Case No: 2410321/2021
2410477/2021
2410942/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr S Whittle

Respondent: R Banks & Son Funerals Limited

HELD AT: Manchester **ON:** 6, 7 and 8 March 2023 (chambers discussion on 15 May 2023)

BEFORE: Employment Judge Johnson

MEMBERS: Mr B Rowen
Ms C Gallagher

REPRESENTATION:

Claimant: Unrepresented
Respondent: Mr C Johnson (consultant)

JUDGMENT

The judgment of the Tribunal is that:

(1) The claimant was disabled in accordance with section 6 Equality Act 2010 by reason of ulcerative colitis during his employment but not Crohn's disease.

(2) The complaint of discrimination arising from a disability contrary to section 15 Equality Act 2010 is not well founded and is unsuccessful.

(3) The complaint of constructive unfair dismissal contrary to Part X Employment Rights Act 1996 is not well founded and is unsuccessful.

(4) The complaint of an unlawful deduction from wages contrary to section 13 Employment Rights Act 1996 is not well founded and is unsuccessful.

REASONS

Introduction

1. These proceedings arose from the claimant's employment as a funeral service operator which commenced on 16 August 2016 (the respondent says 15 August 2016) and which ended with his resignation on 10 June 2021, (the respondent says the effective date of termination was 8 July 2021).

2. The claimant presented his first claim form to the Tribunal on 26 August 2021 (Case No: 2410321/2021) following a period of early conciliation from 16 July 2021 to 19 July 2021 bringing complaints of unfair dismissal and 'other' payments.

3. The second claim form was presented on 1 September 2021 (Case No: 2410477/2021) relying upon the existing early conciliation certificate bringing complaints of unfair dismissal and disability discrimination.

4. The third claim form was presented on 7 September 2021 (Case No: 2410942/2021), again relying upon the existing early conciliation certificate and bringing complaints of unfair dismissal and other payments.

5. The respondent presented a response to the first claim on 7 September 2021, to the second claim on 4 October 2021 and to the third claim on 17 February 2021.

6. The case was subject to case management and was the first preliminary hearing case management (PHCM), took place before Employment Judge (EJ) Dunlop on 8 March 2023. EJ Dunlop recorded amongst other things, that all 3 claims be considered together.

7. A further PHCM took place before EJ Batten, and it was noted that the claimant relied upon the impairments of ulcerative colitis and Crohn's disease as disabilities in relation to his disability discrimination complaint and in accordance with section 6 Equality Act (EQA). The list of issues was discussed (see Issues section below), and the complaints of constructive unfair dismissal, direct discrimination, harassment and a failure to make reasonable adjustments in relation to disability and an unlawful deduction from wages.

8. On 11 November 2022 the respondent confirmed that it accepted the claimant as being disabled by reason of ulcerative colitis, but not Crohn's disease at the material time in this case.

Issues

9. The PHCM before EJ Batten on 30 September 2022 prepared a framework for the list of issues to be used in this case, (pp76-80). The claimant was ordered to ordered to provide a list of allegations in relation to this framework,

but at the date of the final hearing, he had only provided an email containing a list of incidents/acts, (pp84-99).

10. Accordingly, we began day 1 of the final hearing without a finalised version of the list of issues and it was necessary to spend some time discussing this with the parties before we could proceed to hear evidence.

11. The finalised list of issues was therefore as follows:

Constructive unfair dismissal

a) Was claimant dismissed?

b) Did the respondent do the following things:

   i) On 4 June 2019 – Georgina Bennett sent malicious texts to Brian Halliwell.
   ii) On 12 June 2019 – Wayne Morton made malicious comments
   iii) On 30 October 2019 – Paul Heaton prevented claimant from going to friend's funeral.
   iv) In November 2019 – the claimant was treated differently by various members of the respondent's staff in connection with measures arising from Covid 19.
   v) On 12 December 2019 – the claimant alleges a verbal attack by Gareth Jones concerning claimant's PPE (personal protective equipment).
   vi) On dates during June to July 2020 - the claimant alleges that he was taken off driving for funerals.
   vii) On 21 July 2020 – the claimant alleged a verbal attack by Gareth Jones regarding *'on call'* rules.
   viii) On 12 August 2020 – the claimant was allegedly tasked to attend two funerals with insufficient time to travel between two venues
   ix) On days between September 2020 to 10 June 2021 – the claimant had a period of sickness absence and was not being contacted by management (the claimant arguing that the lack of contact by the respondent's managers being the last straw which led to resignation on 10 June 2021)

c) Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
   i) Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and,
   ii) Whether it had reasonable and proper cause for doing so.

d) Was any breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

e) Did the claimant resign in response to any breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

f) Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that he chose to keep the contract alive even after the breach.

g) If the claimant was dismissed, what was the reason or principal reason for dismissal – i.e. what was the reason for the breach of contract?

h) Was it a potentially fair reason?

i) Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Disability (section 6 EQA)

a) It is accepted by the respondent that claimant suffered from ulcerative colitis at the material time being when the alleged discrimination took place.

Discrimination arising from disability (section 15 EQA)

a) Did respondent treat the claimant unfavourably by:

    i) Failing to keep any and/or regular contact with the claimant during his period of sickness absence from 27 September 2020 until 10 June 2021.

b) Did the following things arise in consequence of the claimant's disability?

    i) The claimant's sickness absence

c) Was the unfavourable treatment because of any of those things?

d) Did the respondent constructively dismiss the claimant because of that sickness absence?

e) Was the treatment a proportionate means of achieving a legitimate aim? The respondent says its aims were:

    i) Limit the physical contact to claimant by reason of Covid restrictions and/or claimant's anxiety and depression.

f) The Tribunal will decide in particular:

i) Was the treatment an appropriate and reasonably necessary way to achieve those aims?
ii) Could something less discriminatory have been done instead?
iii) How should the needs of the claimant and the respondent be balanced?

g) Did the respondent know or could it reasonably have been expected to know claimant had disability? From what date.

Unauthorised deductions

a) Did the respondent make unauthorised deductions from the claimant's wages by failing to pay the claimant in respect of lieu days untaken at the termination of employment, *(the claimant relies upon p297 of bundle*)?

(i) 23/34 June 2018
(ii) 28/29 June 2018
(iii) Bank Holiday 27 August 2018
(iv) 8/9 September 2018
(v) 13/14 October 2018
(vi) 20/21 October 2018
(vii) 1/2 December 2018
(viii) 8/9December 2018

b) How much is the claimant owed?

Remedy

a) How much should the claimant be awarded?

12. Note the claimant confirmed that although EJ Batten had identified possible discrimination complaints of direct, harassment and reasonable adjustments, he did not seek to apply any of the alleged incidents/acts to those forms of discrimination. Also, the claimant had relied upon the conditions of ulcerative colitis and/or Crohn's disease. However, the respondent accepted that he was disabled at the material time solely in relation to the ulcerative colitis and the claimant confirmed that this would be the only disability relied upon in this case.

Evidence used

13. The claimant gave witness evidence and provided a witness statement from Mrs Whittle. He also provided a witness statement of his colleague Christopher Cooke, whose statement was unsigned, and he did not attend the hearing. Accordingly, no evidential weight could be applied to this document.

14. The respondent relied upon the witness evidence of the following individuals who gave oral evidence during the final hearing in the following order:

a) Paul Andrew
b) Gareth John Jones
c) Mrs Carina Halliwell Jones (HR Manager and initial grievance officer)
d) Mrs Jennifer Hailliwell (grievance appeal manager)

15. The Tribunal was provided with a paginated hearing bundle which had been prepared by the respondent and was made available to the claimant. Additional information requested 24 November 2022, reply 4 December 2022 (pp103-4). Additional documents were provided and were added to the bundle as pages 362 to 5 relating to staff days of work and the claimant's holiday request forms.

Findings of fact

<u>The respondent</u>

16. The respondent ('Banks') is a family owned funeral business although operate as a limited company. They are based in the Wigan and Preston area, and they operate 12 funeral homes.

17. As a reasonably large employer the company has in place policies and procedures, contained within an employee handbook made available to all employees and extracts of which were included in the hearing bundle.

<u>The claimant</u>

18. The claimant ('Mr Whittle') commenced working for the respondent as a funeral service operative and began his employment with them from 15 August 2016. He was provided with a contract of employment on 18 January 2017 and he signed this document on 13 March 2017, (pp105 to 110 bundle). No issues arose from the date when this contract was provided to Mr Whittle, and he confirmed that he signed the document.

19. Mr Whittle's normal place of work was Pemberton near Wigan, but he was expected to work at other locations as required. He was paid an hourly rate for 42.5 hours per week. Overtime was payable for any work done over these hours, with weekday overtime paid time and a quarter, Saturdays time and a half and Sundays double time. There was a call out rota which applied to all of the operatives to provide emergency cover. There was a standby allowance of £25 per week night and £30 per weekend night. Each call out involved a payment of £25.

20. His hours of work were normally 8.30am to 5.00pm Monday to Friday with a break of 1 hour. *'Reasonable' o*vertime and on call was a requirement of the contract.

21. The employee handbook provided in section 4 that in relation to sickness absence, an employee should notify a member of senior management by

phone at least one hour before the start of the first day absence. An ongoing duty to keep the employer notified of long sickness was required, but there was no formal provision for welfare calls or other sickness management steps to be taken during an absence period, other than to seek medical information, (p111).

22. The other extract of the employee handbook included within the bundle was from chapter 8 relating to an equal opportunities and discrimination policy which stated that Banks will not tolerate any harassment or bullying, (p123-4).

23. Mr Whittle had a history of ulcerative colitis and made Banks aware of this condition when he commenced his employment. This required routine check ups with the hospital and the occasional flare up. Banks confirmed that they were aware that Mr Whittle suffered with ulcerative colitis.

<u>Grievances</u>

24. Mr Whittle complained of a series of incidents as part of a grievance which he raised during his sickness absence which began from 29 September 2020, following an admission to hospital. He initially wrote to Mrs Halliwell-Jones (HR Manager) on 7 December 2020 and questioned the calculation of his contractual sick pay entitlement, (p126). She replied on 10 December 2020 confirming that there had been an oversight and that this would be corrected and included in his December wages. This appeared to resolve the matter in question, (p127).

25. Mr Whittle then raised a further grievance by letter on 11 January 2021 referring to bullying and discrimination in the workplace during the previous 12 to 18 months. It did not deal with specific allegations but the relevant events which he eventually disclosed during the next few months which form part of the list of issues are discussed in turn below, (pp128-129). They were the subject of a detailed grievance investigation by Ms Halliwell Jones and where she interviewed many members of staff including Mr Whittle with 16 separate interviews involving 13 members of staff between 5 March to 23 March 2021, (pp172-207)

26. The grievance appeal took place before Mrs Jennifer Halliwell, and the first hearing took place on 13 April 2021 with a second hearing taking place on 11 May 2021 (rescheduled from 5 May 2021 at Mr Whittle's request). She explained that she wanted to clarify some of the information which she had before reaching a final decision.

27. Sam Marshall of Unite represented Mr Whittle at both the initial grievance and the two appeal hearings. We noted that the appeal hearing was particularly ill tempered and became increasingly so.

<u>On 4 June 2019 – allegation that Georgina Bennett sent malicious texts to Brian Halliwell.</u>

28. This matter was discussed at the grievance hearing on 1 March 2021, (p157). Ms Bennett was described by Mr Whittle as the *'admin arranger'* at the Leigh funeral office and Mr Whittle said she sent a text to Mr Halliwell the managing director on 4 June 2019 about the hearse which Mr Whittle had been driving that day, was dirty. Ms Halliwell Jones found in her grievance decision that there was a legitimate concern being expressed by Ms Bennett about the condition of the hearse at the time. However, she noted that once the hearse was checked no disciplinary or other action arose from this incident. Indeed, during his evidence, Mr Whittle did not dispute that the hearse was dirty on the day in question. The Tribunal did not hear evidence from Ms Bennett, but on balance, based upon the evidence that was available before us, we are unable to find that Mr Whittle was subject to any behaviour which (as he put it), *'undermined my professionalism' (pp208-9).*

On 12 June 2019 – allegation that Wayne Morton made malicious comments

29. There was limited evidence concerning this allegation and Mr Whittle said that his colleague Mr Morton was talking behind his back. They were considered at the grievance hearing and Ms Halliwell Jones found that this was investigated and there was no evidence that Mr Morton made any such comments about Mr Whittle, (pp208-9). On balance, we were unable to accept that these comments were made as alleged by Mr Whittle.

On 30 October 2019 – Paul Heaton prevented the claimant from going to a friend's funeral.

30. During the grievance, Mr Whittle asked Mr Halliwell if he could attend his friend's funeral in October 2019. Mr Halliwell confirmed that he had no objections to this, providing his work was covered. Paul Heaton (the funeral services operations manager), then said he could not allow him to go because *'he could not deviate from the running sheet'.* This was resolved when Mr Whittle obtained clearance from another manager, and he accepted that he actually attended the funeral. Despite an allegation that there was a deliberate attempt to stop Mr Whittle attending the funeral, we did not hear any convincing evidence that there was malicious intent on the part of Mr Heaton, and he had assumed he would book the time off if attending a funeral on a personal matter.

In November 2019 – the claimant was treated differently by various members of the respondent's staff in connection with measures arising from Covid 19.

31. This allegation was incorrectly described by Mr Whittle in his further particulars as arising from November 2019. The respondent says it was actually relating to events arising in June 2020 and we accept that this must be correct given that the Covid pandemic did not reach the UK until March 2020. It involved Banks asking for volunteers to work extra hours given the understandable increase in work arising from Covid. They were unable to offer overtime enhancements but promised a bonus once the company's financial position became clearer. Mr Heaton gave convincing and reliable

evidence concerning this matter and explained that there was no obligation placed upon employees to volunteer and 3 or 4 chose to do so. Mr Whittle in cross examination said that 4 or 5 volunteered and 3 or 4 did not, (one of the latter we understood to be Mr Whittle). Mr Heaton asserted that those who did not volunteer were treated no differently and in absence of any convincing evidence to the contrary we accept that a genuinely voluntary scheme was in place and Mr Whittle was not treated unfavourably.

<u>12 December 2019 – the claimant alleges a verbal attack by Gareth Jones concerning claimant's PPE (personal protective equipment).</u>

32. Mr Whittle asserted that this incident arose in December 2019, but we find that this cannot be correct as it preceded the arrival of the Covid pandemic to the UK in March 2020 and has already been considered above. Nonetheless, even though it was not possible to establish a precise date, an incident took place between late March 2020 and before Mr Whittle's sickness absence in September 2020 and there no dispute that a conversation took place relating to the wearing of PPE.

33. Mr Whittle said that he came into work with a paper mask and was challenged about not wearing the more substantial rubber mask (which included a filter) and which had been issued to all operatives with instructions from an eternal company concerning how they should be worn. Gareth Jones when challenging him, was told by Mr Whittle that he had a left the mask in the car and Mr Jones raised the matter with Mr Heaton

34. Seven of the eight witnesses interviewed by Ms Halliwell Jones during the grievance confirmed that they had been issued with the rubber masks and knew how to wear them. She was satisfied that it was a properly implemented by Banks.

35. He was told by Mr Heaton that Gareth Jones wanted Mr Whittle to wear the issued mask as instructed. Mr Whittle conceded in evidence that he replied *'I don't give a s**t what he says'* but accepted no disciplinary action arose.

36. Mrs Halliwell Jones found there was no evidence of threatened disciplinary action and we did not hear convincing evidence of a verbal attack. It may have felt like that to Mr Whittle, but we find that it was more connected with him being unhappy about being instructed to wear this PPE. It was a reasonable and understandable instruction considering the circumstances surrounding Covid at that time.

<u>On dates during June to July 2020 - the claimant alleges that he was taken off driving for funerals.</u>

37. Mr Whittle's reasons for raising this as a grievance was that he was being allocated to fewer jobs as a driver. We accepted from the evidence available that all funeral service operatives had the same job description and could be asked to perform a variety of roles including driving, pall bearing, dressing

bodies, travelling to mortuaries and other building coffins/other backroom functions. The duties made no difference to pay. Although it was understood that gratuities might be received when attending funerals, the practice at Banks was that they would be pooled and used to fund social events. A document was produced (358 to 360) which showed data for each operative's allocation to driving duties and there was no obvious disadvantage experienced by Mr Whittle during the June to August 2020 period.

<u>On 21 July 2020 – the claimant alleged a verbal attack by Gareth Jones regarding *'on call'* rules.</u>

38. A staff meeting took place on 21 July 2020 with all the funeral service operatives and at this meeting, Mr Jones expressed his frustration concerning the *'on call'* rules. He said in evidence that he wanted to ensure the operatives understood how this system worked.

39. The Tribunal accepted that all of those present were asked by Mr Jones if they understood the on-call procedure. However, Mr Whittle was specifically challenged about volunteering to work on call when he had lieu days booked for the next day and practice was that work should finish at 5pm that day, so proper rest took place on the lieu days allocated. Mr Whittle conceded he had been *'pulled up'* on previous occasions, but had not changed his behaviour, which gave rise to the challenge at the meeting

40. While this may have been the case, the Tribunal felt that directly challenging Mr Whittle in front of colleagues at the meeting was not the best way of resolving this issue, even if they felt he was not responding to earlier challenges. There was some evidence from others present during the grievance investigation that Mr Jones was visibly angry and at the appeal, of the grievance, Mrs Halliwell accepted that he behaved inappropriately and would be subject to appropriate action. However, this behaviour was found to have been directed at several members of staff and not just Mr Whittle.

<u>On 12 August 2020 – the claimant was allegedly tasked to attend two funerals with insufficient time to travel between two venues.</u>

41. There was no dispute that Mr Whittle was asked to attend 2 funerals on 12 August 2020. One at 11am at Howe Bridge, Wigan and the other at 11.30am St Helens. Mr Whittle felt the short period allowed for travelling and considering roadworks in place on the route, suggested to him that he was being set up to fail in his work by management. He was accompanied by a colleague Stephen Rosbottom who was driving and while Mr Jones accepted it was not ideal to have 2 funerals in separate locations so close together, he noted that they were completed in time and that Covid meant they had more funerals to deal with.

42. While Mr Whittle claimed he could not recall whether Mr Rosbottom was driving the hearse (believing him to be in another vehicle), there was no evidence of any action being taken against him. It appears that this issue

resulted from Mr Whittle's own anxieties about the road works rather than from any motive on the part of his employer.

<u>On days between September 2020 to 10 June 2021 – the claimant had a period of sickness absence and was not being contacted by management (the claimant arguing that the lack of contact by the respondent's managers being the last straw which led to resignation on 10 June 2021).</u>

43. There was no dispute that Mr Whittle was absent from work from September 2020 until he resigned in June 2021. He was on annual leave for a period of two weeks during September 2021 and was admitted to hospital on 27 September 2021 before he returned to work as he suffered a flare up with his ulcerative colitis.

44. He reported his sickness absence in the required manner, but Mr Whittle's main dispute was that he was not contacted by management during his absence. Mrs Halliwell Jones argued that she did try to call him on several occasions between September and October 2021 and Mr Whittle produced his mobile phone records for this period (346-347) and while a number of calls were made, it was not clear who made the calls and their duration. She did respond to a text message on 27 November 2021 concerning contractual sick issues identified by Mr Whittle, (pp348-350).

45. Mr Whittle said that Mr Jones spoke with him on 16 October 2021 in his grievance document (p135 and p146). Mr Jones gave evidence that he recalled speaking to Mr Whittle when he was in hospital and gave a credible description of where he was standing in his garden when he spoke to him.

46. Mr Whittle continued to provide Med 3 fit notes and they were included within the bundle for 6 October 2020, 7 October 2020, 12 October 2020, 6 November 2020, 20 November 2020, 2 December 2020, 25 February 2021, (p321 to 329). The fit notes described the reason for the absence as being colitis, apart from the penultimate and final ones which signed him off work until 24 May 2021 and describe the absence as being caused by anxiety/ulcerative colitis and anxiety/depression/ulcerative colitis respectively.

47. The company handbook provided no formal procedure for welfare meetings or other forms of contact with employees on sick leave.

48. By this point, Mr Whittle had been on sick leave for more than 4 months letter was sent on 5 February 2021 by Mrs Halliwell Jones, (pp148-149). By this time, she was aware of the grievance, and it seems that this complaint prompted her into a more active management of the sickness absence. Mr Whittle was initially asked if there was anything that Banks could do to *'facilitate your return to work'.* The letter then went on to seek permission to access his medical records.

49. The grievance then appeared to be the focus during the next few months with the investigation and hearing in March 2021 and the appeal on 13 April and

11 May 2021. Martin Halliwell emailed Mr Whittle on 20 May 2021 and asked about his health and explained he was now dealing with staff welfare and wanted to arrange a call the following week, (p275). Mr Whittle responded on 24 May 2021 (p277) saying:

"I am reluctant to have a welfare call with youself (sic) for the following reasons;

The way i have been treated, with no response R banks since 26th November 2020 even when I was admitted to hospital close to intensive care/high dependency unit.

The way the whole grievance investigation has been conducted.

The way I have to make arrangements for you to call me from R banks landline – knowing the call will be monitored exposing my medical condition to which I am not comfortable with.

Also may I add, that you only got involved as note taker in the second appeal meeting on 11th May 2021, however, due to the actions and attitude within this meeting, (the shaking of Jennifers head and rolling of eyes) question the conduct, and fuels the way I have continually been treated by R banks.

I am still awaiting the notes and the outcome letter from the said meeting (11th May 2021), as these should of been completed by now – as indicated by Jennifer at the meeting and via email.

This will then determine my next step to seek legal advice and have these grievances come finally to a close.

As my union representative did state in the mentioned meeting, the whole investigation is a sham, and R banks continue to white wash over the whole of my grievances."

50. The grievance appeal decision was sent by Mrs Halliwell on 26 May 2021 and apart from the partial upholding to the complaint made against Mr Jones being angry at the team meeting, the appeal was dismissed, (pp278-282).

51. On 8 June 2021 letter was sent to him by Mrs Halliwell Jones because he had not sent an up-to-date sick note following the expiry of the one issued on 25 February 2021, (p285). She reminded him that the company handbook required him to be in touch every week which it does provide.

52. On 10 June 2021 he sent an email to Mrs Halliwell providing the missing sick note and also giving notice of his resignation which he attributed to the:

"…following reasons:

1, There has been a significant breach of trust & confidence in the employment relationship.

2, That i belive (sic) that i have been bullied, harassed & demoralised by my employer.

3, That i belive that i have been a victim of T U detriment for being the employee spokesman in the collective pay request.

4, That i belive that R Banks & son have failed in their duty of care for my welfare during my absence due to my serious illness.

5. That the recent grievance process has been unfair and perverse with the company, originally discounting its own investigation and witness statements to uphold my grievances, and the grievance process being undertaken by the wife, mother and brother in law of the instigator.

I feel i cannot return to this company due the corruption said in most of the statements given, including yourself, and the conduct and attitudes towards myself also including Mrs J Halliwell which was witnessed also by my union representative, also the way the whole investigation relating to my grievances has also been conducted.

However, i will also like to add that all relevant paperwork has now been escalated to the legal team within my union, as i intend to take this further, and hope to call on everyone who has signed the statements as a true document.

As of today 10th June 2021, i Stephen Ellis Whittle serve my notice of termination of employment from R Banks & son.

I would expect my GP note to cover the relevant notice and also to receive my p45 in a timely manner."

53. The resignation was acknowledged by Mrs Halliwell Jones on 11 June 2021 and a formal letter of reply was sent on 14 June 2021 and gave him 7 days to reconsider, (p290).

54. Although it was apparent from the documents in the hearing bundle that the parties did adopt positions which at times appeared fractious, the Tribunal felt that on balance, the grievance and management of the sickness absence process were carried out fairly. While it may have been wise for managers to have been proactive in contacting Mr Whittle, we acknowledge that taking into account the ongoing circumstances surrounding the Covid pandemic, the constant flow of advice and guidance from the government and the increase in work, it is not surprising that things drifted somewhat. We felt it was reasonable to take judicial notice of the circumstances surrounding the Covid pandemic during 2020 and additional pressures that these exceptional circumstances placed upon both employers and employees(and the way in

which they both reacted during this period). However, having considered all of the circumstances in this case, we find that in broad terms, the respondent did not behave unreasonably.

<u>Wages claim - Lieu days</u>

55. There was no dispute between the parties that employees were regularly required to be 'on call' for the non-working hours after 5pm until 8am the next working day. In return, the employee on call could recover this time with a lieu day reflecting the additional time spent being on call and therefore available for work. We accept that this was a working practice in operation during the claimant's employment.

56. Lieu days were expected to be taken by entitled employees within their leave year and which ran from April to March. Untaken accrued lieu days would not normally be carried over into the next leave year. We heard minimal evidence from Mr Whittle concerning this practice and on balance, we accepted Mrs K Halliwell Jones's evidence concerning this matter on this point as this would reflect normal business practice and the application tax years rather than calendar years.

57. Mr Whittle said that he had been paid all of his holiday following his termination of employment and he was simply seeking the payment of lieu days. These on call days claimed by Mr Whittle all related to dates within 2018 and based upon when they arose, they should have been taken by 31 March 2018. The email dated 15 July 2021 (p298), was from Mrs Halliwell and was sent to Mr Whittle. She explained that she had given him the option of to carry the days over to 2019 or be paid by them. She provided a copy of the lieu days accrued and when they were subsequently taken by Mr Whittle. These were also included within the hearing bundle (pp299 to 300) and these were recorded as being accrued in 2018/2019 and noted as being taken at later dates ending with 4 October 2019 in respect of the 10 days accrued and carried over.

58. We spent some time during the hearing discussing these schedules of lieu days accrued for the 2018/2019 year and the computerised payroll record for the period of 1 November 2018 to 31 October 2019. We were also provided with during the hearing with copies of the available records of holiday request forms completed by Mr Whittle and relating to accrued lieu days. (pp361-365). The latter documents were not a complete record but together with the computerised record supported Mrs Halliwell's argument. They related to 2018 and 2019 year and on 15 July 2021, Mrs Halliwell wrote to Mr Whittle and said that although he should have taken the accrued lieu days before the end of 2018/2019, as a gesture of goodwill, he would be compensated for the untaken days, (p298). This was a reasonable approach by Banks under the circumstances and Mrs Halliwell they had already been taken.

59. On balance, we preferred the employer's argument that the lieu days although generously allowed to be carried over from 2018/2019, they were all taken during the following year and were not outstanding.

Law

Constructive Unfair Dismissal (Employment Rights Act ('ERA')

60. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

61. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

(i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach);

(ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; and,

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

62. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

63. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

Disability (EQA)

64. Section 6 of the Equality Act 2010 provides that a person has a disability if they have a physical or mental impairment, and the impairment has a substantial

and long-term adverse effect on their ability to carry out normal day-to-day activities.

Time limits (s123 EQA)

65. A complaint relating to discrimination at work will not be accepted by the Tribunal if it is presented after the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

66. Section 123(3) provides that conduct extending over a period is being treated as done at the end of that period and a failure to do something is the person in question decided on it.

Discrimination arising from disability (s15 EQA)

67. Section 15 of the EQA provides that a person discriminates against a disabled person if they treatment them unfavourably because of something arising in consequence of their disability and they cannot show that the treatment was a proportionate means of achieving a legitimate aim.

Burden of proof (s136 EQA)

68. Section 136 provides that when where there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person contravened the relevant provision of the EQA, the Tribunal must hold that the contravention occurred. This will not be the case if the person concerned can show that they did not contravene the relevant provision.

Unlawful deduction from wages

69. Section 13 ERA provides that an employer must not make a deduction from a worker's wages employed by him unless the deduction is required by statute, under a relevant provision in a worker's contract, or the worker has previously signed their written agreement or consent to the making of the deduction in question.

Discussion

70. The claimant Mr Whittle resigned on 10 June 2021 but worked his notice until 8 July 2021 when his employment ended. He notified ACAS on 16 July 2021 and following the issue of the early conciliation certificate. He presented his claim form to the Tribunal on 26 August 2021. Accordingly, the Tribunal could accept the claim form. However, there are issues relating to when specific allegations of breaches of contract in relation to the constructive dismissal and the allegations of disability discrimination.

Constructive unfair dismissal

71. Mr Whittle made a number of allegations which he felt were breaches of his contract of employment which began on 4 June 2019, and which ended with the period of sickness between September 2020 and his resignation on 10 June 2021. He argued that it was not being contacted by management which amounted to the last straw which led to resignation on 10 June 2021. Given that the absence continued from September 2020 until the end of his employment, this was a matter which was potentially continuing and ended when the decision was made to resign. There appear to be no issues relating to time limits concerning this allegation in accordance with section 111 ERA.

72. The Tribunal considered the earlier events concerning Banks alleged behaviour and as we discussed above in the Findings of Fact, were unable to find that they happened as alleged, that they were significant, or indeed happened at all. The so-called malicious texts sent by Ms Bennett simply involved the reporting of a hearse being dirty, which was not disputed and while it may have felt harsh by Mr Whittle for the message to have been sent, it was not something which unreasonable, whatever the reasons behind the vehicle becoming dirty. It is understood that no disciplinary action took place.

73. Another allegation related to being prevented from attending a friend's funeral by Mr Heaton, but which from the context of the evidence available, simply involved a process where Mr Whittle had not chosen to book a day's leave and instead wanted time off during the working day on compassionate grounds, when it may have impacted upon staffing rotas and duties on a particular day. He said that he didn't feel it was appropriate to interrupt the running of the whole business and *'didn't feel the need to take the whole day'.* While an employee may believe the request is something which would be automatically granted, it was something that amounted to a negotiation between employee and employer. This could include dealing with a number of managers. As it was, Mr Whittle was allowed to attend the funeral and did not suffer any prejudice as a consequence.

74. The Tribunal felt that Mr Whittle had developed a view over time where he believed that he was being picked on by management, (he said that he felt that he was being *'singled out'*). However, the evidence heard by the Tribunal did not support this argument. An example of this related to the allegation from 2020 where Mr Whittle believed he was unfairly asked to work extra hours because of the demands placed upon Banks because of the Covid pandemic.

75. The Covid pandemic was a challenging time for everyone and while many businesses had staff who were furloughed or working from home, there were significant numbers of people involved in essential services which required employees to continue to attend work, to often work extra hours and to support the absences arising from employees with particular health conditions who were required to 'shield' and stay at home.

76. In this instance, Banks as a funeral service operator was undeniably providing an essential service and was having to deal with the rise in deaths across the

UK. It is understandable that they might need to ask more of their employees. However, Mr Whittle was not compelled to provide this additional work and the evidence suggested that about half of the employees volunteered and half (including Mr Whittle), did not volunteer. The Tribunal did not hear convincing evidence on balance which supported the allegation that Mr Whittle was treated less favourably or differently compared with those employees who volunteered to work additional hours. There was certainly no suggestion that he was denied opportunities as a consequence.

77. The personal protective equipment incident was similarly not as serious incident as perceived by Mr Whittle. He simply wore the incorrect and insufficient PPE, despite on balance of evidence, all employees were provided with that equipment and told to wear it. It is understandable that Mr Whittle felt (like many others at the time), overwhelmed and even oppressed by the health and safety requirements existing at the time and which he may have felt disproportionate. But these were the rules for the workplace and managers were concerned about the health and safety of employees and it may have required further instruction of employees if they failed to comply with those rules. This was the case here and it was not a disproportionate action by Banks.

78. The Tribunal noted that there was a concern on the part of Mr Whittle about his employer's attitude to him and he was hyper vigilant to anything being done to him which he perceived as less favourable treatment. He held a role which was identical to that of a number of colleagues who worked as funeral service operatives and whose job description was the same. He believed that he was treated differently relating to work he was allocated (not being given as many driving roles as others) and when driving, being given two jobs with limited travelling time between them, for example. But as with many of the other allegations, we could not find on balance of probabilities that they happened in the way which Mr Whittle alleged. For example, it was not the case that he was actually taken off driving on funerals and this was supported by the data sheets provided by Banks. He may have believed he was *'one of the preferred drivers'*, but that was only a perception and he remained one of a number of funeral services operatives who could have been asked to carry out this role when each funeral took place.

79. Even the incident involving Gareth Jones, which did result in him being subject to corrective action, was an incident where on balance, everyone present at the meeting was subject to his behaviour. Mr Jones clearly should not have been as forthright as he was. After all, it was probably not the best way to improve the capabilities of funeral services operatives and he was criticised during Mr Whittle's grievance. However, this is the single example of unreasonable line management conduct towards Mr Whittle and the Tribunal found that this fell within the *'lesser blows'* referred to in *Croft v Consignia (the initial EAT case described above)* and did not amount to a serious incident that could undermine trust and confidence in Banks as an employer, especially as the grievance were unhappy with this behaviour.

80. Banks' witnesses gave credible and reliable evidence in support of the respondent's resistance of the claim. Mr Jones in particular, gave evidence with a credible and convincing recollection being able to remember where he was when particular telephone conversations took place.

81. Mr Whittle argued that he felt the grievance process was unfair because he was never interviewed by Mrs Halliwell Jones and in any event, the investigation should have been carried out independently. He said that he did not feel like he had *'a fair crack of the whip'.*

82. However, from the evidence we heard, Banks dealt with the grievance and appointed investigating officers who were not involved in the subject matter of the grievance. In broad terms, they followed the guidance provided by ACAS in relation to *Discipline and Grievances at Work (2020),* taking into account the challenges provided by the Covid pandemic. A full investigation took place, a detailed explanation was provided in writing of the outcome and an appeal was offered heard by another senior manager not involved with the issues being investigated. While employers may sometimes decide to employ external HR businesses to manage grievances, it was not essential in this case and the Tribunal were satisfied that Mrs Halliwell Jones and Mrs Halliwell who heard the grievance and grievance appeal, were suitable hearing officers.

83. Mr Whittle asserted that his final straw which prompted his resignation was not being contacted by management during his period of absence between September 2020 to 10 June 2021. Accordingly, he was arguing that the final straw was the way in which sickness absence was manged by Banks. The Company Handbook did seem to place the greater responsibility upon employees to stay in touch and there was an absence of personal welfare contact by managers at Bank from end of October 2020 to early January 2021 and no welfare notes were included within the bundle for this period.

84. As a matter of good practice, it would always be advisable for an employer to keep in touch with an employee on a regular basis subject to any variations recommended by a GP or OH. After all, some employees on long term sickness can struggle with (what they perceive to be), overly frequent welfare calls. In this case, Banks ideally could have had more engagement in relation to general welfare, rather than more procedural and formal matters relating to sickness absence management. However, the Tribunal felt that it must take judicial notice of the circumstances arising from the Covid pandemic and the demands placed upon businesses who fulfilled an essential function. There was clear evidence of an increased in number of funerals, restrictions on how organised, staff working additional hours, government updates.

85. In his resignation letter sent 10 June 2021, Mr Whittle referred to the issues which prompted his resignation and they appeared to go beyond an absence of management contact. Indeed, Mr Whittle described his overall perception of treatment and is unhappiness with grievance outcome and effect on his health. By this point, Banks had completed the initial grievance investigation

and had attempted to engage in a welfare process to return Mr Whittle to work. We felt that in terms of timing, Mr Whittle resignation was not actually caused primarily by the lack of welfare contact during the sickness absence process, but by the grievance not producing the outcome he wanted and Banks now turning their attention to discuss his return to work.

86. Ideally, an employer should be able to deal with sickness absence management and grievances in tandem but taking into account the size and resources of Banks at the time and the unique circumstances arising from the Covid pandemic, this was not a case of an employer behaving unreasonably. Mr Whittle instead appeared to be aggrieved with his grievance not going the way he wanted and annoyance at the welfare process beginning, hence his refusal to engage.

87. Ultimately, we did not accept that the final straw alleged was a fundamental breach and, in any event, we did not think that this was the real reason behind the decision to resign. However, even if this was the main reason, it was something which Mr Whittle appeared to acquiesce to over many months and his reaction was relatively late in the day and at a point where any absence of contact by Banks was being addressed and a more thorough engagement was taking place. Each of the earlier actions complained about happened some time before they were included in the grievance and were relatively minor matters which a reasonable employee would be expected to absorb, or to deal with through the grievance process.

88. There was nothing before us which indicated a series of breaches or fundamental breaches by Banks as alleged by Mr Whittle and any which he perceived as being serious were not acted upon when they happened. He was clearly unhappy with his situation, but he did not present something in this case which suggested the mutual trust and confidence between employee and employer had been critically undermined by Banks' actions.

Disability discrimination

89. The claimant was disabled in accordance with section 6 Equality Act 2010 by reason of ulcerative colitis during his employment. There was no dispute about this condition, but Banks disputed that Mr Whittle was disabled by reason of Crohn's disease. The Tribunal did not hear any further evidence supporting Mr Whittle's assertion that Crohn's was a relevant disability, and we were unable to find he was so disabled. However, taking into account the relationship between the condition of ulcerative colitis and the condition of Crohn's disease, this did not prevent Mr Whittle proceeding to argue his complaint of disability discrimination.

90. However, it is still necessary to consider the substantive grounds of complaint in relation to the discrimination attributed to this protected characteristic of disability. Mr Whittle relied solely upon the complaint of discrimination arising from disability contrary to section 15 EQA and the alleged unfavourable treatment of Banks failing to keep any and/or regular contact with the claimant

during his period of sickness absence from 27 September 2020 until 10 June 2021.

91. For the reasons given above in relation to the complaint of constructive unfair dismissal, that Mr Whittle's belief that there had been a failure by Banks to keep any and/or regular contact with him during his absence amounted to unfavourable treatment. This term, while identified in section 15 EQA, is actually identified in the Equality and Human Rights Commission's Code of Practice on Employment (2011). Paragraph 5.7 of this Code states that for a disabled employee to be treated unfavourably, that person *"…must have been put at a disadvantage".*

92. While there is no need for a disabled person to identify a comparator under section 15 and a claimant can simply argue that the alleged treatment was unfavourable in its own terms. The disadvantage in this complaint is a failure to keep in contact with the claimant. Banks appeared to not act inconsistently with its Employment Handbook and although it did engage with Mr Whittle, there was clearly no process of regular welfare meetings until shortly before he resigned. While there was no need to identify a comparator, this was a situation where based upon the information available to the Tribunal, Mr Whittle was seeking a more advantageous treatment than what would be typically offered by Banks as his employer in accordance with its operations at the time. This was not a complaint seeking reasonable adjustments and a different approach is required in relation to a section 15 complaint.

93. It is fair to say that Mr Whittle's sickness absence was connected to a significant degree with his ulcerative colitis and the absence in question could therefore be said to arise in consequence of his disability. But the treatment alleged was not considered to be unfavourable. Had it been a situation where he had been subject to a sickness absence capability sanction such as dismissal for medical incapability, he may have been able to demonstrate that this was unfavourable treatment arising from the disability related absence.

94. This was not of course the case here and instead the argument was that Banks constructively dismissed Mr Whittle because of his sickness absence. Unfortunately, as we explained above, the alleged treatment relating to an absence of contact was not unfavourable treatment and this complaint of disability discrimination cannot succeed.

95. As a consequence, it is not necessary for Banks to advance its argument that the alleged treatment was a proportionate means of achieving a legitimate aim? Banks said its aims were to limit the physical contact to Mr Whittle by reason of Covid restrictions and/or his anxiety and depression. It was true that Mr Whittle's absence did develop with fit notes being provided which referred to anxiety and depression. Without the benefit of medical evidence from OH or event Mr Whittle's GP, Banks did not appear to demonstrate a conscious decision being made not to contact him for these reasons. Indeed, even with Covid, there was no reason for contact not to be conducted remotely. Consequently, the Tribunal did not accept that that the legitimate

aims were genuinely in consideration or reasonably held views at the relevant time of Mr Whittle's absence, or if they were, that a proportionate approach was taken by a more careful consideration of medical evidence.

96. Fortunately for Banks as respondent, we do not have to address the defence of legitimate aim and the section 15 EQA complaint fails in relation to its initial consideration by the Tribunal as described above.

<u>Unauthorised deductions</u>

97. This complaint only requires a brief consideration as our findings of fact quite clearly identified that on balance of probability, the evidence supported the argument advanced by Banks as respondent that Mr Whittle was permitted to take his identified accrued lieu days, and this was in good time before his absence began and his employment ended. As a consequence, Mr Whittle is owed nothing for this loss which he claims.

Conclusion

98. Accordingly, the judgment of the Tribunal is that:

a) The claimant was disabled in accordance with section 6 Equality Act 2010 by reason of ulcerative colitis during his employment but not Crohn's disease.

b) The complaint of discrimination arising from a disability contrary to section 15 Equality Act 2010 is not well founded and is unsuccessful.

c) The complaint of constructive unfair dismissal contrary to Part X Employment Rights Act 1996 is not well founded and is unsuccessful.

d) The complaint of an unlawful deduction from wages contrary to section 13 Employment Rights Act 1996 is not well founded and is unsuccessful.

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Employment Judge Johnson

Date 31 May 2023

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JUDGMENT SENT TO THE PARTIES ON
5 June 2023

FOR THE TRIBUNAL OFFICE