Neutral Citation Number: [2022] EAT 98

Case No: EA-2020-000686-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 July 2022

Before :

HIS HONOUR JUDGE AUERBACH
MR M PILKINGTON
MRS R WHEELDON

- -

Between :

HANSON QUARRY PRODUCTS EUROPE LIMITED OF HANSON HOUSE **Appellant**
- and -
MR PETER LUCK **Respondent**

- -
- -

Ms C Davis QC (instructed by Boyes Turner LLP) for the **Appellant**
Mr A Worthley (instructed by Beers LLP) for the **Respondent**

Hearing date: 9 June 2022

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

UNLAWFUL DEDUCTION FROM WAGES

The claimant was employed as a lorry driver. Following a period of some months, during which he was initially signed unfit by his GP, subject to medical investigations, and referred to the respondent's occupational health (OH) team, the claimant provided evidence that the DVLA now considered him fit to drive and, in light of that, so did OH. At a return to work meeting the respondent asked the claimant to sign a letter confirming that he had reported to the DVLA the "sudden dizziness experienced in November 2018", which it understood had led to the start of the absence and medical investigations. The claimant declined to do so, although in further correspondence he indicated that he would be willing to sign an amended, accurate version. The respondent stopped the claimant's pay, indicated that it considered him to be absent without good cause, and warned him that he might face disciplinary action. Following further exchanges, the claimant resigned.

The employment tribunal found that the claimant was constructively unfairly dismissed, as the respondent was in breach of an express term by stopping his wages, and was also in breach of the implied duty of trust and confidence. It went on to find, however, that there was a 25% chance that the claimant's employment would have ended within six months of when it did end, without fault on the part of the respondent.

The tribunal had not erred by failing to find that the claimant was not ready, willing and able to return to his contracted role of relief driver, because he had asked to return as a local driver. It had not found that the claimant had refused to return as a relief driver, if his preference were not granted. Nor did the tribunal err in finding that the respondent was in breach of the express terms of the claimant's contract by stopping his pay; nor did it err in finding that it was in breach of the implied duty of trust and confidence, by applying the wrong legal test. The tribunal was also not wrong to reject the respondent's case that the factual reason for dismissal did not amount to capability or some other substantial fair reason. The issue of the claimant's capability provided the context for the

respondent's conduct which caused him to resign, but not the reason for that conduct. Finally, the tribunal did not err by failing to find that it was 100% certain that the claimant would never have returned to his contracted role. The respondent had not shown that a statement by the tribunal in its decision, about what the claimant had said in evidence on that point, was plainly wrong.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. We will refer to the parties as they were in the employment tribunal as claimant and respondent. The respondent supplies building materials to the construction industry. The claimant was employed by it from April 2015 until he resigned with immediate effect on 9 October 2019.

2. In a reserved judgment and reasons following a full merits hearing, the employment tribunal (EJ Hargrove, Ms W Richards Wood and Mrs M Rowntree) upheld the claimant's complaints of constructive unfair dismissal and of unlawful deduction from wages in respect of the period from 23 August 2019 until the date of his resignation. It also found that there was a 25% chance that, absent unfairness, the claimant's employment would have ended in any event within 6 months after it did.

3. This is the respondent's appeal in respect of those decisions. For completeness we note that there were also live at the full merits hearing complaints of victimisation and of a failure to comply with the duty to provide an up-to-date written statement of terms and conditions, both of which were dismissed by the tribunal, and in respect of which there was no appeal or cross-appeal.

4. There were originally seven grounds of appeal, all of which were permitted to proceed to a full appeal hearing. However, at the hearing of this appeal what were grounds 4 and 5 were not pursued. We will use the original numbering in respect of the live grounds: 1, 2, 3, 6 and 7.

The Facts

5. We will start with a summary of the relevant factual history, as found by the tribunal and appearing from the primary documents. We will return to some of the more specific factual findings made by the tribunal in due course.

6. The claimant began working for the respondent in April 2015 on a 12-month contract as a day driver working from a particular quarry in Cornwall. From April 2016 he was permanently employed as a relief driver. In that role he was required to make deliveries in South-West England and South Wales, driving a variety of HGV vehicles including eight-wheelers, tippers and concrete mixers.

7. Within paragraph [14] of its reasons the tribunal said this:

> **"… on 11 November 2018, the claimant had an episode of what was thought to be presyncope while shopping at Morrison's and was admitted to the Minor Injuries Unit at hospital. See paragraph 28 below for more details. We understand presyncope to be an episode of dizziness, lightheadedness, or vertigo and blurring or narrowed vision, short of unconsciousness. One of its possible causes is high blood pressure (HBP)."**

8. Thereafter the claimant began a period of sickness absence. He submitted two-weekly sick-notes up to the end of January 2019, which cited "special investigations and examinations."

9. GP records before the tribunal included a reference to a further episode of dizziness at Christmas 2018.

10. On 31 January 2019 the claimant attended an OH consultation with Dr Prajapati. His subsequent report included references to a history of high blood pressure, the claimant having been admitted to A & E in recent months, various investigations and a previous problem with heavy lifting at work. He recommended that the claimant obtain a fit note from the GP confirming that his resting blood pressure was normal and stating that his vision was compatible with driving group 1 or group 2 vehicles; and that the claimant obtain such medical evidence prior to management considering whether he was fit to return to his contractual role.

11. On 4 February the claimant emailed Erica Williams of HR a fit note which recommended a phased return to work on amended duties "as agreed with employer, local driver and not heavy

lifting." The tribunal noted that Ms Williams in fact had yet to see Dr Prajapati's report and no discussion had yet taken place with the claimant.

12. Following receipt of Dr Prajapati's report, during February the respondent sought clarification from the claimant's GP as to whether he was fit to drive. In reply to a question from the respondent, a further report from Dr Prajapati on 1 March included advice that blood pressure readings provided by the claimant to the DVLA should not be relied upon unless provided by a trained clinician.

13. On 17 March the DVLA issued the claimant with a new licence.

14. On 15 April a third OH report was produced by Dr Prajapati. This referred to various materials including a letter from a Dr Edwards of 13 November 2018 which gave a description of the 11 November incident. Dr Edwards "diagnosed an episode of pre-syncope." Dr Prajapati stated: "There is clinical suspicion from the medical evidence received, that Mr Luck is experiencing unprovoked episodes of disabling dizziness." He stated that the claimant "is advised not to drive and must notify the DVLA about his dizziness." He saw no reason why the claimant could not resume his contractual role if he had confirmation from DVLA that he was fit to drive group 2 vehicles. He added:

> **"In the interest of compliance and probity, it is recommended that management obtain evidence from the DVLA through Mr Luck that he is fit to drive; in order that this evidence can be accepted, it should contain information that Mr Luck has disclosed his condition of dizziness to the DVLA."**

15. On 17 April Jeremy Dyal of the respondent emailed the claimant referring to that advice and asking him to contact the DVLA and to inform them of the outcome regarding his class 2 licence.

16. The claimant contacted the DVLA, read them extracts from the OH report, and then, at their request, sent them a completed DIZ1V form. On 2 May the DVLA emailed the claimant's GP that he had notified them that he "is experiencing/has experienced dizziness" and enclosing a form DIZ2V

containing questions for the GP to answer and return. The GP signed the completed form on 13 May. Answers given by the GP included that the diagnosis was "pre-syncope", that an attack would be disabling or likely to affect driving if it occurred while driving, and that the claimant had been free of disabling dizziness for "Months 4+".

17. On 20 May the DVLA informed the claimant that the matter was being referred to its team of doctors, investigations might take some time to complete, and they would keep him informed.

18. Concurrently with these developments in relation to his sickness absence, the claimant instituted a grievance at the end of February 2019. This related to a number of matters including a disciplinary process that had been begun in November 2018 relating to an incident in October, but was pursued no further after January 2019, and various issues relating to the claimant's sickness absence and sick pay. In May, the manager who had considered the grievance, Nicholas Elliott, partially upheld complaints relating to the delay in dealing with the return to work process, and the delay in notifying the claimant of his reversion to SSP at the end of the contractual sick pay period at the end of February. He also recommended further steps to be taken to medically assess the claimant's fitness to drive and that he be returned to basic pay backdated to February until that assessment was completed. Thereafter there were further communications between the claimant and Mr Elliott, he was returned to basic pay, and a back payment was made, calculated at the rate of 39.5 hours per week less SSP, plus holiday pay.

19. We also interpose that in April the claimant also presented a tribunal claim, which, following his resignation, was amended to include the constructive unfair dismissal claim which concerns us.

20. On 19 June there was a formal return to work meeting with a manager, Philip Harvey, at which the claimant asserted that his licence had been renewed by the DVLA on 17 March, following a

medical at which his blood pressure had been found to have returned to a normal level.

21. In July the respondent made a further OH referral, following which the claimant had a telephone consultation with Dr Hall-Smith of OH on 8 August 2019.

22. In his report Dr Hall-Smith referred to having reviewed various medical records, including a printed summary of GP consultations, and said he had taken a detailed account from the claimant, including of the 11 November incident and subsequent investigations. The tribunal said, at [40]:

> **"The report continued: – 'He had a medical for the renewal of his HGV licence in March 2019. This was carried out by a doctor in Exeter who did not have access to his medical records but who recorded the details of his hospital investigation on the form. Mr Luck believes that the DVLA made contact with his GP to confirm the history at that stage but I can see no reference to that in the summarised records. The DVLA did issue him with a renewal of his licence following that medical.' The letter continued with a reference to advice from Dr P stating that 'he needed to inform the DVLA about his symptoms and he duly did that'.**
>
> **'My own view based purely on the information available to me, is that Mr Luck is almost certainly fit to drive. He has had no further episodes and the episodes themselves were not, in my opinion, disabling. (Tribunal's underlining). The requirement to report to the DVLA does depend on the interpretation of wording and certainly episodes of dizziness which are sudden and disabling, need to be reported. The advice to report was given in good faith at the time, as it is the DVLA medical advisors who are the final arbiters on fitness to drive issues. Now that they are involved I do feel that it will be necessary for them to confirm fitness.'**
>
> **'In an attempt to progress this case, I did try to phone the DVLA medical advice line for doctors during the consultation. I was unable to get through, but did succeed in talking to one of the DVLA doctors (Dr Prasad) on Friday 9 August. She was unable to discuss the case but did access the file and has promised to review it as a matter of urgency. She was unable to advise over the telephone whether Mr Luck could drive pending her decision.**
>
> **'In summary, Mr Luck is currently in limbo. He has undergone extensive investigation for what appears to have been very minor, transient symptoms. Nevertheless, this was taken seriously at the time and he did undergo a lot of tests. Other than raised blood pressure, no pathology was identified, and the passage of time has confirmed that he has not suffered any further episodes. Whilst I believe the DVLA will confirm his fitness to drive, the matter is now in their hands and I do feel that he should await their guidance before resuming HGV driving.' "**

23. On 14 August the DVLA wrote to the claimant that "from the information we have received" he satisfied the medical standards for safe driving and could keep his licence. On 23 August Dr Hall-

Smith conveyed that to the respondent and advised that, on the basis of that letter, he regarded the claimant as fully fit to resume his normal driving duties.

24. On 9 September there was a return to work interview between the claimant and Erica Williams of HR. The tribunal found that "the claimant was wanting a phased return to work, but as a local driver not a relief driver, as he had been working prior to going off sick in November 2018, and as recommended in the latest GP sick note of February 2019." The tribunal said that there was a discussion about this "proposal". The claimant raised concerns that he would not be able to drive to the yard where local trucks were parked, due to poor lighting conditions and rough ground, and he asked if a risk assessment had been carried out. The claimant also raised what he regarded as outstanding issues relating to sick and holiday pay which had been the subject of his earlier grievance.

25. The tribunal also found that Ms Williams handed to the claimant a draft letter which she asked him to sign. Within paragraph [45] it set out the full text, which was as follows:

> **"Dear Peter,**
> **In respect of your entitlement to drive a large goods vehicle.**
> **Thank you for your cooperation in the process of establishing your fitness to drive a large goods vehicle. This has taken some time to complete and I am sure you share the view that we consider extremely important the fitness to drive of our drivers and the safety of all road users.**
> **Following your declaration of an episode of dizziness in November 2018 Hanson are obliged to ensure you are fit to drive a lorry before allowing you to return to driving at work. In order to establish fitness to drive and provide advice on the same Hanson engaged the (IDC) to review your medical records and conduct examinations. Whilst I am confident you are aware that you must tell the DVLA if you suffer from dizziness that is sudden I need confirmation that you have informed them.**
> **Please confirm you have informed the DVLA of the sudden dizziness experienced in November 2018.**
> **I Peter Luck informed the DVLA of my episode of dizziness that occurred in November 2018.**
> **Signed Peter Luck…….. Date……..."**

26. The tribunal continued, at [46]:

> **"The claimant declined to sign the letter during the meeting. He claims that it required him to admit that he had had an episode of dizziness in November 2018 which he did not accept. The claimant sent an email to EW on 11 September setting**

> **out his version, and asking for another return to work meeting."**

27. On 19 September the claimant, having discovered that his pay had been stopped on the instructions of Mr Dyal, emailed the respondent's Operations Director, Clare Soper, reiterating a number of his grievances and asserting that he had been constructively dismissed.

28. That same day Ms Soper wrote to the claimant. She referred to his having at the meeting "declined to confirm that you are fit for work by signing the letter that was prepared for you and you have not returned to work. You have not provided a valid medical reason for your continued absence and you are now absent without a valid reason. Therefore, in accordance with company policy you are not eligible for contractual pay or sick pay. Furthermore, as you are absent without authorisation you are in breach of your contract of employment and may be subject to disciplinary action."

29. The tribunal continued its account at [48]:

> **"On 30 September 2019 the claimant emailed a further grievance letter to Clare Soper at page 316, setting out his position and stating that he would be returning to work on Wednesday, the 2 October 2019 and that if he was refused and not paid it would be a breach of contract. He also threatened to add additional claims to his existing tribunal claims."**

30. The tribunal referred to the exchange of emails which followed. It plainly took these into account, and cited them in its conclusions. We were given sight of these and will summarise them, as it assists when considering the tribunal's conclusions. In an email of 1 October Mr Dyal referred to the OH advice in April that management obtain evidence "from the DVLA, through Mr Luck, that he is fit to drive", including "information that Mr Luck has disclosed his condition of dizziness to the DVLA"; he gave a summary account of the claimant's stance at the 9 September meeting; maintained that the respondent had a duty not to allow the claimant "back into a driving role" until they had specific confirmation that he had advised the DVLA of his dizzy spells; and stated that they were willing, as a goodwill gesture, to vary this requirement by asking the claimant to self-certify "that you

have obtained the necessary clearance", but he had declined, and until they had received "some comfort that you are safe to drive you may not return to your driving role."

31. In his reply of 2 October, the claimant wrote that "DVLA was informed on 18 April 2019 of my unsteadiness on Christmas Day and they told me it was not reportable." He referred to the DVLA's August letter and said that they and his GP had said that he was fit to drive, and that on 2 September Ms Soper had emailed that she had sufficient information to be able to organise his return to work. He continued:

> **"The letter that you wanted me to sign was not on Hanson headed paper, the information in it was inaccurate, namely because you refer to a dizzy spell in November which never occurred. I therefore said I was going to seek advice from my union and solicitors before signing the letter, I did not refuse to sign it. Such letter I will sign once it has been amended and is factually correct."**

32. The claimant resigned by email on 9 October 2019, setting out his reasons in some detail, including matters which formed the basis of his constructive dismissal claim.

The Tribunal's Review of the Law and the Issues

33. In the course of its review of the law and the issues, the tribunal referred to relevant legislation relating to unlawful deduction from wages and to statutory sick pay entitlement. It identified at [52.1] that there was an issue as to "[w]hether, and if so when, did the claimant become ready, willing and able to work, and thus when he became entitled properly to be paid his wages, and at what rate: 39.5 hours per week or 50 hours per week?"

34. The tribunal also directed itself as to the concept of constructive dismissal, referring to the words of section 95(1)(c) **Employment Rights Act 1996**, and key well-known authorities, and the principles emerging from them, including in relation to the implied duty of trust and confidence. There was no challenge to this self-direction, and we do not need to reproduce it. In the course of that part of its decision the tribunal noted that the claimant asserted that in the present case there were

breaches both of express terms relating to working hours and sick pay, and of that implied duty.

The Tribunal's Conclusions

35. Owing to some glitch, the reasons had two sections numbered [54]. These each consisted of a series of paragraphs which, unfortunately, are not separately numbered, and are themselves quite long. The first of these sections concerned what the tribunal called the "50 hours issue" and related matters. We do not need to address this in any detail. It suffices to note that, drawing on detailed findings of fact, it concluded that contracted hours were 39.5 per week, though in practice, in order to cover the rotas, the respondent was dependent on drivers offering to work a 50-hour week, and the claimant habitually did so. However, the express contractual right to sick pay was at 39.5 hours per week, so the respondent was not in breach of contract by failing to calculate it at 50 hours per week.

36. In the second section [54] the tribunal addressed what it called the "ready, willing and able issue". We need to set out the bulk of that long section, which was as follows.

> **"The essential issue is whether the claimant was ready, willing and able to return to his pre-sickness employment as a relief driver; and when, and in those circumstances, whether the respondent acted without reasonable and proper cause in continuing to refuse to allow him to return, in subsequently stopping his pay and threatening to commence disciplinary proceedings against him unless he signed and returned the statement that he had informed DVLA of the sudden dizziness experienced in November 2018. Having considered carefully the respondent's lengthy submissions at paragraph 29, we have concluded that the respondent did act with reasonable and proper cause at least up to the receipt of Dr Hall Smith's report of the consultation with the claimant on the 8th of August 2019, received on the 19th of August 2019, and the follow-up letter of the 23rd of August 2019, coupled with the DVLA letter of 14 August 2019 about which the respondent was informed by Dr Hall Smith in his follow up letter. There was information from Dr P's earlier reports which indicated some ongoing concerns as to the claimant's fitness to drive even if the claimant had been issued with a new licence by the DVLA on the 17th of March 2019, which was notified to the respondent – see paragraph 24 above. In his third occupational health report of the 15th of April 2019 Dr P had troublingly referred to a clinical suspicion that Mr Luck was experiencing unprovoked episodes of disabling dizziness, and concerns at his compliance with anti-hypertensive medication. However, as we have indicated above, we accept that the claimant did read out to the DVLA the passage from Dr P's report; and did return a completed days DIZ IV report on 24th of April which, as we found, was received and acted upon by the DVLA who then sent a draft DIZ2V statement to Dr Mantle, clearly confirming that episodes of severe dizziness had been reported by the claimant. Dr Mantle's response did indicate that the**

claimant had been free of disabling dizziness for 4 months plus, and that there had been no episodes of loss of consciousness. Even if the respondent had not seen that document, the claimant was saying that he had reported to the DVLA. It was in those circumstances wholly inappropriate for the respondent to require the claimant to sign a statement to raise an issue which had been properly resolved with the DVLA. If the respondent continued to have doubts about that matter the appropriate course would have been to contact the occupational health advisor Dr Hall Smith for clarification, if it was required. Dr Hall Smith had already been in telephone contact with Dr Prasad at the DVLA. There is no doubt that the Doctor's advice would have confirmed the claimant's position. We understand the claimant's sensitivity about signing a statement which he did not believe represented the truth, and which could be submitted to the DVLA with the possibility of yet further delay after the necessary information had been supplied to DVLA by his GP since early May 2019.

The system of licensing HGV drivers relies in the first instance upon the driver giving full and proper disclosure to the DVLA. We accept that the employer of such a driver has a responsibility for ensuring that proper disclosure has been made if there is reason to doubt it, not least because of the employer's vicarious liability for any accident caused by the driver's negligence, which could have very serious consequences. The respondent had been aware of the contents of Dr P's reports referring to the claimant's spell or spells of dizziness since 15 April 2019. As it turns out the claimant had reported the contents of that report to DVLA. This is confirmed by the format of the DIZ2V form sent to Dr Mantle. The typed contents were those of the DVLA. The GP's entries are handwritten.The typed contents can only have come from the claimant having read out the relevant passage from Dr P's report.

Whether the respondent was aware of that is nothing to the point.The respondent's attack on the claimant's bona fide's represents an ex post facto attempt to justify the late imposition of an unjustified condition upon his return. If it was so important, we asked ourselves why had it not been imposed much earlier, rather than 4 months after the true position had been made clear to DVLA. Mr Dyal referred in his email of 1 October to having received "clear and unambiguous advice from our OH provider that we should obtain written confirmation that you have advised the DVLA of your dizzy spells." This was out of date advice because it refers back to Dr P's report of April. That had been superseded by subsequent events as described above. Furthermore, we note that CS's letter of invitation dated 2 September 2019 at page 299 to attend the return to work meeting on 9 September did not refer to the letter of the same date which required his signature, but which was not produced until the meeting itself. The claimant was to that extent taken by surprise. Based upon the claimant's refusal to sign it, on 19 September CS wrote to the claimant, noted that he had not signed the letter, had not returned to work without a valid medical reason, and was now absent without a valid reason, and stated that he was not eligible for contractual or sick pay. Furthermore, disciplinary action was threatened.

We find that the claimant was ready, willing and able to return to work as of at least 9 September. There was a reference to a clause in paragraph 10(b) of the PCA under the heading "Employees availability" relied upon by the respondent: "The decision of the management regarding fitness of conditions for working shall be final and conclusive". This has no relevance to the believed state of health of the claimant. Even If it is to be interpreted as the respondent asserts, *Braganza*, relied on by the claimant, confirms that such a deeming clause is not conclusive, but, as Lady Hale put it at paragraph 32 of her Judgment: 'Any decision-making function entrusted to the employer has to be exercised in accordance with the implied

> **obligation of trust and confidence'. "**

37. The tribunal concluded this section by recapping its findings regarding communications following the 9 September meeting and up to the claimant's resignation. It went on, at [55], to consider the particular matters relied upon as amounting, or contributing, to repudiatory conduct by the respondent. Its conclusions included the following. The claimant was correctly paid while on sick leave at the rate of 39.5 hours. Indeed, he was overpaid. The respondent was not required by its absence management policy to offer the claimant an alternative job. "That only applies where there are medical reasons why the employee should not continue in his current role. That was not the position here. The jury was still out as to whether he was fit to resume his current role." Although the sick note of 4 February signed the claimant as fit, it was subject to qualification. "Thereafter the respondent acted with reasonable and proper cause in treating him as sick and continuing to pay him sick pay, at least until early September 2019."

38. The tribunal then said this at [55(g)]:

> **"The respondent wrongfully refused to accept that the claimant was ready, willing and able to return to work at least as a local driver as from the 23 August when the respondent received the Hall Smith confirmatory letter. Thereafter, the claimant became entitled to be paid, arguably at the rate of 50 hours per week since he was offering to make himself available, although it may have been a phased return, and certainly at the rate of 39.5 hours. To this limited extent, his claim for an unlawful deduction from wages succeeds. The respondent was in breach of an express term of the contract in stopping his pay. The obligation to pay wages is so fundamental that breaches of that duty are likely to be treated as fundamental. See eg *Cantor Fitzgerald v Callaghan* 1999 ICR page 639 (CA). Furthermore, that breach, the refusal to allow him to return to work, and the threat of disciplinary action were collectively a breach of the implied term of trust and confidence."**

39. Further on, at paragraphs [57] and [58], the tribunal said this:

> **"57. Did the claimant resign in response?**
> **There are a whole series of reasons set out in the resignation , some of which have not been identified as repudiatory conduct. We are well satisfied however that the claimant did resign in part at least because of the respondent's failure to allow him to return to work except on terms which they had no reasonable and proper cause to impose, and because his pay was stopped. Although it remains a matter of some doubt whether the claimant would have returned as a relief driver – he had expressed a preference to return as a local driver, and had raised issues about it at**

> **the return to work meeting, the respondent had not indicated that that preference would be refused. There is no basis for the submission that the claimant resigned because he did not wish to return to work as a relief driver. The respondent's treatment of him was the principal reason.**
>
> **58. There is no basis for the submission that the claimant's dismissal was for a reason related to capability or some other substantial reason. The respondent never raised either of these as a possibility during the many exchanges between them. The dismissal was substantially unfair."**

40. In the bulk of another long section or paragraph, [59], the tribunal wrote:

> **"Polkey issue. We have found this to be a difficult issue. The essential issue is what are the chances that the claimant's employment would have come to an end at any time absent unfairness by the respondent, and when? We accept that in a number of respects the claimant was extremely difficult to manage. He raised a number of matters of complaint about his treatment, for which there was no reasonable basis. We find that Mr Elliott properly dealt with the claimant's many grievances, some of which were entirely unfounded. He persisted with the claim that he was entitled to sick pay at the rate of 50 hours per week, even after Mr Elliott had generously agreed to extend the period of contractual sick pay long after the claimant's entitlement had expired. Although we do not find that the claimant was himself in breach of the implied term of trust and confidence up to the time of his resignation, his persistent conduct was such that it was well on the cards that he would cause such a breakdown in the future on the basis that he was unmanageable. There is also the fact of his request to revert to a local driver, first raised at the time of his fit note of 4 February, and repeated at the return to work meeting. It is note worthy that the claimant raised health and safety issues as a possible obstacle. The respondent was under no obligation to allow him to change jobs, and it is unclear whether there was a vacancy. Indeed the evidence of EW and of Elliott was that there was a queue of people for a local driver's job. The claimant's contractual entitlement was to return to his relief job once he was fit to work, not to another job. In any event the claimant raised health and safety obstacles to a return to work as a local driver. However, we note that the claimant told the Tribunal that if he did not get a local driver's job, he would return as a relief driver, but we have considerable doubts about how long he would have continued in that employment Having regard to these matters, we consider that there was a 25% chance that his employment would have come to an end within 6 months of 9 October 2019, either because of his resignation, without any repudiatory conduct by the respondent, or because of a breakdown of trust and confidence for which the claimant would have been responsible and the respondent would not have been responsible."**

41. The tribunal went on to say that it presently lacked the information needed to make findings about "how long the employment at the 75% rate would have continued", in particular about the impact of the pandemic; and that a further hearing would be needed, if this could not be resolved by agreement.

Grounds of Appeal, Arguments, Discussion, Conclusions

42. We had the benefit of detailed skeletons and oral argument on the five live grounds of appeal. We have considered it all. In what follows we refer to what seem to us to have been the most significant points advanced on each side.

Grounds 1 and 7

43. Ground 1 draws specifically on the tribunal's finding that, at the return to work meeting on 9 September 2019, the claimant requested a phased return to work as a local driver, whereas, as the tribunal found elsewhere, his contractual entitlement was, once fit, to return to the relief driver job. The gist of this ground is that the tribunal erred because, having found that the claimant was "only offering to return to work as a local driver on a reduced hours basis", and that there was no obligation on the respondent to offer him an alternative job, it should have found that he was "not in fact ready, willing and able to work between 9 September and 9 October 2019 (and thus not entitled to be paid)" as he was only offering part performance, by way of a return to work in a different role, and indeed on a phased basis, which the respondent was under no obligation to accept. The respondent cited **Miller v 5M (UK) Limited**, UKEAT/0359/05, in support.

44. This ground forms the basis of a challenge to the tribunal's conclusions, at [55(g)], that the respondent "wrongfully refused to accept that the claimant was ready, willing and able to return to work at least as a local driver as from the 23 August", and hence that it was in fundamental breach of an express term of the contract by withholding pay.

45. Ms Davis referred to the introductory paragraph [53] of the tribunal's conclusions. She said that it initially identified the issue correctly: "Whether at any stage, and if so when, the claimant was ready, willing and able to return to work as a relief driver." But further on it referred, wrongly, to when he was ready, etc., to return "as a relief or local driver". Similarly, at the start of the second

section [54] it referred correctly to when he was ready, etc., to return as "a relief driver", but it then wrongly referred at [55(g)] to being ready, etc., to return "at least as a local driver". So, though it had posed the right question, it had then wrongly taken into account his willingness to return as a local driver, when deciding whether the respondent's conduct placed it in fundamental breach of contract.

46. For completeness we should note that Ms Davis observed that the respondent considered that 23 August was not the right start date for the deduction from wages award, as the tribunal found (and it was not disputed) that the respondent only stopped the claimant's wages in September (between the 9 September meeting and 19 September); but there was no ground of appeal specifically on that point, and, if the appeal of principle against the decision that the respondent made an unlawful deduction was unsuccessful, she was content that this point could be picked up at the remedy hearing.

47. It is also convenient to consider with this, ground 7, as the point with which it is concerned is distinct, but in related factual territory, and in view of how the arguments were put. This contends that the tribunal's conclusion on the *Polkey* point considered at paragraph [59] was perverse, as there was no evidence to support the conclusion that the claimant might have returned to the role of relief driver had he not been given a local driver job. On the contrary, his evidence to the tribunal was that he would not have returned to the role of relief driver, not for medical reasons, but because he did not want to do it anymore. He wanted to be local and not live out of a suitcase. This was a reference to a particular passage of his cross-examination. The parties had exchanged their notes of this passage, but there was no agreed note. Ms Davis indicated in discussion that the notes were materially the same, and she was content to rely on the note taken by a trainee solicitor on the claimant's team. The respondent's case was that the claimant had not given evidence specifically on this subject at any other point. The claimant's solicitors had not suggested otherwise. In light of this passage in the cross-examination the tribunal should, she submitted, have found that the claimant would not have returned to work after 9 September 2019 in any event.

48. Ms Davis added that, although this was a passage from what the claimant had told the tribunal in the course of his evidence, and the *Polkey* issue was distinct, it was consistent with the respondent's case, that he had never told it, at the time, that he was willing to return to work as a relief driver.

49. Mr Worthley submitted that ground 1 was in reality a perversity challenge to a finding of fact made by the tribunal, as was apparent from a consideration of ground 7. Neither ground advanced a tenable perversity challenge. There was a difference between a finding that the claimant had a preference for a different role, or possibly other alternate roles, and a finding that he was unwilling to undertake his contractual role. The tribunal noted at [59] that the claimant had told it that, if he did not get a local driver's job, he would have returned as a relief driver. The evidence the claimant gave in the passage in cross-examination upon which the respondent relied did not contradict what the tribunal has said at [59]. If the respondent contended that that statement by the tribunal was unsupported by *any* evidence, it was for the respondent to make that case good before the EAT.

50. While the tribunal did refer, at points, to the claimant's willingness to return as a local driver, it did indeed pose the correct question, and it found towards the end of the second section [54] that the claimant was ready, willing and able "to return to work as of at least 9 September", a finding which was not restricted to a particular role, and which the tribunal was entitled to make. Nowhere had it found that the claimant had refused to return as a relief driver, as opposed to expressing his wish, and requesting to be permitted, to return as a local driver. The proper findings of fact did not support ground 1. Nor had the respondent shown, as asserted by ground 7, that the statement about the claimant's evidence made as part of the *Polkey* decision was insupportable, and so perverse.

51. Our conclusions on these grounds are as follows.

52. As to ground 1, the parties did not disagree about the law. Had the tribunal found as a fact that the claimant's stance, as of 9 September, was that he was not willing to return to work as a relief driver, in any circumstances, though fit to do so, then it would have been bound to conclude that the respondent was entitled to withhold his pay on the basis that he was unwilling to carry out his contracted role. The issue was whether the tribunal erred by failing to make such a finding of fact.

53. As to that, the tribunal's findings of fact about the 9 September meeting included that the claimant was "wanting" a phased return to work as a local driver, not a relief driver, and that what it called this "proposal" was discussed at that meeting, with the claimant himself raising some issues and concerns in that connection. In the opening of paragraph [57] the tribunal referred to him having expressed a "preference" to return as a local driver, and in the course of [59] to his "request" to revert to a local driver. This had been first raised at the time of the 4 February fit note, and then repeated at that meeting in September.

54. The findings that, at the 9 September meeting, the claimant conveyed a preference, wish or request to return to a local driver role cannot be equated to a finding to the effect that the claimant at that meeting refused to return to his relief driver role, or indicated that he would not be willing to do so if his request for a local driver role was not granted. Nor does the fact that the tribunal, it appears to us properly, found that the respondent would have been entitled to refuse the request to return as a local driver alter that analysis. To put the matter another way, ground 1 contends that the tribunal found that the claimant was "only offering" to return to work as a local driver. But that does not equate to the proposition that he was offering, or willing, only to return to work in that capacity.

55. In our bundle was a copy of the manuscript note made of the 9 September meeting, signed by both the claimant and Ms Williams. The tribunal's factual findings about the discussion are consistent with it. It also records the claimant saying that it would mean "short hours for a period to be agreed",

his adding that the doctor was on leave until 18 September, Ms Williams asking what he would think was reasonable and the claimant replying that she would know as he had been off for 10 months. It also records her returning to the topic at the end of the meeting, asking if the "phased back to work" is still relevant and the claimant saying "maybe he can talk about that and sort something out", Ms Williams asking whether this was due to the doctor's or OH report and the claimant replying "no it is really because he does not want to do relief driving and be away from home."

56. None of that content indicated that the tribunal should have found that at the 9 September meeting the claimant *refused* to return as a relief driver, as opposed to saying that he did not want to do so, and wanted to return as a local driver. Ms Davis referred us to a passage in Mr Dyal's 1 October email, in which Mr Dyal referred (in his words) to the claimant having, at that meeting, made "the following requests", including, as Mr Dyal then put it, that the claimant had stated that he "should" no longer be a relief driver and "should" be based at the local site "as you no longer want to be away from home". But, once again, that material does not show that the tribunal erred by not finding that the claimant had *refused* to return as a relief driver.

57. The tribunal recorded at the start of [53] that the tribunal itself raised that the list of issues had not identified the "fundamental" issue that needed to be addressed, which it correctly formulated there as being whether, or when, the claimant was "ready, willing and able to return to work as a relief driver". It correctly formulated it again at the start of the second section [54] where it described it as the "essential issue". Read in the context of the decision as a whole, we do not think that the other passages relied upon by Ms Davis show that, despite that, the tribunal then applied a different test in coming to its conclusions.

58. We note in particular that in the course of [57] the tribunal said: "Although it remains a matter of some doubt whether the claimant would have returned as a relief driver – he had expressed a

preference to return as a local driver, and had raised issues about it at the return to work meeting, the respondent had not indicated that that preference would be refused." We interpose that it was not suggested by Ms Davis that the tribunal had evidence that the claimant's request *had* been refused; and the material that we were shown, relating to the meeting and its aftermath, did not show that. The tribunal's view, it seems to us, was that, in circumstances where the claimant was not refusing to return to work at all, had not been told that his request to return as a local driver had been refused, and had *not* positively stated that he would not return as a relief driver, the respondent was not entitled to treat him as though he *had*, simply because there was cause to doubt whether he would do so, were his request to return as a local driver to be refused.

59. That, it seems to us, was why the tribunal referred towards the end of [54] to the claimant being ready, willing and able to "return to work" without any particular qualification, and referred at [55(g)] to him being ready, etc., to work "at least as a local driver". Perhaps what the tribunal said at [55(g)] could have been better expressed, but, read as a whole, it appears to us that the tribunal did not err by, despite having itself twice posed the right question, then answering the wrong one.

60. In summary, the tribunal properly found that the claimant's stance, following the DVLA August letter, and the supplementary report from Dr Hall-Smith, was that he was fit to drive lorries, had produced the evidence to support that, wanted to return to work, and wished to do so as a local driver; and it properly found that he had not been told that that request was refused, and had not specifically refused to return as a relief driver. All of that being so, it was not perverse or wrong of it to fail to conclude that the claimant was, in the requisite legal sense, unwilling to work in his contracted role as a relief driver, so as to entitle the respondent to withhold his pay.

61. Paragraph [59] was specifically concerned with *Polkey*. It is important to keep in mind that the tribunal was therefore there not making further findings of fact about what *did* happen, but

considering the counterfactual question of what would or might have happened, had the respondent not – on the tribunal's findings – acted in fundamental breach, materially contributing to the claimant's decision to resign. That fell to be assessed by the tribunal, drawing on all the evidence available to it. It plainly considered, in coming to its overall conclusion that there was a 25% chance that the employment would have ended within six months in circumstances for which the respondent would not have been liable, a number of different possible counterfactual scenarios. It was, in principle, entitled to factor in what it said the claimant had told it he would have done, and its "considerable doubts" about how long he would have continued had he returned in the relief role. Nothing in this part of its reasoning, about what might have happened, appears to us to us to be at odds with the earlier findings about what was actually said at the 9 September meeting.

62. The note of evidence given by the claimant in cross-examination does not take matters any further. It shows the claimant acknowledging that he wanted to change to a local role irrespective of his health at that point, and agreeing that he did not want to be a relief driver any more, but disagreeing that this was why he resigned, which he asserted was because of the financial effect of his not being paid. It does not show the claimant saying that he *would* have returned in the relief role, if refused the local role; but nor does it show him saying that he *would not* have done so.

63. Ms Davis indicated that the respondent's solicitors had told the claimant's solicitors that they considered this passage to be relevant, and the claimant's solicitors had not asserted that any other passage was relevant, so the respondent's solicitors did not think they needed to do more. We do not agree. In particular, as we raised with Ms Davis in the course of argument, it would have been open to the respondent's solicitors, on the basis that their case was that the claimant had at no point given any evidence which might support the tribunal's statement, to request the EAT to ask the tribunal a question, as to what part of the claimant's evidence it had in mind when making that statement. That would, likely, have led either to a correction from the tribunal, or a clarification of what evidence it

was referring to, which may in turn have led to the ground being either abandoned, or pursued on the basis of the relevant material being available to the EAT to enable it to be fairly adjudicated.

64. As matters stand, however, we do not have any sufficient basis to go behind what the tribunal said; and therefore we conclude that it was not wrong to take into account, and weigh up, what it recorded the claimant had said to it, in considering the chance that he might have returned in the relief driver role, had the respondent not acted in fundamental breach, and had it also refused his request to be permitted to return as a local driver. It was not bound to conclude that he would not in any circumstances have been willing to return as a relief driver, as asserted by ground 7.

65. For these reasons we conclude that grounds 1 and 7 both fail.

Ground 2

66. Ground 2 refers, first, to the tribunal's treatment of clause 10(b) of the Pay and Conditions Agreement, which read: "The decision of the management regarding fitness of conditions for working shall be final and conclusive". The gist is that the tribunal failed to explain why it concluded, at [54], that this provision had "no relevance to the believed state of health of the claimant". Ms Davis submitted that, read in context, this provision should have been construed as relating to the employer's assessment of the fitness of the employee. The first part of this ground further contended that, if this provision *was* indeed to be construed that way, then the tribunal had also failed properly to explain why it considered that it had not been properly relied upon by the respondent. In particular, authorities such as **Braganza v BP Shipping Limited** [2015] ICR 449, indicate that the exercise of a discretion conferred by the contract on the employer can only be challenged on *Wednesbury* grounds.

67. More generally, this ground contended that the tribunal failed to consider whether there were express or implied terms setting out relevant preconditions on the claimant's ability to perform his

contracted duties, applying the approach described in **Agarwal v Cardiff University** [2017] ICR 967 (EAT) at [50]. Ms Davis also cited **North West Anglia NHS Foundation Trust v Gregg** [2019] IRLR 570 at [54] in support of the proposition that the tribunal should have considered whether the respondent's withholding of the claimant's pay was in accordance with the express or implied terms of the contract of employment.

68. Ms Davis submitted that relevant express provisions of the claimant's contract or the incorporated Pay and Conditions Agreement, included provisions that he would only be paid sick pay for periods of absence covered by an appropriate medical certificate, that at any time during sickness absence employees may be required to undergo a medical examination, that in support of unavailability on account of sickness an employee must submit a doctor's certificate or other evidence acceptable to the respondent, and that the employee was required to authorise a medical practitioner to disclose the results of any relevant medical examination or matters arising. The tribunal wrongly failed to consider these provisions, all of which were cited to it. Had it done so, and applying **Braganza**, the tribunal should have concluded that the respondent had properly exercised its discretion to take steps to satisfy itself that the claimant was medically fit to perform his duties, by requesting him to sign the letter which it tabled to him at the 9 September meeting.

69. In discussion Ms Davis also submitted that it was relevant that the claimant's right to contractual and statutory sick pay had been exhausted and that he was only still receiving basic pay in September by virtue of Mr Elliott having so decided, when he determined the claimant's grievance in May; but this was not something that the respondent was obliged to continue doing.

70. Mr Worthley submitted that the tribunal properly found that clause 10(b) in the Pay and Conditions Agreement had no relevance to the claimant's fitness for work. Rather, it related to working conditions. That was its plain and natural meaning, and its meaning in the context of clause

10 generally. The **Braganza** point in relation to it therefore fell away.

71. The other arguments in support of this ground wrongly focussed narrowly on particular contractual clauses, rather than the tribunal's wide-ranging and holistic consideration of the evidence going to the claimant's state of health and his ability to return to work at the relevant time, which was painstakingly considered by the tribunal over the course of its decision.

72. Our conclusions on this ground are as follows.

73. We consider first clause 10(b) of the Pay and Conditions Agreement. We agree with Mr Worthley that the wording of the clause itself is unambiguous and that the tribunal's interpretation of it was correct. The ordinary and natural meaning of "fitness of conditions for working" is that it refers to whether conditions at the working location or workplace are fit for the employee to work in, and not to the condition of fitness of the individual employee to do work.

74. Even if we are wrong about that, this reading is, in our view, reinforced by the context. This provision falls within clause 10, which is headed "Employees [*sic*] Availability". This starts with a definition of the circumstances in which an employee is to be deemed to have kept themselves available for work during their contracted hours, which are, in summary: if not otherwise instructed, being present on site, or complying with any other specific instructions as to reporting for work, or as to work to be carried out. This is followed by clause 10(b); then by 10(c) concerning the consequences of a failure by an employee without reasonable cause to keep themselves available during working hours; and then (d) on the effect of employees being absent through illness during a lay-off period. That last provision relates not to assessment of the employee's fitness to work, but to the question of how the lay-off pay provisions and sick pay provisions operate in a situation where both potentially apply. Read within that context, clause 10(b) is part of a group of provisions

concerned with when employees will be deemed to have made themselves available, but preserves the right of management to decide whether, though the employee has made themselves available at a given site, the conditions there are suitable for them to work in. These provisions are not concerned with the employee's fitness to work, as opposed to whether they have made themselves available.

75. The tribunal was therefore right to consider that this sub-clause had no application to the issues that were before it. We therefore also agree with Mr Worthley that the **Braganza** point in relation to it falls away.

76. Nor do any of the express provisions of the contract or the Pay and Conditions Agreement on which the respondent relied assist this ground. The respondent was not, in September 2019, requiring the claimant to undergo a further medical examination or himself obtain a further medical certificate or other medical evidence. Nor was it requiring him to authorise his GP or other clinician who had examined him to provide medical information to it. What it was requiring him to do was to sign the document that it had tabled to him at the 9 September meeting as a condition of being permitted to return to work, and as a condition of being paid. Although it is correct that the tribunal did not, in its decision, go through all of the express contractual provisions relied upon by the respondent, we conclude that it did not err by failing to find that any of them sanctioned this conduct.

77. Further, and in any event, the dictum in **Agarwal** relied upon by Ms Davis needs to be approached with some care and caution. In that case, following a period of ill health, a surgeon returned to academic duties but not clinical duties, and her pay was pro-rated. She claimed unlawful deduction from wages on the basis that the she was ready, willing and able to perform her clinical duties, but there was a dispute about the construction of the relevant provisions of her contract. In the paragraph highlighted in this ground of appeal, at [50], the EAT said:

> **"In my judgment the relevant question is whether the contract of employment under which the Claimant was entitled to payment, that between her and the First Respondent, was subject to express or implied terms setting out relevant pre-conditions on her ability to perform clinical duties for the Second Respondent. If, for example, it was a contractual requirement that after a period of sickness absence the Claimant agreed to undertake an Occupational Health assessment arranged by and reporting to the Second Respondent, it may be said that until she had undertaken such an assessment and agreed to comply with the Second Respondent's decisions as whether she was fit to return to work having considered the assessment, although she may have been ready and willing, she was not able to perform her clinical duties for the Second Respondent and so was not entitled to payment for her clinical sessions."**

78. However, in fact the EAT did not purport to resolve the question of contractual interpretation because of its conclusion that the tribunal did not have the power to determine it (a point on which it was overturned by the Court of Appeal [2019] ICR 433).

79. Further, it is important to note that the EAT began this passage, at [48], by stating:

> **"Integral to her case of entitlement to wages in respect of her clinical duties is the Claimant's assertion that she was able to perform these duties. In these circumstances the first question for the EJ to determine was whether the Claimant's contract of employment with the First Respondent contained any terms, express or implied, bearing on whether in the circumstances there were preconditions to payment for clinical sessions and whether the Claimant fulfilled these from 1 October 2014."**

80. As that passage, it appears to us, correctly identified, the issue was whether, on a correct construction of the contract in that case, there were preconditions *to payment* for clinical sessions. That is also in line with **Gregg**. We note also that the closing words of paragraph [50] of **Agarwal** postulate that being able to work may be a precondition of *being entitled to be paid*. Whether or not they are binding upon us, we do not think that these passages should be read as authority for the proposition that a condition requiring an employee to take some step to assist the employer to assess or satisfy itself as to their fitness to work, should, in and of itself, in every case, be construed as a condition precedent to the employee *being entitled to be paid*, even where they have been medically certified as fit and are willing to return to work, if allowed.

81. It also seems to us that another pertinent authority was referred to in the **Miller** case, being **Beveridge v KLM UK Limited** [2000] IRLR 765. There, following a period of sickness absence, the employee was certified as fit to work, and was willing to return, but the employer declined to take her back until, some six weeks later, its own doctor certified her as fit. The EAT held that she was entitled to be paid in the interim, in the absence of an express term of the contract permitting the employer to withhold payment, in circumstances where she had proffered her services, against what the EAT called a background of a certificate of good health.

82. We appreciate that it might, perhaps, be said that a point of distinction from **Beveridge** is that, in that case, there was nothing more that the employee could have been expected to do that she was not doing, whereas in this case the respondent referred the tribunal to various conditions that entitled it to require various forms of further co-operation from the employee. The short answer, as we have stated, is this was not a case where the respondent was, in September 2019, invoking any of those specific provisions. But, in any event, we remain of the view that the existence of a provision requiring some form of co-operation from the employee in the process of the employer assessing their fitness for work should not necessarily, in all cases, by itself, be taken as sanctioning the withholding of wages in the event of non-co-operation, if there is no express provision to that effect.

83. Finally, Ms Davis' reference to the circumstances in which the tribunal found that the claimant was returned to basic pay earlier in the year cannot see this ground home. That is for the following reasons. First, this ground was not advanced on the basis that the tribunal erred by failing to conclude that the continuation of basic pay was voluntary and could be unilaterally withdrawn; secondly, the tribunal's findings, and the correspondence to which it refers, indicate that the respondent did not, in September, purport to stop paying the claimant on that basis; and finally, that does not appear to have been the way the decision to stop the claimant's wages was defended before the tribunal.

84. For all of these reasons, ground 2 fails.

Ground 3

85. Ground 3 is to the effect that, in considering whether the respondent was in breach of the implied duty of trust and confidence (which we will call the *Malik* implied term), and despite directing itself correctly as to the *Malik* implied term, the tribunal failed to consider whether, objectively, the respondent had reasonable and proper cause for acting as it did between 23 August and when the claimant resigned, and instead substituted its own view of what it, the tribunal, would have done.

86. Specifically, the tribunal had accepted in the course of [54] that the system of licencing depended on a driver giving full and proper disclosure to the DVLA, and that the respondent had a responsibility to ensure that such disclosure had been made if there was reason to doubt it, because of its potential exposure to vicarious liability. It had also accepted that the respondent was in doubt as to what information the claimant had shared with the DVLA about his dizzy spells, and that the claimant had declined to sign the letter tabled to him on the basis that it was not factually accurate.

87. In light of all of that, it is submitted, had the tribunal applied the correct approach it would have been bound to conclude that the respondent had reasonable and proper cause to require the claimant to sign the letter presented to him at the 9 September meeting and, in light of his failure to do so, to doubt whether he had in fact made full disclosure to the DVLA and/or his fitness to drive. It was a proper management instruction. Ms Davis also submitted that the tribunal's suggestion that, if it was concerned, the respondent could have contacted Dr Hall-Smith, and asked him to clarify the position with the DVLA, was unrealistic, given that Dr Hall-Smith had reported that the DVLA had declined to discuss the matter with him when he rang them in August.

88. Mr Worthley submitted that this was another ground which amounted, in reality, to an untenable perversity challenge. The tribunal properly found that, in all the circumstances, it was wholly inappropriate to require the claimant to sign a statement in respect of an issue that had been wholly resolved by the DVLA, and that this was an unjustified condition to impose upon his return to work. This was a proper finding by the tribunal that the respondent had, in all the circumstances, objectively, no reasonable and proper cause for this particular action. The tribunal had not substituted its own view. It had not said that it, the tribunal, would not have required the claimant to sign the document, or anything equivalent to that.

89. As we have described, the tribunal found that there was a breach of an express term by stopping the claimant's pay and a breach of the *Malik* implied term. Ms Davis accepted, as she was bound to in light of clear authority, that the tribunal was right to conclude that, if (contrary to her case) stopping the claimant's wages as the respondent did was a breach of contract, then that was a fundamental breach. It follows, in light of our decision on grounds 1 and 2, that the tribunal did not err in finding that there was a breach of the wages term (and given that it found that the stopping of his wages contributed to the claimant's decision to resign, and there is no suggestion that it should have found waiver), that the tribunal's finding that the claimant was constructively dismissed must stand, whether or not it erred by finding that there was also a breach of the *Malik* implied term.

90. Nevertheless, as the ground was argued, and for good order, we will set out our conclusions in relation to it.

91. First, the respondent is right that the tribunal accepted in the course of [54] that the system relied on drivers making full disclosure to the DVLA, and the respondent had a responsibility for making sure this had been done, if there was reason to doubt it, because of the obvious serious consequences that could ensue, and for which it might be held liable, were the claimant in fact not

wholly safe to drive. We also see some force in the submission that it was material in this regard that Dr Hall-Smith had not said in his reports that he himself had seen the evidence that appropriate disclosure had been made to the DVLA, even though the tribunal itself saw the DIZ2V form. We also see some force in the contention that the respondent's case that the claimant's explanation in his later email for why the letter was wrong: that a dizzy spell in November "never occurred" and the DVLA had told him that the "unsteadiness on Christmas Day" was "not reportable", did not provide it with the comfort it sought, should have been given some credence by the tribunal.

92. It can be said that these points together should have been treated as getting the respondent some way down the road by establishing reasonable and proper cause for (still) wanting to be satisfied that sufficient disclosure had been made to the DVLA, so that its sign-off could safely be relied upon.

93. However, for reasons we have already given in relation to ground 2, we do not think that these concerns (or any incorporated term) should have been regarded as giving the respondent proper cause for stopping the claimant's wages pending its receipt of whatever further comfort it felt it needed. In relation to the *Malik* implied term, it is important to note that the tribunal did not simply rely on the respondent having tabled, and asked the claimant to sign, the letter at the 9 September meeting (although the tribunal was critical of the respondent for having done that without forewarning). Specifically, the tribunal found, at the end of [55(g)], that the breach of the implied term arose from the combination of the stoppage of wages, the refusal to allow the claimant to return to work and the threat of disciplinary action. From this, and the general discussion in [54], it is clear that it was the overall way that the respondent followed up after the meeting on 9 September that the tribunal considered brought about the breach.

94. In our judgment, that view was properly reached by the tribunal. We do not agree that it substituted its own view for that of the respondent. Rather, the tribunal properly considered whether

the particular actions the respondent took had reasonable and proper cause, taking account of the options that were open to it to address any remaining concerns it had, notwithstanding the DVLA sign-off and latest OH reports. While asking Dr Hall-Smith to contact the DVLA might not, by itself, have borne fruit, the tribunal was plainly entitled to take the view that there were other options open to the respondent. But in any event the tribunal was entitled to take the view that it was wrong to threaten the claimant with disciplinary action, and for *that* reason refuse to permit him to return, unless or until he signed the letter. That is having regard, for example, to the evidence before it that he had indicated in his email that he wanted to get advice on the wording of the letter, and would sign an amended version that he was satisfied was accurate. Accordingly, though, in view of our decision on grounds 1 and 2, the outcome of the appeal does not, in the event, turn on it, ground 3 also fails.

Ground 6

95. Ground 6 challenges the tribunal's conclusion at [58] that there was no basis for the submission that the claimant's dismissal was for a reason related to capability or some other substantial fair reason. This is said to be perverse on the basis that it was clear that the respondent's entire case before the tribunal was that it required the claimant to sign the letter because it was concerned that he remained medically unfit to drive and had not made proper disclosure to the DVLA. It was not necessary for the respondent to have used the terms "capability" or "some other substantial reason" in correspondence, in order for it to contend that its reason for constructive dismissal (if so found) fell into one of these two legal categories. In oral argument Ms Davis suggested that "some other substantial reason" was a fair label for the claimant's refusal to sign the letter and general intransigence.

96. Mr Worthley submitted that this ground failed to engage with the tribunal's finding at [57] that the claimant resigned at least in part because of the respondent's failure to allow him to return except on terms which it had no reasonable and proper cause to impose, and because his pay was

stopped. There was no challenge to that core finding. The tribunal was not wrong to conclude that this reason did not amount to capability or some other substantial reason. He also submitted that this was in effect an appeal against a passage in the reasons, not against the finding or decision itself.

97. In oral argument Mr Worthley also submitted that in any event, even had the tribunal found that the claimant was constructively dismissed for a potentially fair reason, it plainly considered that the matter was unfairly handled, and in light of its findings would have in any event found the dismissal to be unfair.

98. Our conclusions on this ground are as follows.

99. It is long established that, where the employee has been constructively dismissed, then, for the purposes of an unfair dismissal claim, the reason for dismissal is taken to be the reason for the conduct of the employer that amounted to a fundamental breach of contract in response to which the employee resigned. In this case the tribunal found, as we have described, that it was the conduct of the respondent in the way that it followed up on the claimant not signing the letter that constituted a breach of both the express and implied terms of the contract, and in response to which he resigned.

100. It appears to us that, in light of the tribunal's findings of fact, the correct analysis was *not* that the reason for the respondent's conduct was a matter relating to capability, in the form of the claimant's fitness to drive. The tribunal did not find that this was the reason, or principal reason, for the respondent's actions, as such. Rather, the tribunal's findings indicate that, at best, concerns about the claimant's fitness to drive provided the context, or wider motive behind the specific conduct of the respondent that amounted to the fundamental breach. But the *reason* for that *particular* conduct by the respondent was the way that the claimant responded to being asked to sign the letter. It appears to us that the tribunal was right to regard *that* as not being a reason relating to capability. It was also

right to regard it as not falling into the category of some other substantial reason. The respondent did not contend that it had acted as it did because of a general impasse or breakdown in the relationship. Rather, as is reflected in the tribunal's finding that it threatened the claimant with disciplinary action, it was reacting to conduct on the claimant's part.

101. It therefore seems to us that, if the factual reason for dismissal found by the tribunal in this case fell into any category within section 98(1)(b) or (2) of the **1996 Act**, it was a reason relating to the claimant's conduct – section 98(2)(b). But that was not the case advanced by the respondent, and the tribunal did not err in not accepting that it was a reason relating to capability or some other substantial fair reason.

102. Ground 6 therefore fails.

103. For completeness, we also agree with Mr Worthley that, on the facts of this case, the tribunal would surely have found the dismissal in any event to be unfair for section 98(4) purposes. As we have already discussed in relation to ground 7, the tribunal's decision on *Polkey*, as far as it went, properly considered, without error, the chances that, whether by resignation or otherwise, including having regard to him being, in its words "in a number of respects … extremely difficult to manage", the claimant's employment would, at some point have ended without unfairness.

Outcome

104. The appeal is dismissed.