unloading point at INEOS is at a remote part of that particular terminal and is not well sheltered. Unloading at INEOS is therefore seen as the more difficult part of the contract because of the exposed nature of the location and because the discharge of the fuel takes at least 15 minutes longer than it takes to load it.

The claimant's disability

48. Since 2016 the claimant has suffered from pain and discomfort in his hip, leg and back caused by arthritis in his left hip. From 2016 onwards that pain and discomfort increasingly limited his mobility and his ability to stand on his feet for any more than short periods of time, to the extent that he eventually underwent a hip replacement operation in early 2022. It is not in dispute that he meets the definition of disability in section 6 of the Equality Act 2010.

49. From October 2016 onwards the claimant started to find the loading of ethanol at Inter Terminal and unloading at INEOS on the 4 delivery INEOS contract painful and uncomfortable because of the amount of time he was required to stand on his feet. As a result, in the latter part of 2016 he spoke to his then managers Raymond Grey and Garry Blades about the pain and discomfort that working on this contract caused him. However, they continued to instruct him to work on the Ineos contract, despite his account of his difficulties.

50. When Jemma Deans became his manager in early 2017 he also told her of his pain and discomfort while working on the Ineos contract, as well as the fact that by February/March 2017 his wife had started to help him put on his socks and shoes because of the pain this caused him. In common with the claimant's previous managers, Miss Deans continued to instruct him to work on the Ineos contract.

51. Although he had suffered pain and discomfort since 2016 he did not seek medical advice and a diagnosis until July 2017 when his GP referred him to Dr Alexander Patton, a radiologist, who in turn produced a report dated 1 August 2017, which stated as follows –

'Clinical History – Pain in left groin radiating to knee limited external rotation query osteoarthritis.

Findings - Moderate to severe degenerative change affecting the left hip joint with almost complete loss of joint space height at the weight nearing lateral part. Some presumed pheboliths seen in the pelvis on the right.

Presume you will refer the patient to an orthopaedic surgeon?'"

52. The claimant provided Miss Deans with a copy of this report during the first week of August 2017. He was anxious that she should understand that the likely cause of his pain and discomfort while working on the Ineos contract was arthritis in his hip. He hoped that in the circumstances she would be willing to remove him from the requirement to work on that contract, which he had told his managers had been causing him pain since October 2016. However, on reading the report, Miss Deans said to the claimant -

'You don't want to go down this road, Chris, not being fit for the job'

53. The claimant interpreted Miss Deans' statement as a threat that if he did not continue with the INEOS work he would be dismissed. At that time, he felt more deflated than he had felt in his life.

54. After their discussion about the medical report Miss Deans stopped instructing the claimant on the Ineos contract that required him to carry out 4 ethanol collections and deliveries in a single day. She did however continue to allocate him up to 3 ethanol collections and deliveries in a single day, normally comprising 2 Inter Terminal/Ineos trips and 1 Inter Terminal/Greenergy Clydebank trip.

55. Although the claimant was no longer required to carry out the 4 delivery Ineos contract this meant he was still required to carry out tasks that caused him pain and discomfort because of his disability. As a result, he continued to raise with Miss Deans his concerns about his fitness to work on ethanol jobs, particularly when they involved deliveries to the INEOS terminal because of the pain and discomfort caused by the 50 minute duration of the delivery during which he had to remain on his feet, the physical layout there and its

lack of shelter. During his discussions with Miss Deans, the claimant requested a seat when he was working at that location. However, she informed him that the terminal manager Mr McCrae would not allow it and the decision was out of the respondent's hands.

56. Although the INEOS discharge element of the claimant's role was the main focus of his ongoing discussions with the respondent the 35-minute ethanol loading time at Inter Terminal continued to cause him pain and discomfort.

57. On 13 November 2017, the claimant spoke to his supervisor Robin Smith about the difficulties he continued to encounter on ethanol collection and delivery, particularly when he had to deliver to INEOS. Following their discussion Mr Smith sent an email to Jemma Deans that same day, in the following terms -

"Hi, Jemma -

Just a heads up.

Chris was in the office on Monday complaining about doing Ineos, reminding us that he has arthritis in his hip. The problem is that he is limited to about a five-foot square area he's allowed to stand and the fact there's no shelter. I offered him some thermals, and he refused, saying he would file a grievance before he would make any arrangements to work Ineos. I just wanted you to be prepared, in case this does come through."

58. Despite everything the claimant had told Miss Deans about the pain and discomfort he was suffering on ethanol work and despite the possibility of his now raising a grievance Miss Deans continued to assign the claimant duties at Inter Terminal and INEOS involving ethanol collection and delivery. She did so even though there were other drivers available to cover that work; nine of the seventeen drivers available to the respondent at Grangemouth being trained on ethanol discharge and delivery. Even if untrained, drivers could still have been trained relatively quickly on its requirements; such training involving only a one-day familiarisation course, including training on the computer controls at the respective control points.

Mr Crane's report of 20 February 2018

59. On 19 February 2018, the claimant consulted an orthopaedic surgeon, Mr Evan Crane, who produced a report in the following terms dated 20 February 2018:

"This gentleman is 52 years old and works as a truck driver. He has had a bit of increasing trouble with his left hip but actually when you drill down into it, the pain is not a major feature. He has some stiffness and restriction of motion e.g. putting on socks, but he is still able to do quite intense exercise classes (boxercise). He does not yet take any pain relief and he continues to work. He has adjusted the seating position in his truck and he does not have any significant nocturnal pain either. He is relatively fit and well otherwise.

…..

I have explained to him that whilst he does have arthritis of the hip, he is still at the bottom of the treatment ladder. I have organised some physiotherapy for this in order to try and improve things for him but I have explained to him that the reason to do a hip replacement is pain relief and if he is not actually taking any pain relief at the moment, there is not actually much to gain but potentially quite a lot to lose from hip replacement in comparison to simple analgesia. If he gets to the point where he has increasing trouble with his hip which I think he might, he will initially try some regularly analgesia and if that fails to settle things and he is having more functional and nocturnal symptoms then I have given him my secretary's contact details to seek an appointment with me to review things and potentially consider a hip replacement.

I think he will come to need a hip replacement probably in his 50s but he understands the reasoning for leaving this as long as possible due to his young age, the risk of revision surgery in the feature but also if something goes wrong then it could stop him working before his planned retirement. We gave him an information booklet about hip replacement and I spent quite a long time talking him through things and he seems happy with the current arrangements. Discharged but he will seek an appointment back with me if required."

60. The claimant provided Jemma Deans with a copy of Mr Crane's report in order to confirm the diagnosis of arthritis and the likelihood of his requiring a hip replacement in his 50s. He did so in the hope that the respondent would appreciate the genuineness of his health difficulties and it would persuade Miss Deans to take him off ethanol duties. However she neither sought advice from the respondent's HR or occupational health advisers about Mr Crane's report nor made any alterations to the claimant's duties.

The claimant's May 2018 shift rota

61. For reasons unrelated to his disability the claimant was off sick with stress between 12 March and 6 May 2018.

62. On 21 May 2018, shortly after his return to work, Miss Deans sent him an e-mail with his shift rota for the following week. That proposed rota included his working the four delivery INEOS contract on Saturday 28 May 2018. On receipt of that he emailed Miss Deans on 22 May 2018 in the following terms:

"Further to my previous conversations with you regarding my osteoarthritis in my hip, I have advised you that Ineos gives me severe pain in my hip and lower back. I am surprised to learn that I have been put on four Ineos on Saturday night. The issue is that standing in the one position causes me extreme pain. I haven't done four Ineos loads since I was diagnosed with osteoarthritis since last August. As per my conversation with you two weeks ago, my doctor advised me to slow down and take the four day week as my condition is deteriorating. I have asked in the past if I could get a seat to take the pressure of. Can you please advise by response email?"

63. On receipt of that email, Miss Deans forwarded it to HR by email dated 22 May 2018, copied to Simon Holdway and Jon Price, in the following terms:

"Hi,

Looking for some assistance and guidance regarding Chris' email below.

Chris cannot pick and choose his work, he is either fit for work or he is not. He was off sick with work related stress not having Osteoarthritis."

64. In response, Luciana Santos in HR sent an email to Jemma Deans on 22 May 2018 in the following terms:

"Hi Jemma,

I think the best thing to do is arrange a welfare meeting with him and take it from there. It may be that we require more information (from GP or OH) but it would be something to discuss during the meeting."

65. As a result, Miss Deans sent a letter to the claimant on 25 May inviting him to a welfare meeting on Wednesday 30 May in order to discuss his email of 22 May. In her letter she explained:

"The purpose of this meeting is to discuss in detail your email and the current health restrictions you have. We will also discuss and agree how we move forward based on what we discuss"

Welfare meeting on 30 May 2018

66. The welfare meeting took place as planned on 30 May 2018 between the claimant and Miss Deans. Miss Santos joined the meeting by telephone conference.

67. At the outset the claimant explained he was shocked that it had taken the respondent from the time he reported his diagnosis in August 2017 until May 2018 to arrange a welfare meeting. The possible provision of a seat at INEOS was then discussed but Miss Deans reminded the claimant that the terminal manager would not allow that. The claimant also referred to other available jobs that he believed could be allocated to him, such as 'aviation' work at locations where a seat was available.

68. However, referring to ethanol work, Miss Deans leaned over the table and told the claimant that *"I want you doing this'*. The claimant felt this comment was a form of torture.

69. After some further discussion it was agreed that no decision would be made there and then and that the welfare meeting would be adjourned pending the claimant being referred to the respondent's occupational health advisers for

advice on the claimant's ability to carry out his normal duties, including the ethanol work. In the meantime, the possibility of the claimant being instructed to work on the ethanol contract still remained.

70. In due course the claimant completed an occupational health questionnaire for that purpose. Within that questionnaire, he confirmed that:

"I have arthritis in my hip. I get back leg groin pain if standing for long periods of time."

71. In due course a face-to-face consultation took place between the claimant and the respondent's occupational health advisor John Dougan of Clarity Healthcare on 4 July 2018. Following that consultation, Mr Dougan issued his report to Luciana Santos in HR that same day, as follows:

"Dear Luciana,

SITUATION

Thank you for referring Chris for a face to face consultation today, Wednesday 4 July 2018. I explained my role to Chris and the purpose of the consultation and have obtained his consent to provide you with this report regarding his fitness for work. I have also requested our Data Management Team to forward Chris a copy of this report in accordance with his wishes.

Chris informs me that he is employed as an HGV driver and has been in this role for 30 years and with this current employer for 7 years. I understand that his role involves the delivery of fuel to various sites across the country. This involves manual handling tasks that require him to be able to lift, pull, push, bend, twist and turn to execute. He is also expected to stand for prolonged periods during the transfer of fuel, the duration of which varies from job to job. Chris advises me that his normal working hours are 0430-1630 hours working 4 from 7 days per week.

PROBLEM

Chris states that he has been diagnosed with arthritis affecting his left hip. This is a progressive condition that results in pain and stiffness in the joint

and will ultimately require a hip replacement some time in the future. His symptoms are variable on a day to day basis and Chris informs me that the symptoms are affected by prolonged static positions such as standing. At present Chris does not need to take any medication, however, this could change should his symptoms dictate in the future. Chris states that there is no current impact upon his normal day to day function although he can experience some sleep disruption due to his condition but this settles after changing position.

ON ASSESSMENT TODAY

On assessment today, Chris has a full range of movement in his major joints although he did have some very slight difficulty getting up from a kneeling position. He informs me that he is able to walk for up to 60 minutes without any great difficulty.

RECOMMENDATION

Given the above, I would advise that Chris is fit to undertake his role. However, due to his current symptoms, he will have to be able to alternate between sitting and standing if he is required to undertake tasks that involve prolonged periods of standing. You should arrange for a review of Chris' manual handling risk assessment and explore the opportunity of providing him with portable seating at jobs as required that can be used for those fuel delivery tasks that require him to stand.

CONCLUSION

I have not made any formal plans to review Chris but would be happy to do at your request.

All recommendations contained in this report are recommendations only and it is the responsibility of the employer to decide what is and is not a reasonable adjustment."

72. Following receipt of that report, Luciana Santos replied to John Dougan by e-mail on 31 August 2018 in the following terms:

"Hi John,

Further to the report attached, we have some concerns/comments to make and I would appreciate your further assistance.

The report we had access to from Chris is dated July 2017, did the employee say that he has been checking the progression of his arthritis with his GP? Any routine/follow up appointments? Is there a measurement to say his current level of arthritis/restriction?

When we initially saw Chris, he mentioned specific concerns with Ineos (he's asked to stand for 40 minutes, but this can happen as often as 4 times per day). Chris will alternate between sitting and standing for the duration of his day. For the duration of the delivery (i.e. 40 minutes), it is mandatory that he is standing, alert to everything around him, controlling the delivery.

You recommended a portable seating but this is illegal to have. It's a legal requirement that the driver is standing, walking around if necessary and control all aspects of a delivery, especially when he is delivering such dangerous substances. This will not be deemed as recommended as we will be instructing our driver to break the law.

At this delivery site (Ineos) such as others, the driver is required to stand, walk around if he prefers, but only for the full length of the vehicle. Are there any exercise/stretch movements that you recommend? Could it be that would restrict his duties to one Ineos delivery every 1 or 2 weeks?

We are questioning the employee's fitness to perform the job, as the standing is required at all delivery sites so I would be grateful if you could provide more information, as this is crucial to help us decide if his employment will continue on the current requirements. Please note that we have not concluded this process, I am just considering all options."

73. In addition to sending this e-mail Miss Santos spoke to Mr Dougan by telephone as well as engaging in further e-mail correspondence with other individuals within Clarity Healthcare in order to impress on them that further

advice was still required in relation to the claimant's fitness to perform the INEOS ethanol work.

74. In an e-mail to Jayne Dann of Clarity Health Care dated 4 September 2018, Miss Santos wrote –

"John kept saying that the recommended seating was simply a recommendation that the company should decide to use or not, and as much as I would try to explain that it's illegal, I don't think he understood. I wanted to confirm if John was aware of the H&S requirements for ADR terminals prior to finalising his report but he confirmed he was not aware.

…

John said that Chris had to alternate between sitting and standing. I told John that when Chris is assigned the Ineos work, he will both stand and sit but we needed more information of the percentage of time on each. John said that it varies from person to person, from day to day and he kept on saying that Chris is fit to do his job. If part of his job is to stand for 40 minutes and he cannot do that I'm unsure how he can be fit.

When I asked John this question he said that this is a decision that the company has to make which I understand to a point but I was hoping for some further medical input which is why we initially engaged OH.

It just seemed that John was avoiding answering my questions below, making vague comments, always putting the focus on the company.

I told John that Chris sent an e-mail on 22/05/2018 and he said he was put on 4 Ineos on Saturday night (i.e. asked to stand for 40 minutes, but this can happen as often as 4 times per shift) and these 4 times cannot be split between drivers as is not effective"

75. On 2 October 2018, Miss Santos sent a further e-mail to Clarity Healthcare, this time to their Sobia Awan, as follows –

"The recommendation paragraph has been raised as a concern by my manager and I would like Diane to comment on what we discussed las week

so I have a paper record i.e. amended report + additional email – in case we need to discuss this further with our employee/our solicitor.

RECOMMENDATION

Given the above, I would advise that Chris is fit to undertake his role. However, due to his current symptoms, he will have to be able to alternate between sitting and standing if he is required to undertake tasks that involve prolonged periods of standing. You should arrange for a review of Chris' manual handling risk assessment and explore the opportunity of providing him with portable seating at jobs as required that can be used for those fuel delivery tasks that require him to stand.

It is recommended that he is allowed to alternate between periods of standing and seating – as discussed with Diane we cannot provide a portable seating. I told Diana that throughout the day he will alternate between sitting and standing. This is an example of the Ethanol work.

Start job at Grangemouth, drive 10 minutes, arrive at Ineos and load for a duration of 30 to 40 minutes. Drive for 15 minutes to delivery place, tip for 40/50 minutes. Drive back to loading point (15 minutes). I told Diane that this can repeat itself up to 4 times on the same day. I would ask for the recommendation of the min amount and max amount of time standing to be clarified.

We also discussed that it's not mandatory for Chris to be static in the same position for the duration of the loading and delivery – he can walk the length of the truck but never go in the truck. He has to be alert in case something goes wrong. I would appreciate that this is also included on the amended report/additional e-mail."

76. In response to the matters raised by Miss Santos in her various e-mails, Mr Dougan provide a supplementary report dated 4 October 2018, in which he provided the following advice -

"Dear Luciana,

Thank you for providing further information regarding the details of the tasks associated with Chris' role, particular the Ineos depot. In my initial consultation with Chris, I was given the impression that when working on the Ineos contract that he was obliged to remain within a small restricted area that did not allow him to mobilise freely and resulted in Chris having to sustain a static standing position for the duration of the fuel exchange. However as you state he does indeed have the opportunity to mobilise freely along the length of the truck. Given this and the fact that Chris informed me that he is able to walk for up to 60 minutes without any significant problems, then I think that it would be reasonable to expect him to undertake his full range of duties.

You enquire regarding the benefits to be gained by individuals taking medication for such conditions as Chris', and this is a valid point. However, it is entirely a personal decision for the individual and the side effects from some strong analgesia can have the potential to impact upon an individual's ability to drive or operate machinery depending on the strength and frequency of the analgesia."

Welfare meeting on 24 October 2018

77. On receipt of Mr Dougan's letter of 4 October 2018, Jemma Deans wrote to the claimant on 16 October inviting him to a welfare meeting on Tuesday 23 October 2018 to discuss the updated medical advice. The welfare meeting took place as planned on 24 October. In attendance were the claimant, Sandy Smart of Unite the Union, Jemma Dean and Luciana Santos who joined via conference call.

78. It was only on arriving at this meeting that the claimant was provided with a copy of Mr Dougan's updated report dated 4 October 2018. Until he received this report, he had no idea that Miss Santos had been in contact with Mr Dougan seeking an updated report or the reason why that had been sought. The claimant therefore had no input whatsoever in relation to the request for this supplementary report.

79. The claimant had never informed Mr Dougan or Miss Santos that his hip pain would be alleviated by walking along the length of the truck. As he asked

rhetorically during his own evidence –*" if walking alleviated his pain, why would I ask for a seat?"* Furthermore, Mr Dougan's reference to the claimant having the *"the opportunity to mobilise freely along the length of the truck"* was an entirely false premise that did not represent the true position, which was that a driver must stay in close proximity to the control point.

80. Mr Dougan's updated advice was therefore fundamentally flawed by its being based on two erroneous assumptions; namely that the claimant was fit to stay on his feet and walk around during the lengthy delivery times and that a driver was able to walk freely around a truck during those deliveries.

81. During the meeting, the claimant explained to Miss Deans that his condition had deteriorated since his having been diagnosed. In relation to the loading and unloading requirements at Inter terminal and INEOS, he repeated that the area he was required to stand in during loading and discharge was a very small area that he was being confined to stand in for hours and that it caused him pain and discomfort because of his arthritis. When he asked once again if a seat could be provided, he was once again told that was not an option.

82. When Miss Santos said to the claimant:-

“We had the OH report, which states that you are fit to resume these duties. If you cannot do this, it also puts in question if you can do other duties.”

83. He explained that he could still carry out his role as a driver, which he had done for 30 years, but that he needed somewhere to sit or lean during the loading and unloading of fuel, which he was unable to do on Ethanol work. He explained that he could safely carry on doing on other jobs, such as delivering aviation fuel to different locations, which had always been part of his duties.

84. Although following the welfare meeting on 24 October 2018 the claimant was not instructed to carry out ethanol work he was never permanently taken off that work. He therefore remained concerned that this was always a possibility, although he did not raise any further concerns or grievances with

the respondent about his treatment in relation to its management of his disability or the allocation of his duties.

85. From October 2018 until the termination of his employment the claimant was allocated duties that did not require him to be on his feet for extended periods of time and that he was able to carry out safely without pain and discomfort. Such duties were confirmed by Jon Price to have been available at all times after the claimant informed the respondent of his pain and discomfort when carrying out ethanol work.

86. Dr Patton's report made clear to the respondent the likely underlying medical reason for the pain and discomfort that he had been experiencing doing ethanol work, which he had originally disclosed to them in October 2016, and the likely long-term nature of his underlying condition, which was subsequently confirmed. There was no reason why the respondent could not have taken the claimant off ethanol work and allocated him alternative duties from August 2017 when he produced to the respondent the report from Dr Patton. Allocating him such duties would not have been disruptive to the respondent's business. Such a step would have been practicable, and it would have removed the disadvantage he was at relative to non-disabled drivers who were tasked with ethanol work.

87. As a result of the respondent's refusal to allocate him alternative duties, the claimant felt that he was being forced to work on ethanol duties when he had made it plain that those duties caused him pain and discomfort. This caused him feelings of inadequacy and humiliation and impacted his mental health and his relationship with his family. He became uncommunicative and irritable with them. He suffered bouts of depression.

David Scarff and James Gavin

88. In or around 2016, another driver James Gavin reported to his manager Raymond Grey that his GP was concerned that he was suffering from sleep apnoea. On receiving that information Mr Grey immediately took Mr Gavin off night shifts pending a full investigation of his condition. Mr Grey agreed to change Mr Gavin's shifts on the strength of his advising him that he was

undergoing those tests. No occupational health referral or welfare meeting was required. Following those tests, Mr Gavin returned to his normal shifts 6 months later.

89. Around this same time, another driver, David Scarff reported to his manager a temporary personal medical problem, as a result of which he preferred to drive long distances. In common with Mr Gavin, Mr Scarff's request was granted for as long as he needed that alteration to his duties, without the need for an occupational health referral or a welfare meeting.

Colleague A ('A')

90. Although the respondent's drivers generally work alone they are part of a larger team who will often meet at the Grangemouth office or at customer sites. During his employment one of the claimant's fellow drivers was an individual with whom he enjoyed an amicable relationship until January 2017 when an altercation took place between them during a job at Glasgow Airport. As a result of this altercation each reported the other to the police although no police action was ever taken. However, from that point on there was tension between the two men, both of whom reported to Jemma Deans.

Incident on 12 January 2018

91. That tension between the claimant and A came to a head on 12 January 2018 when the claimant walked into the Grangemouth office. After the claimant said hello to A and asked him to make *"no bitchy comments today",* A walked round to the claimant's side of the table and said, *"fucking outside now".* Wishing to avoid any physical altercation, the claimant hurried outside to try to get away from the situation. However, A followed him, and a loud argument continued between the men as the claimant made his way to his car in order to put more distance between them. As he got into his car, he shouted out of his window to A that he was a "*fucking bitch" and* drove off.

92. As a result of this incident, both the claimant and A were rightly subjected to a disciplinary investigation. The claimant's investigation meeting was conducted by the respondent's operations manager, Barry Lewis on 17

January 2018. The claimant's account of the incident as recorded in the minutes of that meeting was as follows -

*"On the day of the incident, A walked into the office and said "hello". I said "no bitchy comments today". A walked round the table and said "you having a f*****g laugh". He walked round the side of the table. He told me that he would kick my c**t in. His arms were in the air, he was screaming. He then said f*****g outside now.*

I'm not interested in fighting at work, I cannot tolerate this guy.

*I walked outside, A was talking to Jemma. I stood behind Jemma and I called him a bitch, a f*****g bitch but I never threatened him. The situation has escalated beyond reasonable behaviour.*

A walked out of the office; Jemma was still in between us. A said that he would phone me later and "I was fucking getting it". I called him a "fucking bitch"

BL – When did Jemma come into the situation?

CB – When A asked me to go outside, I went outside and A went to see Jemma then I went back inside. A started shouting and screaming "you've got my permission to leave". A pushed me into the key cabinet (before JD was involved)."

93. Some, but not all, of this incident took place in front of Jemma Deans. As part of the investigation, Miss Deans provided her own written statement, which said –

"At approximately 14:15 today, I was on the telephone in my office when I heard Brian Shaw shouting "Jemma, he's just assaulted me". I went towards the kitchen where I found Chris Bannan and Brian Shaw arguing and threatening each other.

I stepped in between them to stop it escalating further.

I tried to find out what happened but they were shouting over each other.

I managed to get Chris to go outside, so I could speak to Brian but Chris re-entered to collect his belongings and the shouting started again.

I eventually got Chris back outside with me to try and speak to him alone about what had happened but Brian came out of the office to go to his vehicle and they both started arguing again with me remaining in the middle.

I managed to get Chris to go into his car to defuse the situation, but when Chris got into his car he put the window down and still carried on with more abuse until he drove away."

94. In due course the claimant's disciplinary hearing took place before the respondent's Simon Holdway on 5 March 2018, at the end of which he was issued with a first written warning for his conduct. In his decision letter dated 8 March 2028 Mr Holdway stated –

"I have the summary notes from investigations with both yourself and A and additional information provided at both disciplinary hearings. I also have a statement provided from Miss Deans, from the point of her involvement as a witness.

It is my conclusion that the altercation began with your comment to A stating 'No bitchy comments today'. The altercation then escalated; at this point your statements differ greatly. Therefore I have to rely on the other witness statement, which does tend to suggest you were antagonistic to A and displayed inappropriate conduct at work. My reasons for this is that you re-entered the room, when Miss Deans asked you to wait outside and began the altercation again with A, you also continued to 'abuse' A from your vehicle as you drove away"

95. Although the claimant accepted that he was deserving of his first written warning, he nevertheless appealed against it. He did so because he believed that because of Miss Deans' statement, he was being made to shoulder the majority of the blame for the incident in circumstances where he believed that A had been the aggressor. At this time there were strong rumours in the workplace that A was in a romantic relationship with Miss Deans and the

claimant believed that as a result she had not been impartial and truthful when providing her statement. Although unknown to the claimant at the time, A had received only a verbal warning for his part in the incident.

96. In his appeal letter dated 11 March 2018 he asked Mr Holdway to re-interview Miss Deans. He pointed out a number of matters that he believed ought to have been followed up further with Miss Deans, including threats made by A that he believed she had heard him making, including the following threat –

*"He was screaming at me, you're getting a phone call, you're going to get done. I am going to f*****g do you, and Gary Thompson is going to kick your c**t in too. This is while I was in my car driving out. She was standing there listening to all this".*

97. In his appeal letter, he also explained that the incidents with A had been "*causing me immense amounts of stress".*

98. In due course, Jon Price heard the claimant's appeal against the disciplinary penalty at an appeal hearing on 11 April 2018, which was also attended by the respondent's Head of HR, Rachel Maclaren. In the course of his appeal, the claimant explained to Mr Price that he accepted his written warning but that he did not accept full responsibility for the incident. He did not believe that Jemma Deans was a truly independent witness because she and A were reputed to be in a romantic relationship together. He believed her lack of independence was reflected in her omitting from her statement that she had heard A making threats of violence against him, which proved he had been equally blameworthy.

99. Mr Price wrote to the claimant on 30 April 2018 rejecting his appeal. Despite the claimant having raised concerns about Miss Deans' alleged lack of objectivity and his detailing a specific allegation that he claimed that she had heard A making, Mr Price did not clarify with Miss Deans either whether she had heard A's alleged threats or the status of her relationship with A.

100. Both Mr Price and Miss Maclaren considered it unnecessary to speak to Miss Deans. They reached that view because the claimant had admitted his

misconduct and had not challenged the sanction imposed. They reached that view even though they were aware Miss Deans had prepared her own statement and therefore they knew that it had not been noted by HR or by another independent manager who would more than likely have put the respective positions of both A and the claimant to her for comment. They reached that view even though this was now their opportunity to get to the truth of the matter. They reached that view even though they were both aware of strong rumours that A and Jemma Deans were in a relationship. Surprisingly, they did not even ask Miss Deans if she was in a relationship with A despite the claimant's protestations about her alleged bias and general workplace rumours to that effect.

The claimant's stress related absence

101. As a result of the stress of the situation with A, the claimant went off sick with stress between 12 March 2018 and 6 May 2018. Soon after his return to work he reduced his working days from five days to four days per week in order that his contact with A would be reduced. He also began to start work early at 3.30 a.m. at Grangemouth in order to avoid coming into contact with A at the beginning of the day.

102. He took these steps because he felt that the respondent had treated him harshly and unequally compared to its treatment of A in relation to the 12 January 2018 incident. He also did so because he believed the respondent had failed to treat his concerns sufficiently seriously and had failed to either address A's behaviour or put any measures in place to keep them apart in the workplace. As a result, he remained apprehensive of A and also concerned that the respondent's handling of the 12 January 2018 incident indicated that it was not willing to take seriously his fears and concerns about him. In the circumstances he felt he had to take matters into his own hands, and both alter his start time and reduce his working days in order to reduce his contact with A, even though that was financially to his detriment.

Incident on 14 July 2018

103. On 14 July 2018, there was a further altercation in the workplace between the claimant and A during which A called the claimant "*a fucking tit".* There were no witnesses to this incident.

Incident on 16 July 2018

104. On 16 July 2018, the claimant approached A in the yard at Grangemouth at the start of their shift and they exchanged words. In light of the 14 July incident, which had not been witnessed, the claimant videoed this exchange on his mobile phone in order to obtain evidence of A's behaviour towards him that he could produce to the respondent.

105. A transcript of the exchange captured on video on 16 July 2018 was produced, as follows:

'Claimant: You made a lot of threats towards me?

A: Fuck off.

Claimant: Is that it?

A: Aww, that's it. Do you know what I'm not going to waste another breath on you. You're a waste of space.

Claimant: So they weren't threats, just bravado in front of her. Is that what it was? Just bravado in front of her?

A: See one of these days mate, I'm gonna fucking murder you. Now fuck off.

Claimant: You're gonna murder me?

A calls over to another driver in the yard

A: Hey, this guy is threatening me, Andy right. I am not doing anything. I'm not responding. I'm just telling you this guy is threatening me. Just witness that. I'll walk away now. See

when I phone the police on him later, just tell them when what you saw, will you?

Claimant: *You're gonna murder me?*

A: *You heard it.*

Claimant: *Yes I heard it. So do it."*

106. Later that same day, the claimant emailed the respondent's HR department in the following terms:

"There was an incident in the yard between myself and A whereby he threatened to kill me but more menacing he said he was going to murder me, I have just informed Jemma Deans but I feel she was compromised on the last occasion, I know it's a bank holiday and I will give a more detailed statement in due course and I will be informing the police hopefully with turners approval."

107. In response, Rachel Maclaren emailed the claimant on 19 July requesting a detailed statement of the incident, informing him that

"Following this the company will investigate the allegation and it will be necessary to speak with you further as part of this process. We will write to you in this regards once we have the further information"

108. By e-mail of 22 July 2018 the claimant replied to Rachel Maclaren's e-mail as follows:

"I was walking past A going to my vehicle and he was glaring at me so I stopped and said to him that he had made a lot of threats to me and asked if they were real. I got abuse I then asked if it was just bravado in front of Jemma Deans (who was present at the time of the initial threats). He then turned around and said "one of these days I'm going to fuxxing murder you" and I said your going to kill me he said "you got it" he started shouting he was going to call the police and asked a Wincanton driver to witness me making threats to him which I did not.

I turned around, got in my truck and left the yard.

At no time did I threaten him, I also have this on video and I have asked Garry Blades to send on to yourself as I can't attach it to email.

If you send any letters to me, could you do this through the work I haven't told my wife yet and I live in a rural location I don't want her and my kids to be frightened."

The grievance meeting on 25 July 2018

109. The claimant subsequently met with Simon Holdway on 25 July 2018 to discuss his grievance about A's behaviour towards him. Luciana Santos of HR joined the meeting by telephone conference.

110. In addition to the 16 July incident when A had threatened him, the claimant told Mr Holdway of other incidents between them; in February 2018 A had threatened him three times with violence, telling him he was going to get his "*fucking cunt kicked in"* and on 14 July 2018 when he had asked A to stay away from him and leave him alone, A had responded by calling him a *"fucking tit".* He explained to Mr Holdway that he believed A was *"poking him"* to try to get him to retaliate with violence, which he would not do. The claimant stressed to Mr Holdway the impact these threats were having on his wellbeing, although if A withdrew his threats he would *"shake his hand".*

111. Mr Holdway confirmed that he had seen the video taken on 16 July and that he would now investigate matters and be back in touch when that had taken place.

Incident on 28 August 2018

112. On 28 August 2018, the claimant emailed Rachel Maclaren in the following terms:

"Seen A today for the first time as I was driving out of work in my car as I looked at his truck, he was blowing me kisses.

Just don't know how to cope with this anymore."

113. Miss Maclaren e-mailed the claimant on 30 August 2018 in response to that 28 August email, informing him that his recent complaint about the 16 July 2018 incident was still being dealt with but had been delayed because of a bereavement in Mr Holdway's family. She also asked that, in respect of A, the claimant *"continue to refrain from having any unnecessary contact with him and report any incidents to myself".*

Incident on 19 September 2018

114. On 19 September 2018, the claimant emailed Rachel Maclaren in the following terms:

"A again

…

I was driving out of the yard today in my car when A was coming in towards the ad blue tank in a Turners truck he was pointed for the ad blue tank and I went the opposite way and he turned his truck towards me and just for a second or two I actually felt threatened by it then I stopped my car and he sat on the horn for about 3-4 mins until the workshop people come over. I got out of my car and asked him what he wanted to be told I'm going to batter you I'm biding my time.

He also motioned a cut my throat threat when I drove into Nustar two weeks ago today as I passed the loading bay C.

I asked Jemma to contact but she said there was no CCTV of the bay.

I also asked BTS to view the CCTV from today's incident. I'm going to go to the police after work tomorrow and I'm asking my union to get involved as the time taken on this is unacceptable."

115. Despite the seriousness of the issue raised in this e-mail and the similarity of the threats described to those previously reported, Miss MacLaren did not acknowledge this e-mail, although she did pass it to Simon Holdway who in turn asked Jemma Deans to meet with the claimant to take a statement from him. During their meeting on 25 September 2018 the claimant repeated to

Miss Deans the account he had given in his e-mail and told her that he believed A was going to drive his vehicle into his. When asked by Jemma Deans if he wished to add anything, he responded that :

"After two death threats and to be told I was going to get battered, I am actually worried I am going to get run over with a truck in the yard."

Incident on 6 December 2018

116. On 7 December 2018, the claimant e-mailed Rachel Maclaren as follows –

'Threatened again'.

I was in the office making a coffee to take away home yesterday 6/12 14:20 ish when A walked round the back of me I carried on making my coffee when I heard him at the office door just standing there as I turned round he puckered up his lips and blew me a kiss, I turned around finished making my coffee and left the office my car was right at the door I got in reversed back to see Shaw standing inside locker room holding his stomach and saying ya fat bastard I turned my radio off put the window down to the hear the words ya fat bastard I'll fight you anywhere in this fucking yard I got out of my car and told him to do it to which he folded his arms and shouted can you witness him if he assaults me then looks at me and says go for It ya fat cunt I kept my cool walked back to my car and Jemma was there with A screaming still and Jemma shouting at him to behave on a customer site, I got in my car and left."

117. Once again, Miss Maclaren, failed to acknowledge the claimant's e-mail. As she had witnessed the incident, Jemma Deans emailed Simon Holdway about it and told him she would call him the following day to discuss it. While that discussion did take place, Mr Holdway did not take a statement from Miss Deans about the incident.

118. Despite his assurance that he would investigate the claimant's concerns raised at the grievance meeting on 25 July, Mr Holdway did not get back in touch with him to confirm the result of his investigation or details of any action the respondent proposed to take as a result. Nor did he or anyone else within the respondent's organisation provide the claimant with any response to the

complaints he subsequently made in relation to A's alleged behaviour on 28 August, 19 September and 6 December, including behaviour he had perceived as death threats and about which he had made plain the impact on his health and wellbeing.

119. By the end of 2018 the claimant was therefore left no better off than he had been before he raised his grievance. The steps that he had taken within his own control by reducing his working days and changing his starting time had not been enough to prevent A threatening and harassing him, yet the respondent had failed to address A's behaviour and protect him from it, despite his repeated complaints about him. As a result, he remained fearful of A's conduct towards him and anxious every day when he came to work about the respondent's continued failure to take steps to protect him in the workplace.

Incident on 2 April 2019

120. On 2 April 2019, the claimant emailed Rachel Maclaren and Simon Holdway in the following terms:

"I refer to my grievance meeting with Simon Holdway on 25 July 2018.

I request to see a copy of the grievance procedure notes. I require the grievance to be progressed without delay.

I am about to seek legal advice so will require an immediate response to what is happening regarding my grievance.

It is your legal duty, as an employer, to ensure that reasonable care is taken in the workplace to avoid any employee being harassed and bullied. You as an employer, once notified, should also continue to monitor that this bullying and harassment does not continue.

I am due back on Thursday and must be reassured that all practical measures are in place which will prevent future harassment by this employee.

I look forward to receiving confirmation of this and what steps will be taken to prevent this from happening before I return to work on Thursday, and in the future.

I look forward to receiving this response by return.

Yours sincerely,

Chris Bannon

Incidents 2 April 2019

Today I pulled off the loading bay after loading out of 2 terminals to be glared at by A until I approached in the truck and passed, with him staring, glaring and laughing directly at me, to which I found this to be extremely intimidating. I left the terminal this morning really really stressed and I knew I couldn't carry my delivery for the day. This has pulled me down as it is continually happening. This is continuous bullying and harassment from him.

Note:

I have informed HR of all the previous incidents to which they have stopped replying to my emails.

I start my shifts at 4am every day to avoid this employee A. I have also dropped down to a 4 day week to avoid B Shaw.

Another incident happened two weeks ago Thursday 21 March, about 1630, I was in the office making a coffee to go home. I brushed past him as he was partially blocking the way, then he had a right go at me in front of Graham Busby, I finished making my coffee and left.

I am at the end of my tether with his behaviour. I feel I am getting no support from the company."

121. In response, Rachel Maclaren emailed the claimant on 3 April 2019 as follows -

"Dear Chris

I will arrange for the meeting minutes to be sent to you on my return to the office.

As you are aware, we have had historic discussions with you over issues between yourself and A and have investigated these and the outcomes have been communicated.

You state that HR have stopped replying to e-mails, can you please confirm what emails these are so I can follow this up? If you feel there are outstanding issues then I apologise and I will look onto these for you.

In terms of the information regarding issues in the last two weeks, I will forward these to management and you will be contacted shortly to advise of the next steps to be taken.

I can assure you that matters raised by you will be investigated and appropriate conclusions reached.

In the interim, I ask that you continue to avoid A and the same message will be relayed to him. This appears to have been happening until the latest incidents to which you refer.

We will continue to plan the work system to minimise the contact you may have."

122. On 3 April 2019, the claimant responded to Rachel Maclaren's email in the following terms:

"Dear Rachel,

I spoke to Jemma Tuesday morning and she relayed to me there was no grievance lodged. The meeting minutes you refer to then. What do these relay to.

No outcome of my grievance on 25 July has been communicated to me. I have received nothing at all!

I received a reply from an email complaint I sent to you on 28 July, your reply dated the 30th saying it would be dealt with later. A further email complaint to

you on 13 September, no response received. Also on 30 September, I relayed a complaint to Jemma about the one finger gesture as he passed me in the truck. A further email on 7 December, no reply received.

Your assurance that matters will be investigated do not reassure me, due to the fact that my grievance was raised back in July 2018, and nothing has been done at all.

The whole point of the email yesterday was to clarify your duty of care towards me, and to protect me in the workplace. None of this has been referred to at all.

I have gone out of my way to avoid A by altering my start times as I advised, and by only doing a four day week. He will not avoid me, and takes great pleasure in harassing me.

The whole issue here is I asked for reassurance that this will not occur again, and I do not find that your email has addressed any of these issues at all.

My return to work on Thursday was based on your putting practicable measures in place to reassure me as your employee that no future harassment would occur.

You haven't addressed your legal duty of care towards me at all.

My issue is if I return to work on Thursday, you are putting me directly back into a situation that I left for on Tuesday.

After speaking with Jemma this morning, she was trying to put the responsibility returning to work on me, and I feel this is something you should be dealing with yourselves, as the onus of responsibility now solely lies with you as an employer. It is your responsibility to ensure that I return to a safe working environment free from stress and that I can carry my duties in safe manner. If I return to work on Thursday, you are putting me directly back into the same situation, nothing has changed and you have not addressed your duty of care.

I look forward to receiving confirmation of this and what steps will be taken to prevent this from happening before my return to work. I am under immense stress because of this and I don't think you acknowledge this situation to the full extent."

The events of 4 April 2019

123. On 4 April 2019, the claimant started his shift at Grangemouth at 3.30 a.m. As he was driving out of the loading bay, A looked directly at him and blew kisses at him. The claimant felt intimated by this. After completing his delivery that day at NuStar he telephoned Jemma Deans and told her about this incident. He explained to her that he was now too stressed to take a loaded fuel truck onto public roads. He did not wish to put himself or the public in danger and he wanted the company to act. He then reported sick that same day and began an extended period of sickness absence.

Grievance Meeting on 1 May 2019 with Jon Price

124. On 1 May 2019, the claimant met with Jon Price and Rachel Maclaren with a view to discussing the grievances raised in his e-mails of 2 and 3 April. However, having established with the claimant that he and Miss Maclaren were personally involved in previous matters about which he was aggrieved, Mr Price informed him that he would pass his grievance to an independent manager within the respondent to deal with it. In due course it was determined that this manager would be Allan Hunter.

Grievance meeting on 16 May with Allan Hunter

125. On 8 May 2019, Allan Hunter wrote to the claimant inviting him to a grievance hearing on 16 May at its Larkhall depot.

126. In advance of that meeting, the claimant emailed Mr Hunter on 15 May 2019 setting out the main points of his grievance, which were as follows:

"

(1) Failure to investigate my grievance in July 2018, I feel this one is exhausted. I am taking legal advice – ACAS or going to tribunal.

(2) Lack of duty of care to prevent future harassment and bullying in the workplace and to investigate the threats made to me.

(3) A breach of conflict of interests and a breach of confidentiality.

(4) A cessation from HR who stopped replying to my emails showing my complaints. Who dealt with these complaints and how were the outcomes relayed to me as per Rachel Maclaren. Was it HR or Jemma Deans who dealt with them?

(5) A lack of handwritten notes from Rachel Maclaren and Luciana Santos, which I was advised I had signed off, none of these had ever been produced to me and I have never signed off on any of these. I have asked for copies of these handwritten notes and as yet none have been sent to me.

(6) I asked for a further update witness statement of Jemma Deans from the appeal hearing – Jon Price/Rachel Maclaren – no further statement was produced. I did not receive any notes from the last meeting either.

I require to know why Jemma Deans gave A a row for threatening violence against me. I want to know why this was omitted from her statement, as I didn't get a row from her.

I also informed you the last time about a huge how that took place in Gleaner's Connell depot and how this was covered up by Jemma Deans. Why was this not reported to HR being in a customer's depot?

I made a complaint verbally to Jemma Deans around the beginning of September when I drove into NuStar and A motioned he was going to cut my throat in the terminal. The following morning I got the middle finger gesture from him as he passed in the truck. Jemma Deans told me she informed HR about this incident. I need to know that she did. She told me she phoned NuStar and there was no coverage in the area.

I need to know what HR meant by all the other incidents relayed to me. I have asked for all paperwork and I don't appear to have conclusions to any incidents, bar the initial one, and I find it extremely exhausting.

In light of the allegations that are circling at the moment regarding Jemma Deans and A, in a relationship, as I stated previously in my disciplinary hearing, I require my pay reinstated with back pay. This situation has arisen through no fault of my own and due to the nature of misconduct in the workplace and breach of confidentiality, i.e. HR showing Jemma Deans the video when I specifically asked at the meeting to keep it confidential, as a result I am without pay until the conclusion of this grievance.

I feel Lewis/Turners have failed me with me with a lack of resolution in this situation and I have lost trust and confidence in my employer. My morale is so low, my family life is suffering both emotionally and financially as I reduced my hours because of the harassment. During this period of turmoil, I have received one to two emails from Jemma Deans daily when I am off sick with stress, and I really don't appreciate it.

If the first grievance goes ahead to ACAS or tribunal, I will cite 4 Lewis Drivers, 1 ex driver,1 ex manager and a chap who used to work with DHL who I am looking at contact details at the moment (who was threatened by A with a recording that him and his boys were going to come and burn his house down with him and his family in it), and they sacked the chap for using an electrical recording device in Ineos."

127. The grievance hearing took place as planned on 16 May 2019. The claimant was accompanied by Graham Turnbull from Unite the Union. Mr Hunter was accompanied by Helen King, HR officer.

128. During this meeting, the claimant informed Mr Hunter of all of the incidents when A had threatened him and made plain the impact of those threats on his health and wellbeing. He explained that he had raised his grievance in July 2018 but still nothing had been done. He had had to reduce his working days

and start work earlier each day so as to avoid situations when he would come into contact with A because the respondent had done nothing to prevent that happening or to address A's behaviour. There had been no investigation of the 16 July 2018 incident or of any other subsequent incidents he had reported, and HR had stopped replying to his e-mails. Their manager Jemma Deans was compromised by her relationship with A. He had received a written warning for calling A a bitch but when A had threatened to murder him, nothing had happened. As far as he could tell, everyone thought A *'walks on water'.* The claimant also informed Mr Hunter of the financial impact of A's behaviour because he had recently taken time off with stress and not been paid for the past six weeks.

129. On 18 June 2019, Allan Hunter wrote to the claimant setting out his responses to each of the claimant's grievances set out in his 15 May 2019 e-mail. He upheld the claimant's grievance in relation to the respondent's failure to communicate its decision in relation to the 16 July 2018 incident, the two September 2018 incidents, and the December 2018 incident but he did not accept that the respondent had failed to investigate those incidents.

130. He explained that he had been unable to support the claimant's grievance in relation to the alleged incidents on 19 September and 6 December because it could not be determined who was at fault, given the nature of the complaints and the lack of any corroborating evidence.

131. Otherwise, the claimant's grievances were rejected, including the claimant's complaint that Jemma Deans had not been re-interviewed by management in relation to the 12 January 2018 incident. In Mr Hunter's opinion any alleged relationship between Jemma Deans and A was not relevant in circumstances where the claimant was not appealing the disciplinary sanction he had received.

132. So far as the claimant's concerns about his safety in the workplace were concerned, Mr Hunter's responses were as follows:

"Point 2

Lack of duty of care to prevent future harassment and bullying in the workplace and to investigate the threats made to me"

Having reviewed the information and after speaking with Jemma, I understand that the company have taken steps to minimise the contact you and A have whilst at work. In the hearing, you explained to me that both you and A undertake the same type of work and with the same customers. I have been informed that you have been given different start times and are currently allocated different work each day to minimise the likelihood of your paths crossing. This unfortunately can fail as you collect fuel from the same terminal and it is at these times that you have come into contact with each other.

I have considered that the company has done enough to minimise the contact you have and it is my opinion that we have taken significant steps to reduce the likelihood of you meeting. I asked you at the hearing how you saw the issues between the two of you being resolved, and you stated that you just wanted it sorted and did not give any suggestions as to how this could happen. My recommendation is that the two of you should cross paths then you should ignore each other. I will ensure that the same message is relayed to A.

…

Point 12

"Turners have failed me with the lack of resolution in this situation"

I am sorry that you feel Turners have failed to resolve the issues between yourself and A. As with point 2 above, the Company have taken steps to minimise the contact you and A have whilst at work. I have been informed that you have been given different start times and allocated different work daily but you both collect fuel from the same terminal and therefore your paths may cross. Whilst you both continue to be employed on the same contract, I can see nothing more the company can do to limit the contact you have with each other and I

note that you have not put forward any other suggestions for consideration also. You have both been previously advised to keep out of each other's way. However, from the incidents that have continued to arise between the two of you, following the incident in July 2018, it is clear that this advice is not being followed. I once again remind you to ignore A should you come into contact with him. The same message will be relayed to A."

The claimant's grievance appeal

133. The claimant was dissatisfied with Mr Hunter's decision and wrote to him on 20 June 2019 appealing against the outcome on the basis of his *"conclusions not being satisfactory or truthful".*

134. In due course the claimant's grievance appeal took place before Shaun Leonard on 4 July 2019 at the Marriot Hotel, Edinburgh. During the appeal hearing, the claimant and his representative Mr Turnbull repeated their concerns about the respondent's failure to respond adequately to the threats that A had repeatedly made to him and to provide a safe working environment for him. The claimant also handed over a further formal grievance against Jemma Deans for failing to report the death threat that he had told her A had made to him on 6 September 2018.

135. Following the grievance appeal hearing Mr Leonard wrote to the claimant on 2 August 2019 with his decision. In common with Mr Hunter, Mr Leonard upheld the claimant's grievances insofar as they related to a failure to communicate to him the outcomes of the respondent's investigations, but he also found there had been no failure to investigate. In relation to those parts of the grievance concerning the respondent's alleged failure to provide the claimant with a safe working environment, his response was as follows: -

"Point 2

"Lack of duty of care to prevent future harassment and bullying in the workplace and to investigate the threats made against me"

As part of my investigation I spoke to Jemma Deans (Operations Manager) regarding the change to your start time. She confirmed that the change to an earlier start time was instigated by you (and not the company). I understand that this was not a formal change due to there being a flexible starting window of between 3:30 – 5:00am. I therefore agree that Mr Hunter was mistaken on this point. The substantive issue is that steps are in place to reduce the opportunities for conflict between you and A.

The change in start times does reduce the likelihood of you and A crossing paths. I do not consider that there are any further reasonable steps the Company can take to minimise the contact you have with each other beyond recommending that you both ignore each other when your paths do cross. I would welcome any suggestions from you in this regard as you were unable to propose any alternative solution when I asked you at the hearing.

…

Point 12

"Turners have failed me with a lack of resolution in this situation"

I am also sorry that you do not feel that the Company have resolved the matter between yourself and A. In addition, you have mentioned that there are two other videos which have not been seen by HR despite numerous requests for them. You told me that you would not resend them but as part of my investigation I can confirm that they have not been received by HR in the first instance. Therefore, I cannot comment on the content of these videos.

Furthermore, I asked you what you thought the appropriate resolution to this situation would be. You told me you wanted me to "sack him" (A). I explained to you that this may not be an appropriate course of action. As I have summarised above, A will be spoken to however the outcome will not be communicated to you as the company has a confidentiality obligation…

136. By the time the claimant made his complaints about A from July 2018 onwards, it was well known at Grangemouth that A was a difficult and

confrontational individual whose conduct had caused serious concerns for his colleagues and managers alike.

137. In the circumstances it was a concerning feature of the respondent's response to the claimant's complaints from July 2018 onwards that it failed to approach for comment any of the respondent's other employees based at Grangemouth who may not have been eyewitnesses to the incidents the claimant had reported but may well have been in a position to provide relevant information.

138. Garry Blades was a manager who also covered for drivers on occasion. On one particular driving shift, as he was driving his vehicle out of a customer's yard early in the morning in the dark, A stood in the yard in front of his vehicle, blocking his exit and videoing him. He was not wearing any PPE. Mr Blades found A's behaviour to be contrary to health and safety rules and deliberately provocative and he reported it to his own line manager, although his understanding was that no action was taken against A.

139. Garry Blades also spoke of A *'singling out people, wanting to cause them problems',* that *''he went from driver to driver, trying to get them into trouble and getting them to react''* and that he was *'disruptive'* to other drivers, many of whom had gone out of their way to avoid him.

140. In addition to Garry Blades, another manager Raymond Grey was reported to have found A '*impossible to manage'.*

141. The witness Henry Cowan spoke of A having acted in the workplace as if he could say and do anything to anyone without consequence and that he had also faced conflict from him.

142. James Differ spoke of having been subjected to threats and abuse from A when they were returning home for a stint working together in Bristol in 2013 or 2014. Although Mr Differ reported to his manager that A had been *''shouting, bawling and threatening to kill''* him, the respondent took no action to investigate the incident or address A's reported behaviour. Mr Differ also had to step in to prevent a fight between A and another driver at a union

meeting after A had been shouting and making threats at that driver. In Mr Differ's words, A was *'Teflon'.*

143. In those circumstances, Mr Holdway, Mr Hunter and Mr Leonard should have spoken to other Grangemouth based employees. They should have been aware that some of those colleagues would have been able to speak at the very least to the credibility of the claimant's complaints and to the likelihood of their being well founded. There was no evidence that the respondent had even spoken to A in relation to any of the alleged incidents reported by the claimant in July, August, September, and December 2018. The respondent failed at every stage to speak to potentially relevant witnesses.

144. The respondent also failed to properly investigate Jemma Deans' role in relation to her account of the January 2018 incident or the extent to which her rumoured relationship with A had influenced that. Her relationship with A was likely to have been a material factor. However, that was never explored even though Miss Maclaren accepted that a workplace relationship in which one partner was more senior than the other – precisely what was alleged and allegedly well known - would be a matter of concern to the respondent.

145. The respondent let the claimant down badly in its response to his complaints about A. Its investigations were inadequate, and it did not provide him with details of the investigations that it did conduct. Mr Holdway did not respond to him with outcomes in relation to the July to December 2018 incidents even though he should have known, in light of the frequency of his complaints and the language he had used to describe the impact that A's behaviour was having on him, that this would have at least given him some comfort that his concerns were being taken seriously. When the claimant subsequently raised a formal grievance about his managers' failures to protect him, the managers who dealt with that simply went through the motions.

146. HR's involvement in the investigation was also wholly inadequate. Rachel Maclaren had been made aware of alleged death threats by an employee who was apparently notorious for his confrontational behaviour towards other employees. Even though the claimant had made it clear that he was at the

end of his tether because of this she failed completely to get a grip on his concerns. Apart from her involvement in a number of meetings, she managed this clearly difficult situation by simply forwarding emails to her operational colleagues and hoping they would resolve them locally. As a result, Miss Maclaren was unaware as to whether or not any steps had actually been taken locally to avoid the claimant and A coming into contact with one another.

147. The Tribunal formed the view that A believed that he was untouchable and that the respondent treated him as though that were indeed the case. To a certain extent that appears to have been because of his relationship with Miss Deans. However, that does not fully explain why no action was taken against him in relation to other incidents such as that involving Garry Blades. Whatever the reason for his being untouchable, the impact on the claimant of A's behaviour towards him and of the respondent's abject failure to deal with his many complaints about him was profound. In the light of A's known behaviour towards other employees and managers, the respondent's failure to do anything to protect the claimant from him was egregious.

148. As a result, the claimant was simply left to make his own arrangements to avoid A by reducing his working days and changing his start time, all of which were to his personal detriment. Yet the steps the claimant had taken it upon himself to put in place had plainly proven inadequate as he was still on the receiving end of A's confrontational behaviour and threats. Despite knowing that to be the case, the respondent still failed to take adequate steps to properly investigate and deal with the claimant's concerns, despite what it already knew of A's conduct and behaviour towards others.

The claimant's resignation

149. Having taken time to consider his position in response to the outcome of the grievance procedure, the claimant wrote to the respondent on 27 September 2019 in the following terms: -

"Dear Sirs

I terminate my employment with Lewis Tankers t/a Turners forthwith citing Constructive Dismissal

My Constructive Dismissal is based on:

1. *the company's failure to protect me in the workplace from continued bullying, harassment and death threats;*
2. *disability discrimination.*
3. *a manager and a driver in a relationship which caused a conflict of interest and a breach of confidentiality.*
4. *absolute failure by Jon Price to investigate this relationship, as he was made aware of this in February 2018 by me.*
5. *grievance against my immediate manager Jemma Deans, dated July 2019 still outstanding.*
6. *failing to conclude my grievance against A dated July 2018*
7. *the company's failure to put anything in place for me to return to work which has had a detrimental effect on my health and future health and my mental wellbeing, which would require me to return to my workplace into a situation which remains the same.*
8. *HR's failure to communicate back to me in response to my stated concerns about incidents that had taken place."*

150. Further to that letter, the respondent's Barry Lewis wrote to the claimant on 30 September inviting him to a hearing in respect of his grievance against Jemma Deans. The claimant responded on 3 October explaining that he had no intention of attending the grievance hearing as neither he nor Jemma Deans were still employed by the respondent.

151. Although the claimant refers to disability discrimination in his resignation letter the Tribunal finds that the true reason for the claimant's resignation was the respondent's failure to deal with his complaints about A's conduct towards him

and to provide a safe working environment for him to return to from his period of sickness absence that had started on April 2019

Financial loss

152. Following his resignation, the claimant set himself up as self-employed in an executive travel business, which he named Coltswood Chauffeur Service for clients travelling for airport transfers as well as business travel and occasions such as weddings funerals and family parties. Unfortunately, the Covid pandemic meant that his chauffer business for private customers did not prosper.

153. He therefore sent application letters in February 2020 to companies such as Certas Energy Grangemouth, Sucklings Transport, XPO Logistics, Hoyer UK and DHL Grangemouth, although he did not receive any response to those applications.

154. In order to mitigate his financial losses, the claimant therefore also registered with three commercial agencies involved in the recruitment of heavy goods drivers namely Nexus, Ten Live and Men at Work.

155. The claimant's personal experience was that work for drivers was not as plentiful as the press had led the public to believe. Although he derived earnings of £7,297.50 from Nexus, that work dried up when Nexus began to rely on drivers from England.

156. Furthermore, his disability meant that he was unable to take referrals from Ten Live and Men at Work whose work involved a certain amount of standing during the loading and unloading of deliveries. Indeed, he found himself disadvantaged in the job market within the driving industry because of his disability, which meant he was unable to load and unload vehicles.

157. In addition to losing income following the termination of his employment, the claimant also had to cash in part of his pension pot with Turners and part of his pension pot with ESSO, the total amount taken from his pension as being £46,500.

158. The claimant had to stop driving work altogether in December 2020 due to the impact of his osteoarthritis**.** He did not make any attempt to find driving work after that time, due to the walking distances involved in the work he had carried out with the driver agencies, which he felt unable to put himself through as his hip condition deteriorated.

Submissions

Claimant's submission

Claimant's witnesses

159. In Mr Byrom's submission the claimant and his witnesses had been consistent and credible in their evidence, in contrast to the respondent's witnesses whose evidence was, he believed, characterised by their having repeatedly been unable to recall the events in question.

Constructive unfair dismissal

160. He submitted that the respondent had provided the claimant with an unsafe working environment in that he was exposed to bullying, harassment, and death threats, specifically involving A and Jemma Deans on 16 July, 28 August, 5 September, 19 September and 6 December 2018. There was a body of evidence that confirmed A had harassed colleagues and was a troublemaker. Both Simon Holdway and Allan Hunter had accepted that A's comments to the claimant had been threatening.

161. The evidence showed the respondent had failed to deal with the claimant's July 2018 grievance or his July 2019 grievance against Ms Deans. It had also failed to properly investigate and provide full outcomes for the 2019 grievance and appeal, and it had failed to take a statement from Jemma Deans, despite the claimant's concerns for her independence.

162. It had also failed to facilitate the Claimant's return to work following his absence, as evidenced by no steps having been taken to prevent harassment by A despite the concerns raised to Mr Hunter and Mr Leonard. In Mr Byrom's

submission, the respondent had also discriminated against the Claimant contrary to section 13, section 15 or section 20/21 of the Equality Act 2010.

163. By virtue of these breaches the Respondent had breached the implied duty of mutual trust and confidence in the Claimant's contract of employment by behaving in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent without reasonable and proper cause for doing so. Mr Byrom referred to the following authorities -

London Borough of Waltham Forest v Folu Omilaju [2004] EWCA Civ 1493 [para 14, pts 1 to 4]

Woods v W M Car Services (Peterborough) Ltd [1981] ICR 666 [p670–671]

Mr D Blackburn v Aldi Stores Ltd UKEAT/0185/12/JOJ [para 25]

164. Such breaches as had been proven were sufficiently important to justify the Claimant resigning and he had in fact resigned in response to them, as evidenced by his letter of resignation dated 27 September 2019. He had at no time waived or affirmed any breach or breaches of his contract. In this regard Mr Byrom relied on the following authorities -

London Borough of Waltham Forest v Folu Omilaju [2004] EWCA Civ 1493 [paras 15 and 16]

Gordon v J & D Pierce (Contracts) Limited [2021] IRLR 266 [para 22]

Remedy for Constructive Unfair Dismissal

165. The Claimant sought compensation only and referred the Tribunal to the schedule of loss lodged on his behalf. Mr Byrom submitted that the claimant had taken reasonable steps to replace his lost earnings, for example by looking for another job, as evidenced by the applications he had made and by starting up his own small business.

166. There was no chance that the Claimant would have been fairly dismissed in any event if a fair procedure had been followed, or for some other reason.

167. Mr Byrom submitted that the Acas Code of Practice on Disciplinary and Grievance Procedures applied and that the respondent had unreasonably failed to comply with it, as evidenced by its failure to investigate and provide a response to the claimant's July 2018 grievance and its failure generally to properly investigate the claimant's grievances. It was just and equitable to increase any award payable to the Claimant by up to 25%.

168. Finally, there were no grounds to reduce any element of his award for unfair dismissal if one was made.

Disability Discrimination

169. Direct Disability Discrimination (Equality Act 2010 section 13)

a. The respondent had discriminated against the claimant because of his disability. He had been kept on the INEOS contract despite it causing him pain, in circumstances where non-disabled comparators were taken off duties that were challenging to them because of their health without their having to go through welfare meetings and an OH referral. Mr Byrom referred to the following authorities -

Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11, EAT [para 15]

O'Neill v. Governors of St. Thomas More Roman Catholic Voluntarily Aided Upper School and Another - [1997] ICR 33 [pg 47, B & C]

170. Discrimination Arising from Disability (Equality Act 2010 section 15)

b. The Respondent had treated the Claimant unfavourably by retaining the Claimant on the INEOS contract after the Claimant had informed the respondent of his condition in August 2017. That was evidenced by the routing sheets in May 2018 and by Jemma Deans' evidence that

"as far as I'm concerned drivers have to work all contracts".

c. The Claimant was retained on the Ineos contract despite the pain working on that contract causing him harm. This treatment was not a proportionate means of achieving a legitimate aim. He could and should have been moved

to another contract, such as Greenergy. Other drivers not working INEOS could have been trained in order to replace the claimant's allocation.

d. The Respondent knew or ought reasonably to have been expected to know that the Claimant had a disability by no later than 13 November 2017 having regard to the Robin Smith e-mail dated 13 November 2017 and the 31 July 2017 radiology report. In this regard Mr Byrom referred to the following authorities -

Pnaiser v NHS England and another UKEAT/0137/15/LA [para 31]

Donelien v Liberata UK Ltd [2018] EWCA Civ 129 [para 32]

171. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

e. The respondent had the following PCPs:

i. the requirement for a driver to stand/be on his feet for significant periods of time during a shift whilst working on the INEOS contract; and

ii. the requirement for the Claimant to work on the INEOS contract, which regularly required him to stand/be on his feet whilst working for significant periods of time during a shift.

f. It applied those PCPs to the Claimant, and they put him at a substantial disadvantage compared to someone with the Claimant's disability by causing pain to his hip. The evidence was clear that the Respondent knew or could reasonably have expected to know that the Claimant was likely to be placed at a disadvantage.

g. By way of adjustment the respondent could have taken the following reasonable steps

i. provided the claimant with a chair.

ii. transferred the Claimant onto another contract which did not have the requirement to regularly stand/be on his feet whilst working for significant periods of time during a shift.

h. It was reasonable to have taken those steps on or around 4 July 2018, but the Respondent had failed to do so. Mr Byrom referred to the following authority -

Griffiths v Secretary of State for Work and Pensions [2017] I.C.R. 160 [para 58]

Remedy for disability discrimination

172. The Claimant was entitled to compensation for general financial loss and/or pension loss arising as a consequence of the prohibited acts, in terms of the schedule of loss produced. He was also entitled to an award for injury to feelings in the amount of £15,000, considering his own evidence and that of his wife as to the impact of the situation on him.

Respondent's submission

173. On behalf of the respondent, Mr Newman submitted that this claim was properly considered as two distinct issues, namely:

i. the issues involving the Claimant and A; and, separately

j. the issues relating to the Claimant's arthritis condition.

174. Despite the Claimant's assertion that his resignation was linked to the Respondent's handling of his arthritis condition, the Respondent invited the Tribunal to conclude that was not the case. The resignation letter had made one reference to "disability discrimination" without any further details.

175. When taking into account the sequence of events prior to the resignation, the recent grievance and appeal, the reason for his continued absence since 4 April 2019, the fact that he was never forced to work the INEOS Contract since August 2017 and never did any INEOS work from May 2018, together with the fact that the latest Welfare Meeting was held in October 2018 and he continued to work until April 2019, without any substantive reference to his arthritis at all, Mr Newman submitted that the Tribunal could not credibly find that the Claimant's resignation was tainted by discrimination. The Tribunal was reminded that the Claimant's grievance and grievance appeal made no

substantive reference whatsoever to his arthritis. It was clear that he resigned because of the issues relating to A.

The Claimant/A

176. It is clear the Claimant and A did not get on. The Respondent's position was that the Claimant had a closed mind with regard to A and took personal offence at remarks he made, even when not directed towards him personally.

177. The Tribunal heard evidence in respect of the relationship between the Claimant and A, and also about A's interactions with other employees. Mr Newman submitted that certain evidence before this Tribunal was not in front of the Respondent at the relevant time that it was handling these issues and should not be considered in assessing the reasonableness of its actions.

178. The Respondent reminded the Tribunal that even on the Claimant's own case, he was not an innocent party. He admits, for example, calling A "a fucking bitch". The Respondent submits that the Claimant effectively goaded A into behaving inappropriately and invites the Tribunal to conclude that there was no genuine belief in the Claimant's mind that he was actually having his life threatened by him – if he was, the Claimant would not have placed himself in further situations involving A, but he had.

179. The Police, having viewed video evidence of interactions between A and the Claimant, took no action. If there was a genuine death threat it was a reasonable assumption that the Police would have done so. In cross-examination Mrs Maclaren was asked whether the Police's involvement provided an indication as to the seriousness of the situation. Her response, that based on her experience she would expect the Police to follow up if there was a genuine issue, was reasonable.

180. The Claimant alleges that the Respondent did nothing in respect of A. That is not true. The Tribunal were reminded that A was spoken to by the Respondent on a number of occasions and whilst the Claimant may have expected / wanted a different approach to be taken, it is incorrect to assert that the Respondent took no action. On most occasions there was simply insufficient

evidence to enable a conclusion to be drawn either way as to what had actually happened.

181. The Claimant attempted to paint a picture of A making his life hell for a number of years. However, when considering the evidence, it did not support the Claimant's contention. The Tribunal were reminded of the number of interactions complained of (five) over more than 1.5 years.

Relationship between A and Ms Deans

182. The Claimant asserts that the relationship between Ms Deans and A influenced her dealings with A and he also asserts that A was allowed to get away with inappropriate behaviour which the Claimant also appears to attribute to his relationship with Ms Deans.

183. The Tribunal were reminded that any issues involving A were reported to have occurred prior to Ms Deans' employment with the Respondent and accordingly it was submitted that any relationship between them could not have influenced the Respondent prior to her employment.

184. Further, the Tribunal were reminded that Ms Deans' evidence was that her relationship with A did not commence until Christmas 2018. That could not credibly be challenged by the Claimant and there would in any event be no reason why Ms Deans would state an incorrect date. Accordingly, the events of 2018 involving the Claimant, A and Ms Deans could not have been influenced by their relationship. Ms Deans was a credible witness and her evidence that her personal and professional life were not impacted upon by her relationship should be accepted.

185. Mr Price did not believe that Ms Deans had acted unprofessionally. The Tribunal were reminded that Ms Deans rebuked A and she reported issues to the Respondent. Whilst she now accepts with the benefit of hindsight that it may have been sensible to have reported their relationship that does not mean there was evidence upon which the Tribunal could conclude that Ms Deans favoured A or acted inappropriately, noting that Mr Holdway formally dealt with A.

186. Further, whilst the Claimant asserts that Mr Price should have investigated the relationship between A and Ms Deans, at the time that it was alluded to by the Claimant, Mr Price did not consider the rumour to be true and it was not a central issue raised by the Claimant. Rather it was an off the cuff comment made at the end of their meeting.

187. The Tribunal had the benefit of hearing from a number of witnesses who had addressed it on issues relating to A which the Respondent did not have the benefit of at the relevant time. The picture painted of A before this Tribunal was different to that which the Respondent was aware of at the time.

<u>The claimant's arthritis/INEOS</u>

188. The Tribunal has heard evidence in relation to the INEOS Grangemouth refinery. It was important to recall the distinction between working on the INEOS Contract and working shifts which involved unloading at INEOS.

189. The Claimant's issue has always been stated as working on the INEOS Contract, namely doing four 'runs' between Inter Terminals and INEOS per shift, as compared to other shift patterns which involved unloading at INEOS amongst other locations (which the Claimant had no issues with).

190. The Tribunal had the benefit of photographic evidence showing the location of the unloading point. The Respondent's evidence supported by Mr McCrae and other witnesses was that the Claimant could move around with relative ease. The Claimant's position with regard to not being able to move was simply not credible. It was clear from the evidence that he could move freely.

191. The evidence of all relevant witnesses other than the Claimant was that they could mobilise away from the point of control so long as they could get back to it. The Claimant had adduced no evidence to suggest that he was not fit enough to be able to get to a point of control or that his speed / reaction times were a health and safety issue.

192. Mr McCrae confirmed that an acceptable distance that a Driver could move away from the point of control was 4 to 5 metres. He was clear there was no need to *"be stuck in the shelter"*. Drivers could walk around the point of shelter,

down the steps and behind the vehicle if they wished, and they could within the bunded area.

193. There was a dispute between witnesses as to whether Mr McCrae was involved in discussions with regard to a request for a seat. Both the Claimant and the Respondent's witnesses contend that there were such discussions, whereas Mr McCrae disputes that. The Tribunal were invited to conclude that seat discussions took place, and that Mr McCrae simply cannot recall those discussions in detail.

194. The Tribunal were reminded that the Claimant informed his doctors on 29 July 2019 that he works in dog kennels and was always walking. The Tribunal are reminded of the evidence on this issue from Mrs Bannan, who said that the Claimant would help her by walking two to three dogs for around 10 minutes each. Whilst it is was accepted that cumulatively that did not result in the same length of time as walking during the INEOS Contract, this demonstrated that the Claimant chose to walk and was able to do so.

195. The dialogue between him and his doctors on this document supported the contention that the Claimant's absence from work related to A and not his arthritis (for example the entries dated 4 April 2019 and 2 July 2019).

Occupational Health

196. It was important to remind the Tribunal of the evidence of Mr Dougan. He maintained that in accordance with his report it was his view that his assessment was that the Claimant was able to walk without stopping for up to 60 minutes.

197. It was reasonable for the Respondent to make further enquiries with Occupational Health in light of the fact that it was a requirement of INEOS that the Claimant remain standing (as reported at the time) for the duration of the unloading. Ms Santos explained, reasonably, that the Claimant could not sit down (due to INEOS's position on that not the Respondent's) and sought clarification.

198. The Claimant had asserted that the Respondent contrived to prevent him from working. That was not the case. The updated advice was that it was reasonable to expect the Claimant to be able to undertake his full range of duties.

Claimant's change to shifts to avoid A / continuing issues

199. Whilst the Claimant appears to assert that the Respondent simply allowed A to continue to bully / harass him, that is incorrect. The Claimant was requested to avoid A as much as possible.

200. The Tribunal heard evidence that the Claimant himself changed shift start times to avoid A, following the Respondent's guidance. Whilst it would no doubt be submitted on behalf of the Claimant that the Respondent simply took no action, noting that he had already changed his start times, this was of course no longer an option available to the Respondent.

201. It was reasonable to query with the Claimant himself whether there were any other changes that could assist in keeping A and the Claimant apart. That was not the same as suggesting that the Respondent placed the onus on him, rather it involved him in that dialogue as any reasonable employer would. The fact that the Claimant could not think of anything else, and did not suggest a change of contract, supports the Respondent's position that there was little else that could practically be done beyond maintaining differing start times, trying not to roster A and the Claimant onto shifts which resulted in contact between them and continuing to provide advice and guidance as referred to above (which the Claimant did not follow).

Constructive unfair dismissal

202. The issues for the Tribunal to decide in relation to this aspect of the claim are these:

k. Did the Respondent act in a way for which there was no reasonable and proper cause?

l. If so, was that action calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and the Claimant?

m. If so, was any part of that conduct unlawful discrimination?

n. If the Respondent was guilty of conduct that breached trust and confidence, did the Claimant affirm the continued existence of his contract of employment after that conduct had occurred and so lose the right to claim that he had been constructively dismissed?

o. If not, was the Respondent's repudiatory conduct the reason why the Claimant resigned?

203. The Claimant relies on the following list of "things":

204. Provide an unsafe working environment in that the Claimant was exposed to bullying, harassment and death threats, specifically involving A and Jemma Deans on 16 July, 28 August, 5 September, 19 September and 6 December 2018.

205. The Respondent denies providing an unsafe working environment as alleged or at all. The Claimant relies upon the five incidents listed above. The Tribunal were reminded of the circumstances relating to each one, together with the fact that the Claimant on a number of occasions either instigated or added to the situation rather than following the Respondent's advice.

206. With regard to the 16 July 2018 incident, the Respondent invited the Tribunal to conclude that there was no genuine threat and that the Claimant goaded A into reacting as he did.

207. With regard to the 28 August 2018 incident, the Respondent invited the Tribunal to conclude that this was merely a childish tooting of A's horn and nothing more. It was not a threat.

208. With regard to the 5 September 2018 incident, the Respondent invited the Tribunal to conclude that there is insufficient evidence to conclude that the incident occurred as alleged by the Claimant and in any event, if the Tribunal

were to find that A made a cutthroat gesture, the Claimant could not genuinely have felt that his life was being threatened.

209. With regard to the 19 September 2018 incident, the Respondent invited the Tribunal to conclude that again there was no genuine threat, particularly as if there had been the Claimant would not have engaged as he did with A thereafter.

210. With regard to the 6 December 2018 incident, the Respondent invited the Tribunal to conclude that this was a childish interaction between two individuals who clearly did not like each other and had both on a number of occasions acted inappropriately towards the other.

211. The Respondent could not have done anything more to have prevented these interactions between the Claimant and A in all of the circumstances, including the lack of witnesses on a number of occasions meaning that corroborating evidence was not possible.

Fail to deal with the Claimant's grievance of July 2019 against Ms Deans.

212. The Respondent sought to address this grievance but was unable to do so before the Claimant resigned. In the event that the Tribunal concluded that there was a failure, the Respondent submits this did not amount to a repudiatory breach of contract.

Fail to conclude the Claimant's grievance against A dated July 2018.

213. The Respondent did not fail to conclude the grievance. It was initially dealt with by Mr Holdway and then subsequently dealt with by Mr Hunter and Mr Leonard. Both Mr Hunter and Mr Leonard reached conclusions – the Tribunal were referred to their outcome letters. The Respondent could not rewrite history and produce an outcome letter from Mr Holdway, but it nevertheless reached conclusions. Whilst the Claimant was unhappy with the outcomes, it was not correct to say that there was a failure to conclude.

Fail to facilitate the Claimant's return to work following his absence.

214. The Respondent did not fail to facilitate a return to work. The Claimant commenced his last period of sickness absence on 4 April 2019 and remained signed off throughout the remainder of his employment during which time the Respondent was progressing his grievance / the appeal. The Claimant then resigned without any attempt to discuss a return to work.

Discriminate against the Claimant contrary to section 13, section 15 or section 20/21 of the Equality Act 2010.

215. In respect of alleged discrimination, the Respondent denies any discrimination as alleged or at all.

216. The primary question for the Tribunal was whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent or without reasonable and proper cause for doing so. Mr Newman submitted there was reasonable and proper cause for all the Respondent's actions.

217. Further, there was no credible evidence before the Tribunal that anyone involved in any of these actions was aiming to destroy or seriously damage the relationship of trust and confidence between the Respondent and the Claimant. Objectively assessed, none of these actions was likely to do so.

218. If the Tribunal concluded that the Respondent did so, the Tribunal must go on to consider whether such a breach (or breaches) was sufficiently important to justify the Claimant resigning. The Respondent submitted that in all the circumstances there was no breach sufficiently important to justify the Claimant resigning.

219. The Tribunal must also consider whether the Claimant resigned in response to such breach (or breaches, if the Claimant is relying on a "last straw" event) and whether the Claimant waived or affirmed any such breach (or breaches).

220. Even if the Tribunal accepted that the Respondent's actions in respect of managing his arthritis condition amounted to a repudiatory breach of the Claimant's contract, it was submitted that by his subsequent actions the Claimant affirmed the continued existence of his contract of employment and

lost his right to resign and claim constructive dismissal. The Tribunal were reminded that the Claimant last undertook the INEOS Contract in August 2017 and did not do any INEOS work from May 2018.

Remedy for constructive unfair dismissal

Basic Award

221. The Respondent did not challenge the calculation within the Claimant's Schedule of Loss but submitted that it would be just and equitable to reduce the basic award because of the Claimant's conduct in his own interactions with A which took place before any dismissal. The Respondent submitted that a 25% reduction would be appropriate.

Compensatory Award

222. The Tribunal were reminded that the Claimant's pay in 2015/16 was not reflective of his pay from May 2018 when he dropped to 4 days per week as a result of his doctor's advice. In cross examination the Claimant accepted the following calculations were correct:

'Average pay from May 2018 to April 2019 from his bank statements = £27,850.61

Resulting in an average net monthly pay of £2,320.88

And so an average net weekly pay of £535.59.'

223. The Claimant accepted in cross examination he could no longer drive HGV because of his hip in December 2020. The Tribunal were reminded of the evidence of Mrs Bannan as well, who confirmed that the Claimant was unable to drive HGV.

224. The Respondent submitted that if the Claimant was successful in his claim of unfair dismissal, his Compensatory Award should, prior to any reduction, be:

£535.59 * 65 weeks = £34,813.35

160.2. Less sums earned in mitigation of: £7,297.50

160.3. = £27,515.85

225. The Respondent submitted that this figure should be reduced because of the Claimant's own blameworthy conduct. He repeatedly placed himself into situations which escalated the issues that existed between himself and A. In the circumstances, a reduction by 25% to £20,636 would be appropriate.

Failure to mitigate loss

226. The Respondent submitted that the Claimant also failed to mitigate his loss and that should be taken into account. On his own case, he made some effort to obtain new employment in February 2020, by writing to five transport companies. He did not repeat that exercise, expand his enquires or consider alternative options thereafter.

227. The unchallenged evidence of a number of the Respondent's witnesses addressed the Tribunal on the widely publicised driver shortage across the transport sector. Put simply, had the Claimant wished to do so, he could have obtained a driving role. The Claimant should not be entitled to any losses beyond 2020.

Chance the Claimant would have been fairly dismissed

228. The Respondent also submitted that the Claimant would have been dismissed by the end of 2020 as a result of his being unable to drive HGV.

Disability discrimination

Direct Disability Discrimination (Equality Act 2010 section 13)

229. The Claimant asserted that retaining him on the INEOS contract was less favourable treatment and relies upon Mr Scarff and Mr Gavin as comparators. Mr Gavin suffers from sleep apnoea. He was told by his doctor not to work nights. He informed the Respondent of this and his line manager, Raymond Gray, followed that advice. The Respondent contended that in such circumstances there was no need for an OH referral. In contrast to the Claimant's situation, there was a clear reported medical restriction, whereas in respect of the Claimant the medical advice was that he was actually fit to

undertake his duties. When the Claimant informed the Respondent that he was unable to work on INEOS he was not required to do so.

230. Mr Scarff had a personal medical problem meaning that he preferred to work shifts that involved driving longer distances. Whilst he was recovering the Respondent tried to accommodate him. The Claimant argued that Mr Scarff was taken off a contract and not required to undertake shorter driving shifts. The Claimant was never required to work the INEOS Contract so in effect he was treated the same as Mr Scarff.

231. For the reasons referred to above, the Respondent submits that there are material difference between the comparators' circumstances and those of the Claimant.

232. The Respondent denied that there was less favourable treatment. The Claimant was not forced to work on the INEOS Contract and from May 2018 did no INEOS work. Simply keeping an open mind to an ability to undertake that work so some extent in the future is not less favourable treatment.

233. In the event that the Tribunal concluded that there was less favourable treatment, it should then determine whether it was because of the Claimant's disability. There was no evidence that the Respondent retained the Claimant on the INEOS Contract because of his arthritis and that was never put to the Respondent's witnesses.

234. The Tribunal were also reminded of the Claimant's evidence relating to the reasons why he believed he was retained on the INEOS Contract. He alleged that the real reason was because of Ms Deans' relationship with A, which therefore indicated that even he believed it was not because of his disability.

<u>Discrimination Arising from Disability (Equality Act 2010 section 15)</u>

235. The Claimant relied upon the following allegation of unfavourable treatment: retaining him on the INEOS contract after he had informed the Respondent of his condition in August 2017.

236. The Respondent did not require the Claimant to undertake the INEOS Contract from August 2017. The Claimant himself accepted he never undertook that work (i.e., four runs between Inter Terminal and INEOS) from that date. He also accepted that he never did any discharges at all at INEOS from May 2018.

237. Simply keeping an open mind as to whether the Claimant might be able to undertake some INEOS work in the future in light of OH advice cannot reasonably be found to amount to unfavourable treatment.

238. The Claimant argues that the following arose in consequence of his disability: retaining him on the INEOS contract despite the pain doing so causing him harm. If the Tribunal should conclude that the Claimant was retained on the INEOS Contract, the Respondent submitted that by virtue of him never actually undertaking that work, it is incredible to suggest that pain could have arisen in consequence of his disability.

239. The Tribunal must determine whether the alleged unfavourable treatment was because of that "thing".

240. The Claimant did not undertake the INEOS Contract and as such cannot establish there was unfavourable treatment that was because of pain arising from his disability.

241. In the event that the Tribunal concluded there was unfavourable treatment amounting to a prima facie case of unlawful discrimination, the Respondent submitted that it could show the treatment was a proportionate means of achieving a legitimate aim.

242. The Respondent's legitimate aim was to maintain a flexible workforce with the ability to undertake a variety of work whilst taking into account individual circumstances and medical advice. Keeping an open mind to the possibility that the Claimant might be able to undertake some work at INEOS (in the context of his issues with INEOS being understood to be the INEOS Contract not INEOS per se) was an appropriate and reasonably necessary way of achieving that aim with no less discriminatory option available to it in the

circumstances where the Claimant was never forced to undertake the INEOS Contract. The effect of the Respondent's approach to managing the Claimant's work was to effectively remove him from that work but keep an open mind to the possibility of him undertaking some of it based on Occupational Health advice.

243. In deciding the above, the Tribunal must consider whether the Respondent knew or could it reasonable have been expected to have known that the Claimant had the disability and from what date. The Respondent submits that in light of the medical evidence available to it, it did not have knowledge of the Claimant's disability but accepts it was aware that he had arthritis from around the end of 2017.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

244. The duty to make adjustments arises if an employee is put at a substantial disadvantage in comparison with a person who is not disabled because of the application of a practice or lack of an auxiliary aid, and the employer knew or could reasonably have been expected to know that the employee was a disabled person and was at that disadvantage.

245. The employer is then under a duty to take such steps as it is reasonable for it to have to take to avoid the disadvantage (Section 20 EqA). A failure to meet the duty amounts to discrimination (Section 21(2)) and if the employer subjects the employee to a detriment by discriminating in this way, it is unlawful (Section 39(2)(d)).

246. In relation to each allegation of failure to meet the duty to make adjustments, the Tribunal needs to decide:

    p. In relation to the allegations about adjustments to practices, did the Respondent have that practice?

    q. Was the Claimant at a substantial disadvantage compared with a non-disabled person because of the practice or the lack of the auxiliary aid? A disadvantage is substantial if it is anything more than minor or trivial (Section 212(1) EqA).

r. If he was, did the Respondent know that, or could it reasonably have been expected to know that, and when did that actual or constructive knowledge first arise?

s. What steps, if any, did the Respondent take to adjust the practice or provide the aid, and when?

t. Were those steps sufficient to amount to the steps that it was reasonable for it to have to take to avoid the disadvantage to the Claimant?

u. In deciding whether the Respondent failed in its duty to make reasonable adjustments, the Tribunal must consider whether the Respondent knew or could reasonably have been expected to have known that the Claimant had a disability and from what date.

247. The Claimant relies on the Respondent having the following PCPs:

v. the requirement to stand/be on his feet for significant periods of time during a shift whilst working on the INEOS contract; and

w. the requirement for the Claimant to work on the INEOS Contract, which regularly required him

248. The Respondent did not apply either PCP. On the Claimant's own case, he did not undertake the INEOS Contract from August 2017 and as such was not required to stand/be on his feet for significant periods of time during a shift whilst working on the INEOS Contract. Nor was there a requirement for him to work on the INEOS Contract, which would have regularly required him to stand/be on his feet whilst working for significant periods of time during a shift.

249. The Tribunal must consider whether the PCP put the Claimant at a substantial disadvantage compared to someone with the Claimant's disability by causing pain to the Claimant's hip.

250. In the event that the Tribunal disagree with the Respondent's position relating to the PCPs, it submits that the Claimant was not put at a substantial disadvantage.

251. It must also consider whether the Respondent knew, or could it reasonably have been expected to know, that the Claimant was likely to be placed at a disadvantage.

252. In light of the medical evidence from OH available to it, the Respondent denies that it knew, or could it reasonably have been expected to know, that the Claimant was likely to be placed at a disadvantage.

253. Further, in respect of steps that the Claimant says could have been taken to avoid the disadvantage, the Claimant relies upon the Respondent's alleged failure to:

x. provide the claimant with a chair.

y. transfer the Claimant onto another contract which did not have the requirement to regularly stand/be on his feet whilst working for significant periods of time during a shift.

254. In determining whether it was reasonable to have taken those steps and when; and whether the Respondent failed to take those steps, the Respondent submitted that in light of the clear and unambiguous position from INEOS, that a chair / seat was not allowed, it cannot be found to have failed in its duty to make reasonable adjustments. It was simply unable to provide a chair.

255. Further, the Respondent did require the Claimant to undertake other work that did not have the requirement to regularly stand/be on his feet whilst working for significant periods of time during a shift (as on the INEOS Contract) – on his own case he did not undertake this work from May 2018.

Remedy for disability discrimination

256. The Respondent submits that no compensation should be awarded for general financial loss and/or pension loss arising as a consequence of the prohibited acts. The Claimant has not adduced any evidence in support of this.

257. The Respondent submits that little weight should be attached to Mrs Bannan's evidence in which she believed the Claimant suffered a mental breakdown. There is simply no evidence to support this.

258. When asked in cross examination about the sum claimed in respect of Injury to Feelings, the Claimant referred to Welfare Meetings being held in Portacabins with the windows open and needing to change his shifts (which was on doctor's advice). This was his only oral evidence as to why he is claiming £15,000.

259. He accepted he had never sought medical assistance from, for example, a psychologist. He accepted he carried on working beyond August 2017 and subsequently May 2018. He never had any time off as a result of his arthritis at all.

260. The Respondent submitted that the Claimant was not entitled to any Injury to Feelings award. If the Tribunal concluded that the Claimant had been discriminated against and was entitled to such an award, the Respondent submitted that a sum towards the lower end of the lower band of the Vento guidelines should be considered. In support, the Tribunal were reminded that the Claimant had not adduced any evidence in support of Injury to Feelings. Whilst the Claimant had not worked since December 2020, that was, on his own case, due to the deteriorating nature of his arthritis and the fact that he was unwilling to look for non-driving work, not the conduct of the Respondent.

Discussion and decision

261. Taking the list of issues in turn, the Tribunal finds as follows:

Constructive unfair dismissal

262. **Did the Respondent do the following things:**

Provide an unsafe working environment in that the Claimant was exposed to bullying, harassment and death threats, specifically involving Brian Shaw and Jemma Deans on 16 July, 28 August, 5 September, 19 September and 6 December 2018;

263. The respondent failed to take appropriate steps to address the claimant's complaints against A. Its attitude towards complaints against A was starkly demonstrated by the unfair and inadequate manner in which it dealt with the disciplinary proceedings arising from the altercation between the claimant and A on 12 January 2018.

264. That investigation was fundamentally tainted by Jemma Deans' lack of objectivity when providing her statement about the event, compounded by the respondent's unreasonable failure to take a further statement from Miss Deans when her reported relationship with A was raised as a factor that may have affected her objectivity and independence, even when the claimant invited the respondent to investigate particular allegations against A that the claimant said occurred when Miss Deans was present.

265. Thereafter the respondent failed to take seriously and deal adequately with the claimant's reports of A's alleged conduct towards him in relation to subsequent alleged events on 16 July, 28 August, 5 September, 9 September and 6 December 2018 even though it was well aware of A's propensity for intimidating its employees, including members of its own management team, and despite the clear and unambiguous language of the claimant's reports of A's behaviour towards him, which signalled that the impact on his was profound and serious.

266. It failed to interview any other employees, even though it was clear to the Tribunal that they would have known and likely would have spoken of A's behaviour in the workplace. It failed even to speak to A**,** which in the context of the claimant's repeated complaints of his behaviour and the respondent's knowledge of his behaviour towards other employees was a scandalous omission.

267. In the absence of the respondent taking any action to protect him from A the claimant was left in a position where he had to take his own steps for his own safety, such as reducing his working week from 5 days to 4 days and starting his shift early at 3.30 a.m., so as to avoid coming into contact with A in the Grangemouth yard.

268. Unfortunately, in the absence of any intervention on the part of the respondent that was inadequate and A's campaign of harassment of the claimant continued, leaving him with no reasonable option but to go off sick and, following the respondent's failure to deal adequately with his grievance, to resign and claim that he had been constructively dismissed.

269. The respondent failed completely to respond to the claimant's clear distress about his work situation. He could not have made it any clearer to the respondent than he set out in his e-mails to HR that he found his working conditions intolerable and the reasons why. Any reasonable employer would have realised that more action needed to be taken. Yet the respondent took no action whatsoever to address A's behaviour, despite it knowing full well about A's character and behaviour towards other colleagues and even one of its managers.

270. Instead, it left it to the claimant to make his own arrangements to avoid A, such as reducing his working days and starting earlier than him, even though it was obvious by April 2019 when the claimant went off sick, that these steps were inadequate and the abuse he continued to receive from A on a regular basis left him feeling unsafe.

271. Although the respondent eventually, between May and August, dealt with the claimant's grievances the Tribunal's conclusion was that Mr Hunter and Mr Leonard simply went through the motions. Although Jemma Deans was spoken to, this was principally to confirm the arrangements the claimant had put in place to avoid A, but not to investigate with her the claimant's legitimate concern that she had been fundamentally compromised in relation to the 12 January 2018 incident because of her suspected relationship with A.

272. The claimant had made it plain to the respondent that this was a key concern, which undermined his trust in his manager's ability and willingness to address and his legitimate fears about A's conduct towards him and provide him with a safe working place. Yet the respondent repeatedly and egregiously ignored it.

273. Other than Jemma Deans no other employee was spoken to about the matters the claimant was aggrieved about, even though A's bullying and intimidating behaviour towards his colleagues was notorious.

274. So far as the claimant was concerned the raising of his grievance proved utterly pointless as the respondent failed to suggest, far less implement, a single further measure in addition to those that the claimant had already put in place, which were all that he had the power to do. He had made it abundantly clear to the respondent that such measures as he had put in place were not working and his health was evidently suffering, as evidenced by his absence since 4 April 2019. It did not even propose that he be referred to Occupational Health in circumstances where his health had plainly been profoundly impacted by A's behaviour and the respondent's failure to address that behaviour.

275. In all the circumstances the respondent's failures to take the claimant's grievance seriously and to take appropriate action to manage A's behaviour towards him rendered the workplace unsafe for the claimant.

Fail to deal with the Claimant's grievance of July 2019 against Ms Deans;

276. On the evidence it was clear that the respondent did not even attempt to deal with the claimant's grievance of 4 July 2019 against Miss Deans until 30 September 2019 after he had already resigned on 27 September 2019. This was further evidence of the respondent's clear unwillingness to deal seriously with the claimant's concerns.

Fail to conclude the Claimant's grievance against A dated July 2018;

277. There was a clear failure to conclude that grievance. No outcome was provided despite Mr Holdway's assurance to the claimant that he would report back to him with his decision and despite a number of additional serious and similar allegations having been made in the months after the grievance meeting on 25 July 2018. The claimant was not provided with any details of the investigation undertaken by Mr Holdway, his conclusions or his proposed actions to be taken. In the meantime, he continued to feel unsafe in the

workplace and was in fact subjected to further threats and intimidation at the hands of A.

Fail to facilitate the Claimant's return to work following his absence?

278. In the absence of the respondent taking any action to protect him from A the claimant was left to take steps for his own safety, such as reducing his working week from 5 days to 4 days and starting his shift early at 3.30 a.m., so as to avoid coming into contact with A in the Grangemouth yard.

279. Unfortunately, in the absence of any intervention on the part of the respondent, that was inadequate and A's campaign of harassment of the claimant continued, as a result of which he went off sick. The grievance process was the respondent's opportunity to deal with the claimant's concerns about A and put measures in place to facilitate his return to work, but it failed to do so.

Discriminate against the Claimant contrary to section 13, section 15 or section 20/21 of the Equality Act 2010?

280. For the reasons set out below, the Tribunal finds that the respondent did not discriminate against the claimant in breach of section 13 or section 15 of the Equality Act 2010.

281. **If so, did the Respondent breach the implied duty of mutual trust and confidence in the Claimant's contract of employment by:**

i. Behaving in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; or

ii. Without reasonable and proper cause for doing so?

282. In the present case the claimant relies on an alleged breach of the implied term of trust and confidence. As established in ***Malik v BCCI 1997 ICR 606***, this is a requirement that an employer must not –

"without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee".

283. For the reasons set out above, the Tribunal had no doubt whatsoever that the respondent had, without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant.

284. **If so:**

Was such breach (or breaches) sufficiently important to justify the Claimant tendering his resignation?

Has the Claimant resigned in response to such breach (or breaches, if the Claimant is relying on a "last straw" event)?

Has the Claimant waived or affirmed any such breach (or breaches)?

285. The Tribunal concludes that the claimant resigned in response to the respondent's failure to provide him with a safe working environment, to deal with his grievance of July 2019 against Miss Deans, to deal with his grievance against A dated July 2018 and its failure to facilitate his return to work following his absence, which began on 4 April 2019.

286. By its repeated failures to deal with his complaints about A, the respondent egregiously failed to provide the claimant with a safe working environment and he could not reasonably have been expected to return to work after his sick absence beginning on 4 April 2019. The respondent's conduct in this regard was sufficiently serious to justify the claimant tendering his resignation. The Tribunal finds that these were the reasons why the claimant resigned and that he did not waive or affirm those breaches.

287. Having regard to the evidence presented about the grievance procedure that preceded the claimant's resignation the Tribunal was not persuaded that the claimant also genuinely resigned in response to the respondent's alleged disability discrimination. His grievance dealt with by Mr Hunter and Mr

Leonard never mentioned his disability, only his treatment in relation to A. In those circumstances the Tribunal concluded that the alleged discrimination did not form a material and integral part of the repudiatory conduct in response to which he resigned.

288. In any event even if he had resigned in response to that failure he had affirmed that breach by continuing to remain in the respondent's employment until 27 September 2019 in circumstances where he had complained about the respondent's failure to make adjustments since as far back as November 2017 and had been aware of the respondent's final position, having regard to the medical advice it had obtained eleven months earlier, on 24 October 2018.

Remedy for constructive unfair dismissal

289. The Claimant seeks compensation only.

290. **If there is a compensatory award, how much should it be? The Tribunal will decide:**

What financial losses has the dismissal caused the Claimant?

291. The Tribunal concluded that the claimant should be awarded wage loss for the period between his dismissal and the point in time when he would have been unable, by reason of his disability, to carry on working with the respondent as a driver. It therefore finds that he is entitled to a compensatory award for unfair dismissal, calculated as follows:

Loss of earnings between dismissal on 27 September 2019 and 31 December 2020 = 66 weeks at £535.59 = £35,348.94

Loss of pension contributions = 66 weeks at £21.63 per week = £1,427.58

Subtotal - £36,776.52

Minus money earned post dismissal in mitigation - £7,297.50

Total wage loss = **£29,479.02**

Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

292. The Tribunal was satisfied that the claimant had taken reasonable steps to mitigate his loss by setting up his own business and by applying, albeit ultimately unsuccessfully, for drivers' roles.

If not, for what period of loss should the Claimant be compensated?

293. The claimant took reasonable steps to mitigate his loss,

Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

294. There is no evidence that the claimant would have been fairly dismissed in any event before 31 December 2020.

If so, should the Claimant's compensation be reduced? By how much?

295. There is no basis upon which to reduce the claimant's compensation on the ground that he would have been fairly dismissed in any event..

Did the Acas Code of Practice on Disciplinary and Grievance Procedures (the Acas code) apply?

296. The Acas Code did apply, in circumstances where the claimant resigned because of the respondent's repeated failures to deal properly with his grievances. The relevant parts of the code, as identified by the claimant, are as follows –

"34. Employers, employees and their companions should make every effort to attend the meeting. Employees should be allowed to explain their grievance and how they think it should be resolved. Consideration should be given to adjourning the meeting for any investigation that may be necessary.

…

40. Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken."

Did Claimant unreasonably fail to comply with it by raising the issues with the Respondent by way of grievance or appeal?

297. There is no evidence that the claimant failed at all to comply with the Code. It was a feature of his evidence that he repeatedly and appropriately raised grievances, initially about A and subsequently the respondent's failures to protect him from A.

Did the respondent unreasonably fail to comply with the Acas code?

298. The respondent's initial failure was its failure to provide the claimant with any outcome to his grievance about the 16 July 2018 incident. No reason was ever offered for that failure. In light of the seriousness of the claimant's concerns about the July 2018 incident and its impact on him, which were soon followed by concerns about subsequent similar incidents the respondent's failure to provide any outcome whatsoever was an unreasonable one: particularly having regard to its size and resources, including it having a dedicated HR department.

299. Although the respondent eventually, between May and August, dealt with the claimant's grievances the Tribunal's conclusion was that Mr Hunter and Mr Leonard simply went through the motions. Although Jemma Deans was spoken to, this was principally to confirm the arrangements the claimant had put in place to avoid A, but not to investigate with her the claimant's legitimate concern that she had been fundamentally compromised in relation to the 12 January 2018 incident because of her suspected relationship with A.

300. The claimant had made it plain to the respondent that this was a key concern, which undermined his trust in his manager's ability and willingness to address

and his legitimate fears about A's conduct towards him and provide him with a safe working place. Yet the respondent repeatedly ignored it. That was an unreasonable failure in the light of the respondent's state of knowledge of A's behaviour in the workplace and its impact on the claimant.

301. Other than Jemma Deans no other employee was spoken to about the matters the claimant was aggrieved about, even though A's behaviour towards his colleagues was notorious, and the respondent had the resources to conduct a more thorough investigation.

302. In the circumstances the Tribunal finds that the respondent's failures to follow the Acas code were unreasonable.

If so it is just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

303. The Tribunal finds that by virtue of the seriousness of the respondent's unreasonable failures and their impact on the claimant that he is entitled to an uplift of 25%. The respondent has significant resources, including a dedicated HR department. Its failures to inform the claimant of the outcome of its investigation into his grievance about the 16 July 2018 incident and, in all the circumstances, to identify and interview relevant witnesses in connection with his 15 May 2019 grievance were wholly unreasonable. In determining this uplift the Tribunal takes into account the overall amount of the compensatory award and finds it proportionate that such an uplift is made.

If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

304. The claimant did not to any extent cause or contribute to his dismissal by blameworthy conduct.

If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

305. It would not be reasonable to reduce the claimant's compensatory award.

Does the statutory cap of fifty-two weeks' pay apply?

306. Yes, having regard to the reason found by the Tribunal for his dismissal, the statutory cap should apply.

What basic award is payable to the Claimant, if any?

307. The parties were in agreement that the basic award should be calculated on the basis of the claimant having been 54 years old at the date of termination of his employment at which time he had completed 8 full years of service. The appropriate award is therefore 12 weeks' pay at the statutory maximum applicable on 27 September 2019, that is £525, resulting in a basic award of £6,300

Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

308. There are no grounds upon which it would be just and equitable to reduce the claimant's basic award.

Disability discrimination

309. **Direct Disability Discrimination (Equality Act 2010 section 13)**

Did the Respondent do the following: retain the Claimant on the INEOS contract?

310. The claimant was retained on the Ineos contract until his resignation, at least in the sense that he was never told he would no longer be involved in that work because of his health. However, he was never required to do 4 ethanol collections and deliveries on the INEOS contract after August 2017 and he did not do any ethanol collections or deliveries at all after May 2018.

311. The Tribunal considered that in respect of the allegation of direct discrimination, where the primary facts were not in dispute, that it was able to depart from a rigid approach to the two-stage test in its approach to the burden of proof. It felt able to consider the evidence as a whole, including the respondent's explanation for its admitted treatment of the claimant, in making its determination as to whether direct discrimination took place.

312. There was no dispute that while the claimant was no longer required to do the 4 delivery INEOS contract after his likely arthritis diagnosis in August 2017 he was still retained on some ethanol work after that date and also after November 2017 when he made his concerns clear to the extent that he threatened to raise a grievance if he was required again to deliver ethanol to INEOS.

313. It was clear to the Tribunal that the claimant had been treated less favourably than his non-disabled comparators who were in the same position as he was in in all material respects; that is having declared a health condition affecting their ability to carry out their normal duties.

314. In those comparable circumstances the respondent's insistence that the claimant should remain in his normal role meantime was less favourable treatment than the treatment of the comparators who were taken off their normal duties without fuss soon after they discussed their health conditions with their managers.

If so, was it because of disability?

315. For a claim of direct discrimination to succeed, it must be shown that the disability itself was the reason for the less favourable treatment. Although the respondent's retention of the claimant on INEOS work in circumstances where his disability made that work painful for him was less favourable treatment than his comparators received, there is no evidence that this treatment was *because* of his disability. Rather it was treatment meted out to him *in spite of* his disability.

316. Similarly, the reason for the respondent's insistence that the claimant, unlike his comparators, be referred to its occupational health advisers for advice was not the claimant's disability itself, but rather because it wished to obtain professional advice about whether his disability adversely affected his ability to perform his normal duties.

317. In the circumstances the claimant's claim of direct discrimination must fail.

318. **Discrimination Arising from Disability (Equality Act 2010 section 15)**

Did the Respondent treat the Claimant unfavourably by: retaining the Claimant on the INEOS contract after the Claimant had informed the respondent of his condition in August 2017?

319. The Tribunal considered that in respect of the allegation of discrimination arising from disability, where the primary facts were not in dispute, that it was able to depart from a rigid approach to the two-stage test in its approach to the burden of proof. It felt able to consider the evidence as a whole, including the respondent's explanation for its admitted treatment of the claimant, in making its determination as to whether discrimination arising from disability took place. The Tribunal reminded itself of the two distinct steps to the test to be applied in determining whether discrimination arising from disability has occurred:-

(1) Did the claimant's disability cause, have the consequence of or result in "something"?

(2) Did the employer treat the claimant unfavourably because of that "something"?

320. On the particular facts of this case, while the Tribunal accepted the claimant's submission that the claimant's disability caused him pain, it was not persuaded that the respondent had retained him on the contract after November 2017 *because* of that pain. Rather it found that the respondent kept him on the INEOS contract *in spite of* his pain.

321. While that was not on any view an acceptable way to deal with the situation, that conduct nevertheless does not meet the statutory test that has to be applied. The Tribunal therefore finds there is no prima facie case established that there was discrimination arising from disability

322. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

Did the Respondent know or could it reasonable have been expected to know that the Claimant had the disability? From what date?

323. The respondent should have known that the claimant had a disability from August 2017 when the likely diagnosis of osteoarthritis was handed to Miss Deans, in circumstances where the claimant had already been telling his supervisors since October 2016 about his pain and discomfort while standing for extended periods of time. At that stage the respondent ought reasonably to have known that his condition met the statutory test.

a. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs

i. the requirement to stand/be on his feet for significant periods of time during a shift whilst working on the INEOS contract; and

ii. the requirement for the Claimant to work on the INEOS contract, which regularly required him to stand/be on his feet whilst working for significant periods of time during a shift.

b. Did the Respondent apply the PCPs to the Claimant?

324. The evidence clearly showed that the respondent applied the first PCP to those of its workforce required to work on ethanol collection and deliveries on the 'Ineos' contract and that the claimant was required to work on the Ineos contract, thus being subject to that PCP during such work. He was therefore subject to both PCPs.

c. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability by causing pain to the Claimant's hip?

325. Yes, the claimant was at a substantial disadvantage compared to someone without his disability, because of the pain and discomfort caused to him by the requirement to remain on his feet during the ethanol loading and unloading processes.

d. Did the Respondent know, or could it reasonably have expected to know, that the Claimant was likely to be placed at a disadvantage?

326. The respondent knew or ought to have known by August 2017 that the claimant was likely to be placed at a disadvantage by having these PCPs applied to him

e. What steps could have been taken to avoid the disadvantage? The Claimant relies upon the Respondent's alleged failure to:

i. provide the claimant with a chair.

ii. transfer the Claimant onto another contract which did not have the requirement to regularly stand/be on his feet whilst working for significant periods of time during a shift.

f. Was it reasonable to have taken those steps and when?

327. The Tribunal finds that the claimant should have been taken off these duties altogether in August 2017. It would have been reasonable at that point in time to take him off all ethanol work and deploy him on other contracts that did not require him to be on his feet for significant periods of time during a shift. Taking that step would have removed his disadvantage by enabling him to work without pain and discomfort. According to Jon Price such suitable work was available at that time. It would therefore have been practicable to make that adjustment and it would not have been disruptive to the respondent's business.

328. However, it was not reasonable for the respondent to provide a chair in circumstances where the INEOS terminal manager had informed it that a chair was not allowed, and the respondent was not in a position to countermand that rule.

g. Did the Respondent fail to take those steps?

329. The respondent failed to make the adjustment of removing him from Ineos/ethanol duties in August 2017 and instead required him to carry on working on those duties until May 2018.

Remedy for disability discrimination

330. **Is the Claimant entitled to compensation for general financial loss and/or pension loss arising as a consequence of the prohibited acts?**

The claimant lost no income as a result of the respondent's failure to make this reasonable adjustment, so he is not entitled to general financial or pension loss.

331. **If so, what sum should be awarded?**

N/A

332. **Is the Claimant entitled to an award for Injury to Feelings?**

The claimant is entitled to an award for injury to feelings.

333. **If so, taking into account the Vento guidelines, what sum should be awarded?**

The claimant felt that he was being forced to work the INEOS shift in circumstances in which he had made it plain that it caused him pain and discomfort. This caused him feelings of inadequacy and humiliation and impacted his mental health and his relationship with his family. He became uncommunicative and irritable with them. He suffered bouts of depression. He had always taken pride in his role as a driver in the heavy goods industry and the respondent's failure to make adjustments affected him profoundly

334. In the circumstances the Tribunal found that the appropriate band in terms of the guidelines set out in Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102 was the middle band, which covers serious cases that do not merit an award in the highest band and that the appropriate award was £10,000.

Remedy

335. The claimant's basic award is £6,300.

336. In addition, the claimant is entitled to a compensatory award for unfair dismissal, calculated as follows:

Wage loss

Loss of earnings between dismissal on 27 September 2019 and 31 December 2020 = 66 weeks at £535.59 = £35,348.94

Loss of pension contributions = 66 weeks at £21.63 per week = £1,427.58

Subtotal - £36,776.52

Minus money earned post dismissal in mitigation - £7,297.50

Total wage loss = £29,479.02

Other elements of compensatory award

Uplift for unreasonable failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures – 25% = £7,369.76

Loss of statutory rights - £500

Total compensatory award

Total award - £29, 479.02 + £7,369.76 + £500 = **£37,348.78**

Grossing up Calculation

Amount of compensation up to the £30,000 tax free element = £30,000 - £6,300 = £23,700

Amount of compensation award that should be taxed = £37.348.78 - £23,700 = £13,648.78

Taxable element = £13,648.78

Grossed up element of compensation - £13,648.78 / 0.8 = £17,060.98

Total compensation = £23,700 + £17,060.98 = £40,760.98

Injury to feelings - £10,000 grossed up - £10,000/0.8 = £12,500

Total award –

Basic award - £6,300

Compensatory award - £40,760.98, subject to statutory cap of 52 x £721 = £37,492

Injury to feelings - £12,500

Total - ***£56,292***

Employment Judge: Robert King
Date of Judgment: 07 June 2022
Entered in register: 08 June 2022
and copied to parties