EMPLOYMENT TRIBUNALS

Claimant: **Mr T Holland**

Respondent: **A & A Coach Travel Ltd**

Heard at: **Leeds** **On: 24 January 2023**

Before: **Employment Judge Maidment**

Representation
Claimant: **Mr S Naughton, Counsel**
Respondent: **Mr J Fairchild, lay representative**

JUDGMENT having been sent to the parties on and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The claimant was employed by the respondent as a bus driver. The respondent provides bus and coach transport services - this included performing contracts to take pupils to and from local schools. The claimant resigned from his employment with the respondent.

2. The claimant brings claims of disability related harassment in respect, primarily, of comments which were alleged to have been made to and about him and, separately, of direct disability discrimination in respect of a threat to terminate his employment if he proceeded with an insurance claim in respect of damage to his car.

3. The claimant maintains that he was constructively dismissed and that dismissal constitutes a further act of unlawful discrimination.

4. The claimant brings complaints of victimisation reliant on this tribunal application presented on 3 April 2021 as a protected act. In terms of detrimental treatment, he says that, as a result, the respondent issued a civil claim on 19 January 2021 against the claimant in respect of vehicles

said to have been damaged by him, false complaints were made to the DVLA regarding the claimant's fitness to drive, a subsequent employer of the claimant was contacted suggesting that there had been complaints against the claimant and that his new employer was likely to receive more of the same and that correspondence of 4 March 2022 to his solicitor amounted to blackmail.

5. Finally, the claimant brings a complaint alleging an unauthorised deduction from wages in respect of pay he says has been withheld and for breach of contract (notice pay).

6. In terms of disability, the claimant relies on him suffering from Asperger's Syndrome. The respondent did not accept that the claimant was at all material times a disabled person.

7. The issues, as ultimately identified by Employment Judge Cox on 11 March 2022, are set out in an Annex to these reasons.

Procedural History

8. The issues were first identified at a preliminary hearing conducted by Employment Judge Jones on 5 November 2021. At that hearing an application by the respondent, represented by Mr J Fairchild, was granted for an extension of time to present its response, a draft response having been provided to the tribunal after the expiry of the time provided for the submission of a response. At that hearing orders were made for the provision by both sides of further information, for the inspection by the respondent of medical records relied on by the claimant in respect of his disability and for the respondent to submit an amended response providing full particulars of its defence to the factual allegations made in the grounds of complaint and to clarify if the issue of disability remained in dispute. The draft response from the respondent accepted at the hearing did not fully engage with the specific complaints made by the claimant.

9. At a further preliminary hearing conducted by Employment Judge Cox on 11 March 2022, the respondent was ordered to pay a deposit of £1000 as a condition of continuing to advance the argument that the claimant did not meet the definition of a disabled person at the relevant time. A further preliminary hearing was listed for 12 May 2022 to determine, amongst other things, disability status if the respondent paid the deposit.

10. In her reasons for the deposit order, Employment Judge Cox noted that the respondent accepted that the claimant had had a diagnosis of Asperger's Syndrome since 2002. She noted that Asperger's Syndrome amounts to a mental impairment. The respondent's position was that the condition did not have a substantial, that is to say, more than a minor or trivial, effect on the claimant's ability to carry out normal day to day activities. However, the claimant's GP had confirmed in a letter of 13 December 2017 that the claimant is heavily dependent on his father for social support, is unable to look after himself, has limited ability to understand others' emotions and has difficulty with social interaction.

11. At the hearing, Employment Judge Cox granted the respondent an extension of time to submit its amended response to 4 April. The respondent failed to provide its amended response before that deadline.

12. The respondent did not pay the deposit and the respondent's contention that the claimant did not meet the definition of a disabled person at the relevant time was therefore struck out by a Judgment issued by Employment Judge Cox dated 8 April 2022.

13. In any event, a further preliminary hearing took place on 12 May 2022 before Employment Judge Deeley. Employment Judge Cox had in advance provided that this hearing was to consider, amongst other things, whether the respondent's response should be struck out or and unless order issued due to the respondent's failure to comply with the tribunal's order regarding the submission of an amended response. Employment Judge Deeley considered that it was not appropriate to strike out the response, but that it was appropriate to issue an unless order. The respondent was given until 4pm on 19 May 2022 to submit its amended response. At the hearing, Mr Fairchild had informed the tribunal that he had prepared an amended response and sent it to the respondent for their review, but was unable to explain why it had not been submitted to the Tribunal in time for this hearing on 12 May. He confirmed to the tribunal that he would be able to submit the amended response shortly after this hearing.

14. The respondent emailed the tribunal with an amended response. Employment Judge Deeley noted that the unless order did not specify the matters to be covered in the response although they had been referred to in the reasons for the unless order and in case management orders following the preliminary hearing on 12 May 2022. She determined that the response would not be struck out at this point, but noted that the amended response still failed to provide full details of the respondent's defence to the claimant's factual allegations, amongst other deficiencies. The case was therefore listed for a further preliminary hearing on 6 September 2022 to consider whether the respondent's amended response ought to be struck out on the basis that it had no reasonable prospect of success or whether the respondent's defence be made subject to a further deposit order. At that subsequent preliminary hearing, Employment Judge Shepherd considered that the grounds of response had little reasonable prospect of success and ordered the respondent to pay a deposit by £1000 by 27 September as a condition of being permitted to continue to advance the grounds of response.

15. The respondent failed to pay the deposit such that by Judgement of 30 September 2022 the part of the respondent's response relating to the claimant's complaints of harassment, direct discrimination and victimisation was struck out. The final hearing had already been fixed for 24 January 2023 and it was directed that it would proceed to cover the claimant's remaining complaints of breach of contract and unauthorised deductions from wages which were defended. In addition, the tribunal would consider any remedy to be awarded to the claimant in respect of the complaints of harassment, direct discrimination and victimisation in circumstances where the respondent would only be permitted to participate in that part of the hearing to the extent permitted by the Employment Judge hearing the case.

Evidence

16. The claimant's representatives had provided a bundle of relevant documents numbering 238 pages. The respondent had a copy. The claimant and his father, Robert Holland, gave evidence to the tribunal. The tribunal allowed Mr Fairchild to cross-examine them, albeit, as regards the complaints of discrimination, limited to matters of remedy.

17. The respondent was then allowed to call witness evidence as described below. Both parties made submissions to the tribunal before it adjourned to deliberate.

18. Having considered all relevant evidence, the tribunal made the following factual findings.

Facts

19. The claimant was diagnosed with Asperger's Syndrome in his very early teens by Dr Wright at the York NHS Lime Trees Young Adolescent Assessment Centre. The claimant was said to have difficulties understanding the thoughts and feelings of other people. As a result, he was allocated a permanent mentor at school and was given extra time to complete his exams. He told the tribunal that he was bullied at school because of his condition. A letter from his GP dated 13 December 2017 stated that the claimant's main issues were around social interaction with limited ability to understand others' emotions. He also had problems with conversational reciprocity and imagination. He suffered from some preoccupations and mannerisms and, due to those behaviours, it was thought that he was likely to be bullied and was also thought to be quite vulnerable. He was said to be very dependent on his father for social support and being incapable of looking after himself. It was unlikely that the situation would improve because of the underlying diagnosis of Asperger's Syndrome.

20. The claimant had always wanted to be a bus driver. He commenced employment with the respondent as a bus driver initially in September 2016 disclosing to the respondent that he had Asperger's Syndrome. The claimant's father discussed his medical conditions with Mr Sweeting, who looked after HR matters for the respondent at that time.

21. The tribunal notes that the claimant had had a very brief break in his employment in 2019 but had returned to the respondent within a few weeks. The claimant said that the type of comments he received were not as bad in the earliest part of his employment as they subsequently became.

22. On starting his employment with the respondent, the claimant was invited to join its WhatsApp messaging group which included all members of staff. The claimant was targeted with insults about his disability, predominantly from Mr James Fairchild of the respondent. The claimant's uncontested evidence is accepted.

23. These included being referred to by Mr Fairchild as "special needs" on 24 May 2018, as a "cretin" on 17 December 2018 and as being one of "the two special needs ones" on 14 February 2019.

24. Mr Fairchild had also called the claimant an "illiterate cretin" on 22 January 2019. On another occasion on 27 June 2019 Mr Fairchild called the claimant an "imbecile" and referred to his "fucktardness". He referred to him as "the spakka" in September 2019 and on 24 November 2019 Mr Fairchild said to the claimant: "just do what you are told to do you special need waste of space". On 5 December 2020, Mr La Pilusa, the respondent's Transport Manager, referred to the claimant as "Mr Bean".

25. On another occasion, in response to a message announcing a group training session on helping passengers with disabilities, Mr Trevor Carr and Mr David Moore had an exchange of messages where Mr Carr stated: "We experience it every day working with" the claimant. Mr Moore responded asking whether that was discrimination and Mr Carr replied: "don't give a shit, it's true".

26. The tribunal has been taken to screenshots of a number of these messages. The respondent does not deny that they were sent.

27. The claimant gave evidence of a number of similar comments made through the WhatsApp group beyond those relied upon in his tribunal complaint. He said that he was an easy target and targeted in these messages because of his disability. Similar comments were also made to him face-to-face.

28. The claimant said that he would cry to himself when alone and dreaded going into work each day. He carried on without complaint hoping the behaviour would cease, but it never did. He did not tell his father because he felt embarrassed to do so and did not want to cause him any upset. He just kept telling his father that everything was fine.

29. On 12 November 2020, the claimant parked his own vehicle at work and was later in the day told that another employee had reversed into it. The claimant, when he discovered damage to his vehicle, said that the transport manager, Mr La Pilusa, was not interested. The claimant then described coming under pressure not to pursue an insurance claim. On 15 November 2020 he received a message from Mr La Pilusa asking if he was going through his insurance and was met with an aggressive response when the claimant asked Mr La Pilusa why he was interested. Mr La Pilusa threatened to dismiss the claimant if he didn't stop pursuing an insurance claim.

30. On 2 December 2020, the claimant was called into the office to speak to Mr La Pilusa. Mr La Pilusa was visibly angry and, when the claimant confirmed that he had gone through his insurers, he was told: "fuck off, you are sacked". Mr La Pilusa, however, said that the claimant could stop all that by cancelling his insurance claim. In fear, the claimant rang his insurers and attempted to do so. However, his insurers would not let him. When he reported this back to Mr La Pilusa, the claimant was given a pen and paper and transcribed, as dictated to him by Mr La Pilusa, an account (accepting blame) which would invalidate any insurance complaint.

31. The claimant had been trying that day to contact his father by telephone. His father had subsequently telephoned the police, when the claimant explained what was happening. When he got home, the claimant, with his

father's assistance, emailed his own resignation from the respondent's employment.

32. The claimant subsequently requested payment of outstanding wages by email. Mr La Pilusa responded saying that the claimant owed the respondent money for damage to their buses and he had subtracted outstanding monies owed from the claimant's wages. The claimant said that he was still owed the sum of £576 in wages.

33. The respondent does not dispute that the claimant would ordinarily have been due the sum of £576 in wages. Accordingy to clause 7.1 of a contract of employment signed by the claimant, the respondent had the right to deduct from wages any "losses suffered by it as a result of your negligence …". The tribunal has seen evidence of costs incurred in repairing vehicles driven at times by the claimant. It has seen no evidence, however, that the claimant was driving those vehicles when the damage was sustained. It has seen no evidence as to how the damage had been caused and certainly no evidence of the claimant's negligence. The claimant denies that he was responsible for any damage.

34. The respondent subsequently commenced but then discontinued civil proceedings against the claimant for the recovery of alleged damage to their buses.

35. On 14 December 2020, the claimant commenced new employment at Ross Travel. A few hours after he had started the owner asked him to come into the office for the claimant to be told that the owner had received an email stating that, in the claimant's previous employment with the respondent, claimant had caused a number of accidents. Whilst the claimant said that this was false, he was dismissed on account of this information.

36. In December 2020 the claimant received a communication from the DVLA stating that they had received information causing concern about the claimant's mental state and his standard of driving. He had now to take a full medical at his own expense with the warning that his right to drive could be at risk. The claimant described himself as being devastated and starting to cry at this threat which affected his ability to continue to work.

37. The claimant subsequently commenced work for Arriva in Selby who received an email of 17 March 2021 purporting to be from Ms Rebecca Lewis of the respondent. This was brought to his attention by his new employer. The message inferred that the claimant was a danger to women. The claimant contacted Ms Lewis who said she had no knowledge of the communication, but suggested that Mr La Pilusa was the author. The claimant subsequently left this new employment due to the negative impact on his health of the respondent's conduct.

38. The claimant told the tribunal that he was in regular contact with his GP practice. This resulted in him seeing a Dr Pickard and explaining the treatment he had received from the respondent. As a result, the claimant was referred for mental health counselling which lasted for in excess of 2 months. The claimant told the tribunal that the whole situation had damaged his health considerably. He was crying all the time, his stammer had

returned and he was unable to sleep. Whilst he was feeling slightly better now, he still worried about letters coming through the post and didn't answer his phone unless he knew who the caller was. He described himself as still depressed and not trusting anyone. He said that the last 2 years had been "horrible".

39. The tribunal heard from Mr Robert Holland and accepted his evidence that the claimant had been very depressed and completely withdrawn, as he still was to this day to some extent. He described his son as not the same anymore and still a cause of concern to him. He said that the claimant was constantly worrying and did not show an interest in things he used to.

40. The tribunal allowed Mr Fairchild appearing on behalf of the respondent to cross-examine the claimant. He questioned why the claimant had not raised complaints about the comments in the WhatsApp messaging, if he had been upset by them. The claimant said that he had said at the time that he did not get paid enough to put up with "this shit". Also, 2 members of staff, Marcus Welby and Trevor Carr had, he said stuck up for him and said that Mr Fairchild's comments were not appropriate. However, members of management had seen all of these comments including the transport manager and a director. He did not want to create problems at the time which might jeopardise his job. Mr Fairchild sought to suggest that the claimant had been involved in banter disparaging of others (particularly women) but put nothing specific to the claimant. He put to the claimant that the contract of employment gave the right for the respondent to set off damage to property against debts owed. The claimant's position was that he had not damaged any vehicles and there was no proof that he had. He said he had been accused without any evidence. Whilst he had driven the vehicles which had been damaged and repaired at the respondent's cost, others had driven those vehicles as well. The claimant said that he had left the respondent's employment for his own safety and had been advised by the police to leave work on his final day.

41. It was noted that the claimant had pursued his insurance claim and it had been determined that he was not at fault in any damage to his or the other vehicle involved. There was no evidence that he be negligent in respect of damage to any vehicle, his own or any owned by the respondent.

42. On 4 March 2022 Mr Fairchild emailed the claimant's solicitors saying that some of the evidence of the claimant's capabilities, to be relied upon in support of him being a disabled person, seemed fundamentally incompatible with the holding of a driving licence and that if he made his directors aware of this, they would be under a duty to disclose the information on health and safety grounds to both the Office of the Traffic Commissioner and DVLA as well as the claimant's then current employer. He continued that if, however, this tribunal claim against the respondent was discontinued by 11 March, "there will be no need for me to discuss any aspect of the case further with my directors".

43. The tribunal heard evidence from Mr Wayne Sweeting, former administration and personnel manager, which related primarily to the provision to the claimant of a contract of employment. He also told the tribunal that the claimant had not raised with him the messages that he had

been receiving. He said that the claimant had participated in banter about women which he had found himself to be unacceptable. He also said, without giving any detail, that he had witnessed the claimant having a few accidents. The tribunal heard also from Rebecca Lewis who gave evidence regarding primarily the claimant's meeting with Mr La Pilusa on 2 December. She said that he was angry and annoyed that the claimant was making an insurance claim. Mr La Pilusa was said, however, to have been calm with the claimant when informing him that he was already on a final written warning and he was tempted to tell him to leave and go home arising out of his unhappiness at the claimant's insurance claim. She said that she had told the claimant that she did not think his insurance claim was a good idea given the insurance premiums the respondent already paid out and worry that there could be job losses if those premiums increased.

44. Albeit without reference to any written witness statement provided, the tribunal heard evidence from Mr La Pilusa, transport manager, who said that there was a culture of banter amongst drivers in which the claimant participated. He also said, without giving any detail, that the claimant had damaged 2 vehicles and a caravan.

Applicable law

45. The classic test for a constructive dismissal is that proposed in **Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27CA** where it was stated:

> *"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. The employer is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".*

46. Here no breach of an express term is relied upon. The claimant asserts there to have been a breach of the implied duty of trust and confidence.

47. In terms of the duty of implied trust and confidence the case of **Mahmud v Bank of Credit and Commerce International 1997 IRLR 462** provides guidance clarifying that there is imposed on an employer a duty that he "will not without reasonable and proper cause conduct himself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee". The effect of the employer's conduct must be looked at objectively. The conduct complained of must have played a part in the decision to resign – it may, however, be

one of a number of causes of the resignation – see **Meikle v Nottinghamshire County Council 2005 ICR 1**.

48. On the question of affirmation, the tribunal derives assistance from the Court of Appeal decision in the case of **Buckland v Bournemouth University [2010] EWCA Civ 121**. There Jacobs LJ said:

> *"When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation."*

49. The complaint of harassment is brought pursuant to Section 26 of the Equality Act 2010 which states:

> *"(1) A person (A) harasses another (B) if -*
>
> *A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *the conduct has the purpose or effect of—*
>
> *violating B's dignity, or*
>
> *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *the perception of B;*
> *the other circumstances of the case;*
> *whether it is reasonable for the conduct to have that effect."*

50. Harassment will be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

51. A claim based on "purpose" requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the tribunal to draw inferences as to what the true motive or intent actually was. The person against whom

the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift from accuser to accused.

52. Where the claimant simply relies on the "effect" of the conduct in question, the perpetrator's motive or intention – which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect. The fact that the claimant is peculiarly sensitive to the treatment accorded him does not necessarily mean that harassment will be shown to exist.

53. The claimant complains also of direct discrimination because of disability. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which 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."*

54. In terms of a relevant comparator for the purpose of Section 13, *"there must be no material difference between the circumstances relating to each case".*

55. The Act deals with the burden of proof at Section 136(2) as follows:-

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions".*

56. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language.

57. It is permissible for the Tribunal to consider the explanations of the respondent at the stage of deciding whether a prima facie case is made out (see **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At the second stage the employer must show on the balance of probabilities that the treatment of the claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the

employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

58. Pursuant to Section 27 of the Equality Act 2010:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> *B does a protected act; ….*

59. To succeed in a complaint of victimisation, the detriment must be "because" of the protected act. There is an initial burden on the claimant to prove facts from which the tribunal could conclude, in the absence of any other explanation, that the respondent has contravened Section 27. The burden then passes to the respondent to prove that discrimination did not occur. If the respondent is unable to do so, the tribunal is obliged to uphold the discrimination claim. The question for the tribunal to ask is why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test.

60. It is again clear from the authorities that a person claiming victimisation need not show that the detrimental treatment was meted out solely by reason of the protected act. If protected acts have a "significant influence" on the employer's decision making, discrimination would be made out. It is further clear from authorities, including that of **Igen Limited –v- Wong [2005] ICR 931**, that for an influence to be "significant" it does not have to be of great importance. A significant influence is rather *"an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial."*

61. The time limit in complaints of discrimination is provided for at section 123 of the Equality Act 2010. It is a period of three months starting with the date of the act complained of, but also "such other period as the employment tribunal thinks "just and equitable". Conduct extending over a period of time is to be treated as done at the end of the period.

62. Applying these principles to its factual findings, the tribunal reaches the following conclusions.

Conclusions

63. When a response is struck out, by Rule 37(3) of the Employment Tribunal's Rules of Procedure 2013, Rule 21, which applies where no response is lodged, then applies. If a determination cannot be made on the papers, then a hearing is listed to take place before an Employment Judge. The respondent is only permitted to participate to the extent permitted by the Judge. That is the situation the respondent faces in respect of the complaints of unlawful discrimination, harassment and victimisation.

64. The tribunal is satisfied that at all material times the claimant was a disabled person by reason of him suffering from Asperger's Syndrome. There is clear evidence of a diagnosis in respect of a lifelong condition which will not improve through any form of treatment or medication. The claimant's difficulties in terms of day-to-day activities are accepted from his own evidence and from the comments of doctors who have seen him. He clearly has difficulty with social interaction, understanding others and can only live his life effectively with substantial support, not least from his father. The effect on his ability to carry out day to day activities is substantial, certainly in the sense of them not being minor or trivial. The limbs of the test for disability status in Section 6 of the Equality Act 2010 are all satisfied.

65. The tribunal has accepted the claimant's evidence regarding the complaints of unlawful discrimination. At the very least, the claimant has adduced facts from which the tribunal could reasonably conclude there to have been the acts of discrimination and harassment alleged.

66. The claimant's evidence and the tribunal's factual findings arising from it is of the claimant having received the abuse set out at paragraphs 1 – 9 of Employment Judge Cox Annex under the heading of harassment. The respondent has never sought to deny the comments themselves. The conduct found is of unwanted conduct relating to disability – of clear abuse and belittling of the claimant related to his impairment of Asperger's Syndrome. The tribunal concludes that such treatment of the claimant created a hostile, humiliating and offensive environment for him in the workplace, whatever the actual purpose was of the comments.

67. In terms of the complaints of direct disability discrimination, the tribunal has accepted that Mr La Pilusa sought to intimidate and threaten the claimant if he did not withdraw an insurance claim against the respondent for damage to his car. It has also concluded that he instructed the claimant to cancel his insurance claim and to write a letter Mr La Pilusa dictated saying that the claimant himself was responsible for the damage to his own and the respondent's vehicle. The evidence is such that the claimant has proven facts which the tribunal could reasonably conclude a difference in treatment because of his disability. Mr La Pilusa clearly considered that the claimant would be particularly susceptible to the form of pressure he exerted and to be suggestible enough as to write a false confession regarding damage to the vehicles. The tribunal considers that the burden of proof shifts so as to require the respondent to provide an explanation that the claimant's disability was in no sense whatsoever the reason for the way Mr La Pilusa treated the claimant. The respondent in the circumstances does not and cannot provide a non-discriminatory explanation for its treatment of the claimant such that the complaints of direct discrimination must succeed.

68. Turning to the complaint of victimisation, there is no doubt that this tribunal complaint submitted by the claimant was a protected act given the complaints of unlawful discrimination within it. The evidence is then of a civil claim been brought in respect of vehicles alleged to been damaged by the claimant, which was then discontinued by the respondent in circumstances, the tribunal is satisfied, where there was no supportive evidence. The tribunal concludes that the respondent did also contact the DVLA and the claimant's new employer with the intention of making any future

employment, particularly in a driving position, difficult for the claimant. The letter to the DVLA and the claimant's new employer are alternatively pleaded as complaints of harassment related to disability. The tribunal considers that the correspondence from Mr Fairchild to the claimant's solicitor on 4 March 2022 is to be categorised as an attempt to blackmail the claimant into dropping his tribunal proceedings and a further act of detriment. In all cases, the claimant has proven facts from which the tribunal could reasonably conclude that the reason for the aforementioned actions were the claimant's presentation of his tribunal complaint. Alternatively, the tribunal could reasonably conclude that the contact with the DVLA and the claimant's new employer were related to his disability. The respondent again has not provided an explanation that its actions were untainted by considerations of the claimant's disability and/or his bringing of the tribunal proceedings.

69. The tribunal is mindful of the requirement for complaints of discrimination to be brought within 3 months of the acts complained of. The claimant's complaint to the tribunal was lodged on 3 April 2021 following the termination of the claimant's employment on 2 December 2020 and a period of early conciliation from 3 December to 6 January 2021. The tribunal is clear that there was treatment of the claimant of a very similar nature on an ongoing basis and extending over a period of time up to (and indeed beyond) the termination of his employment. Certainly, the claimant's complaint about the comment made to him by Mr La Pilusa on 5 December 2020 is within the applicable time limit as are the complaints of victimisation also brought in the alternative as further complaints of harassment. The comments made to and about the claimant (and complained of as acts of harassment) form part of a continuing course of conduct up to 5 December 2020. They are in time. No time limit issues arise in respect of any of the complaints of direct discrimination and victimisation. In any event, in circumstances where the claimant's disability impairs his ability to understand the thoughts and feelings of others, where he is clearly a vulnerable person and where he did not feel able to tell his father about the treatment he had received, where his father was not indeed aware of such treatment until after the claimant's leaving employment, it would have been just and equitable to extend time.

70. The claimant's complaint of disability related harassment, direct disability discrimination, including of a discriminatory dismissal and victimisation was therefore succeed. The claimant was dismissed in breach of contract. The aforementioned acts of discrimination amount to a breach of trust and confidence in response to which the claimant resigned. Viewed objectively they were likely to destroy the relationship of trust and confidence.

71. The claimant did also suffer an unauthorised deduction from wages. There is no dispute that the claimant would have been due wages of £576 which remain unpaid. The respondent had the right to deduct monies from wages to recover losses caused by the claimant's negligence. The respondent has not, however, proven that it suffered loss due to the claimant's negligence. The only evidence before the tribunal points to the claimant having not been at fault, including the recovery from the respondent's insurers in respect of damage caused to the claimant's own vehicle. The respondent is therefore

ordered to pay to the claimant the gross sum of £576 in respect of the unauthorised deduction.

Remedy for discrimination/victimisation

72. Awards of compensation in claims of discrimination are governed by Section 124 of the Equality Act 2010 which gives to the tribunal the same power to grant any remedy which could be granted in proceedings in tort before the civil courts. Compensation based on tortious principles aims to put the claimant, so far as possible, into the position that she would have been in had the discrimination not occurred - see **Ministry of Defence v Cannock [1994] ICR 918** – essentially a "but for" test in causation when assessing damages flowing from discriminatory acts.

73. As regards injury to feelings arising out of the detriments found to be proven, according to **Prison Service and others v Johnson [1997] ICR 275** the purpose of an award for injury to feelings is to compensate the claimant for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. In accordance with **Ministry of Defence v Cannock** the aim is to award a sum that, in so far as money can do so, puts the claimant in the position she would have been had the discrimination not taken place. Pursuant to **Corus Hotels Plc v Woodward [2006] UK EAT/0536/05**, an Employment Tribunal should not allow its feelings of indignation at the employer's conduct to inflate the award made in favour of a claimant.

74. The tribunal was referred to the Vento guidelines (derived from **Vento v Chief Constable of West Yorkshire 2003 ICR 318**) and to the guidance given in that case where reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band was to be used for serious cases which did not merit an award in the highest band. Awards in the lower band were appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. Nevertheless, the Tribunal considers that the decisive factor is the effect of the unlawful discrimination on the claimant.

75. The bands originally set out in **Vento** have increased and have given rise to Presidential Guidance which has re-drawn the low band for claims brought on or after April 2019 as ranging from £900 - £8,800 and the mid band from £8,800 at the lower end to £26,300 at the top end.

76. The evidence was that the claimant had suffered 8 weeks' loss of earnings flowing from his discriminatory dismissal. The declared weekly net wage on his tribunal application form was £270 – a figure which is not disputed by the respondent. His loss of earnings, therefore, amount to a total of £2,160.

77. From that figure there falls to be deducted self-employed earnings the claimant has received of £516.78 giving amount ordered to be paid by the respondent of £1643.22 to which must be added interest from a midpoint of 30 December 2020 (and therefore for a period of 107 weeks to the date of this hearing) giving an amount of interest payable of £270.50.

78. As to injury to feelings, the claimant's evidence as to the effect the treatment had on him is largely unchallenged. There is no evidence, however, of him attending medical appointments or of medication prescribed directly resulting from the affect on him of the respondent's treatment. There is evidence that the claimant was able, shortly after the termination of his employment with the respondent, to gain other work elsewhere. However, the claimant did eventually leave a subsequent role due to continuing stress the respondent's actions were causing him.

79. The claimant has described himself as not being able to express his concerns during his employment, to him crying when alone, him being devastated when questions were raised over his fitness to drive and being extremely hurt by suggestions to a new employer that complaints had been made against him. He has been referred to counselling for his mental ill-health. He described himself as being unable to sleep and his stammer returning and him still even now feeling depressed. His father has described his behaviour as having changed and the claimant being withdrawn and not showing an interest in things and constantly worrying.

80. The claimant's upheld complaints include a pattern of frequent name-calling and abuse related to his disability, him being threatened with dismissal and the respondent seeking to take advantage of him. He was constructively dismissed. Thereafter he suffered victimisation in court proceedings being taken against him, being reported to the DVLA and in the respondent writing to a new employer putting the claimant's employment in jeopardy.

81. This treatment of the claimant and its effect must be compensated for at least in the middle of the mid-Vento band without indeed consideration of the complaints of victimisation. Those acts of victimisation did increase/compound the injury to the claimant's feelings and can also be considered as aggravating conduct justifying a high level of compensation.

82. In all the circumstances an appropriate total award for injury to feelings which takes full account of the aggravating features of the respondent's conduct should be made in the sum of £25,000. To this must be added interest over a period of 111 weeks from the date of the termination of the claimant's employment in the further sum of £4069.23.

Costs

83. The tribunal having given its Judgment and reasons, the claimant made an application for costs.

84. Pursuant to Rule 76 of the Employment Tribunals Rules of Procedure 2013 a tribunal may make a costs order and shall consider whether to do so where it considers that a party or its representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing proceedings or the way that the proceedings have been conducted. The tribunal must first ask itself whether a party's conduct falls within the ambit of Rule 76. If so, it must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party. Costs in employment tribunals remain the exception rather than the rule.

85. In the case of **McPherson v BNP Paribas 2004 ICR 1398 CA** Lord Justice Mummery expressed the view that it is not punitive and impermissible for a tribunal to order costs without confining them to those attributable to that conduct. The tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that was not the same as requiring the receiving party to prove that specific unreasonable conduct by the other party caused particular costs to be incurred. While this view was clarified by him in the subsequent case of **Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420**, to recognise that causation is not irrelevant when deciding the amount of costs, he confirmed that the discretion to order costs involves looking at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct and in doing so to identify the conduct what was unreasonable about it and what effects it had.

86. The application here is on the basis of the respondent having behaved in a disruptive, vexatious or unreasonable manner. Reference was made to the need for 4 preliminary hearings involving a disproportionate amount of preparation on the claimant's behalf entirely due to the behaviour of the respondent in providing no factual response, ignoring directions and requiring the claimant to incur further costs. Whilst a single preliminary hearing might have been reasonably necessary in a case such as this the further ones ought not, it is submitted, to have been.

87. Reliance, in terms of the respondent's behaviour, was then placed upon the respondent indulging in abusive name-calling. This was a reference to a chain of correspondence regarding the disclosure of documentation. The claimant's solicitor corresponded with Mr Fairchild stating that the claimant was not in possession of certain documentation, asking that copies of the employment contract and payslips were made available. He did so in an ordinary polite and unconfrontational tone. Mr Fairchild responded by email of 20 October 2022: "YES HE DOES. He is lying – bring it to the tribunal's attention, and we will show evidence to prove that HE and You are both LYING FUCKERS. Going to be making a formal complaint to the SRA about both you and your firm once this matter has been disposed of." Mr Fairchild's submission today in response was that this (admitted) abuse had been provoked.

88. In terms of quantification of costs, there was some third-party funding for costs such that, whilst time spent on the matter represented in excess of £20,000 in terms of costs, only £2000 were recoverable by the claimant's representatives. In such circumstances the claim for costs was limited to £2000.

89. The tribunal considered that its discretion to award costs was engaged. The respondent's behaviour ought certainly to be classified as unreasonable. The tribunal understood that the respondent had every right to try to defend proceedings and that in one sense by making a complete mess of doing so in terms of the orders the tribunal found necessary to make against it and the ultimate striking out of the response, it had made it easier for the claimant to succeed in his complaints. On the other hand, the tribunal has never seen any denial of, in particular, the abusive behaviour directed at the claimant during his employment in circumstances where if this claim could

not be defended it ought to been resolved much more quickly than the very slow progress that has brought the case to a final hearing only today. The tribunal refers to the history of these proceedings set out above.

90. The tribunal also has particular regard to the abusive email quoted above. If that behaviour is insufficient to sound in an award of costs, it is difficult to imagine how high the hurdle must be. Based on the totality of the respondent's unreasonable behaviour and its affect, the tribunal considered that an award in the sum of £1500 was appropriate in all of the circumstances of this case.

Employment Judge Maidment

Date 20 February 2023

ANNEX

The Claimant alleges that he is a disabled person as a result of having Asperger's syndrome.

Harassment

The Claimant alleges that he was subjected to the following unwanted conduct related to his disability, contained in WhatsApp posts.

1. On 24 May 2018 James Fairchild referred to the Claimant as "special needs"

2. On 17 December 2018 James Fairchild referred to the Claimant as a "cretin"

3. On 14 February 2019 James Fairchild referred to the Claimant as being one of "the two special needs ones"

4. On an unknown date, in response to a message announcing a group training session on helping passengers with disabilities, Trevor Carr and David Moore had an exchange as follows: Mr Carr: "We experience it every day working with" the Claimant. Mr Moore: "Is that discrimination, Trev". Mr Carr: "Don't give a shit its true".

5. On 24 November 2019 James Fairchild said to Claimant "Just do what you are told to do you special need waste of space"

6. On an unknown date, James Fairchild called the Claimant an "imbecile" and referred to his "fucktard-ness"

7. On an unknown date, James Fairchild called the Claimant an "illiterate cretin"

8. On an unknown date, James Fairchild referred to the Claimant as "the spakka"

9. On 5 December 2020 Mr La Pilusa referred to the Claimant as "Mr Bean"

Direct discrimination

The Claimant alleges that he was subjected to the following detriments because of his disability and that a person without his disability would not have been treated in this way. **In the alternative, he alleges that these amount to harassment related to his disability.**

1. On an unspecified date, Mr La Pilusa indicated he would sack the Claimant if he were to proceed with his claim against the Respondent for damage to his car, because of the resultant increase to the Respondent's insurance premiums.

2. On 2 December 2020, Mr La Pilusa instructed the Claimant to contact his insurers and cancel his claim in relation to repairs to his car or there would

be serious consequences. He also instructed the Claimant to write a letter on the spot confirming that he was responsible for the damage to his own vehicle and damage to the Respondent's vehicle.

The Claimant alleges that this conduct by the Respondent amounted to or contributed towards a breach of the implied term of mutual trust and confidence in response to which he resigned, and that this was therefore a directly discriminatory constructive dismissal. The other conduct that contributed towards the breach of trust and confidence and led to the Claimant's resignation was that the Respondent initially agreed to pay for the damage to the Claimant's car but then refused to do so.

Victimisation

The Claimant alleges that the following were protected acts:

1. his father's report to the police on 2 December 2020 about the Respondent's conduct [not pursued as a protected act]
2. the presentation of this claim on 3 April 2021

The Claimant alleges that the Respondent subjected him to the following detriments because of protected acts:

1. The Respondent failed to pay him his wages [no longer pursued]

2. The Respondent issued a civil claim against the Claimant for damages in respect of vehicles alleged to have been damaged by him.

3. On an unknown date, the Respondent emailed the DVLA reporting the Claimant for consideration of medical investigation and possible driver conduct consideration.

4. On 17 March 2021 the Respondent sent an email to the Claimant's new employer referring to regular complaints having been made about the Claimant whilst employed by the Respondent and saying "you will start receiving more of these as time goes by".

5. The Claimant alleges that on 4 March 2022 the Respondent sent an email to the Claimant's representative threatening to report the Claimant to DVLA, the Office of the Traffic Commissioner and his current employer if he did not withdraw his claim.

Detriments 3 and 4 are also alleged to be harassment related to disability.

Unauthorised deductions

The Claimant alleges that the Respondent has failed to him £576 in wages that are properly payable to him.

Notice pay

The Claimant alleges that, as a result of constructively dismissing him, the Respondent owes him damages for breach of his contractual right to notice of termination of employment.