Case Number 1311098/2020
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr L Pstragowski		**D&G Bus Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 30 & 31 March 2023
3 & 4 April 2023

EMPLOYMENT JUDGE GASKELL **MEMBERS:** **Mr P Simpson**
Mr P Wilkinson

Representation
For the Claimant: **In Person**
For the Respondent: **Mr K Crawford (Operations Director)**

Interpreter: **Mr M Adam - Polish**

JUDGMENT

(Issued to the parties on 4 April 2023. Reproduced here for ease of reference)

The unanimous Judgement of the tribunal is that:

1 The claimant was not at any time material to this claim a disabled person as defined in the Equality Act 2010. Accordingly claim for disability discrimination is dismissed.
2 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints of race and age discrimination, pursuant to Section 120 of that Act, are dismissed.
3 The claimant did not make any protected disclosures. His claim for protected disclosure detriment is not well-founded and is dismissed.
4 The claimant was not dismissed by the respondent. The claim for unfair dismissal is not well-founded and is dismissed.
5 The claimant's claim for unpaid wages is not well-founded and is dismissed.
6 The claimant's claim for unpaid holiday pay is not well-founded and is dismissed.
7 The claimant was not dismissed by the respondent. The claim for wrongful dismissal (unpaid notice pay) is dismissed.

REASONS

Introduction

1 Reasons for the judgement were given orally at the conclusion of the hearing on 4 April 2023. These written reasons are provided pursuant to a request from the claimant received on 16 April 2023 pursuant to Rule 62(3) of the Employment Tribunals Rules of Procedure 2013.

2 The panel in this case reached a unanimous decision on all aspects of the claims following a hearing over four days in which the panel were present and together at the hearing centre in Birmingham, but the parties and witnesses attended remotely by CVP.

3 The claimant in this case is Mr Leszek Pstragowski, who was employed by the respondent, D&G Bus Limited, as a Bus Driver, from 1 May 2019 until 15 July 2020 when resigned.

4 By a claim form presented to the tribunal on 7 December 2020, the claimant brings the following claims:

(a) Unfair (constructive) dismissal – this is a claim for automatic unfair dismissal pursuant to Section 103A of the Employment Rights Act 1996. The claimant did not have sufficient continuous service prior to presentation to bring a claim for ordinary unfair dismissal.
(b) Wrongful dismissal - unpaid notice pay.
(c) Protected disclosure detriment.
(d) Disability discrimination.
(e) Race discrimination - this claim is based on the claimant's Polish nationality.
(f) Age discrimination.
(g) Unpaid wages.
(h) Unpaid holiday pay.

5 All of the claims are denied:

(a) The respondent denies that at any time it acted in fundamental breach of the employment contract sufficient ground a claim for constructive unfair or wrongful dismissal.
(b) The respondent denies that the claimant made any disclosures qualifying for protection. And in any event denies any of its conduct towards the claimant was motivated by reason of alleged disclosures.
(c) The respondent denies that at any material time the claimant was a disabled person as defined in the Equality Act 2010

(d) The claimant denies any form of discrimination on the grounds of disability, race or age.
(e) The respondent denies that there are any wages or holiday pay this due to the claimant.

The Evidence

6 The claimant gave evidence on his own account. He did not call any additional witnesses. The respondent relied upon the evidence of two witnesses: Mr Stephen Lang - Area Manager, and Mrs Paula Cheshire - Assistant Depot Manager. Mrs Cheshire was the claimant's line manager. The claimant had made four written witness statements regarding different aspects of his claims. The claimant gave oral evidence and was cross-examined and we have the opportunity to ask questions. Mr Lang and Mrs Cheshire had both made written statements, they gave oral evidence and were cross-examined, and we had the opportunity to ask questions.

7 We were provided with a hearing bundle running to some 99 pages. The bundle had not been prepared in compliance with tribunal directions as it was neither indexed nor paginated. In addition, the claimant provided to us and relied upon a brief video/audio recording made on his telephone which related to a meeting between himself and Mrs Cheshire on 15 July 2020.

8 We found the evidence of Mr Lang and Mrs Cheshire to be clear, consistent and compelling. The evidence they gave was consistent with each other; it was consistent with their witness statements and remain so during cross-examination; and it was consistent with contemporaneous documents.

9 By contrast the claimant's evidence was confusing and inconsistent. It comprised largely a series of allegations with insufficient detail and nothing to substantiate the allegations made.

10 In respect of the primary facts, there was little disagreement. But where there was a discrepancy between the evidence given by the claimant and that given by the respondent's witnesses, we prefer the evidence of the respondent's witnesses.

11 We had a medical certificate dated 28 November 2022 from Dr Ignaczak Ewa the claimant's Polish GP.

The Facts

12 The claimant's relevant period of employment with the respondent commenced on 1 May 2019. He had worked for the respondent on a previous occasion, but had then left for a period - returning on 1 May 2019.

13 The first issue with which we are concerned occurred in September 2019 when firstly the claimant's bicycle tyres were vandalised whilst parked at the respondent's depot during a working shift, and then on a later occasion his car tyres were similarly slashed. The claimant is convinced that these were racially motivated attacks but he has no evidence to connect what happened to his Polish nationality. The claimant complained about the incidents and we accept the evidence given by Mrs Cheshire that she viewed the relevant CCTV footage at the respondent's depot but there was nothing to show the damage being done and nothing from which any culprit could be identified. We accept her evidence that it is quite possible that the culprit was not an employee of the respondent. Mrs Cheshire offered to investigate further if the claimant could provide specific dates and times when the damage was allegedly done - but the claimant did not respond to her on this. It was pointed out that cars and bicycles were parked strictly at the owner's risk.

14 After six months service, bus drivers employed by the respondent are eligible to be considered for a merit award - which is an increase in pay. The decision as to whether or not to make the award is not taken by Mr Lang or Mrs Cheshire: they have to provide information as to a driver's performance and the decision is taken by more senior managers at head office.

15 Both Mr Lang and Mrs Cheshire were confident that the claimant would have been eligible for the award if his employment had continued beyond 15 July 2020. But he had not received the award by that date. Mrs Cheshire explained that there were four criteria which to her understanding were applied by head office these were: the drivers appearance/uniform; compliance with company rules and regulations; general attitude; and timekeeping.

16 Although Mrs Cheshire is not privy to the reasons why the award had not been made to the claimant, she believes that the most likely factor operating against him would be timekeeping. This is not a reference to arriving on shift punctually but to maintaining the timetable of the bus he was driving during the shift. It is obviously important for buses to run on time and to avoid late running. But it is equally if not more important that a bus does not run ahead of time. If this happens, the result is that a bus is through a stop before its due time and a passenger arriving at the stop on time will have missed it. Mrs Cheshire informed us that there have been a number of complaints from service users relating to buses driven by the claimant which had gone through a stop ahead of time. This

is something which she had discussed with the claimant several times. In his evidence to us, the claimant did not deny any of this - stated that he drove his bus in exactly the same way as everyone else.

17 The claimant's case is that of other drivers with similar failings in their performance had been given the merit award. He attributed the failure to provide him with the merit award to his Polish nationality. The claimant provided us with no details of any driver with a similar timekeeping record who had received the award. Mrs Cheshire informed us that the respondent employs a number of Polish drivers and drivers of other nationalities as well as British drivers and that all are treated the same. She told us that there were many examples of drivers of other nationalities who had not received a merit award within the first 12 months or longer of their employment.

18 In March 2020, like many businesses the respondent's operation was severely disrupted by the COVID-19 pandemic and the national lockdown. Initially, the claimant and other drivers were placed on furlough – but, of course, there was significant pressure on the respondent to maintain transport services particularly for key workers needing to get to work and for other busy routes. After three weeks, the claimant was brought back into work from furlough and like other drivers was expected to work different routes and an emergency timetable to cover the needs of the business. There was extensive email correspondence between the claimant and Mrs Cheshire regarding late changes to the claimant's shift patterns and regarding the provision of PPE. The claimant also now complains that in the light of his age (63 years), and his health, he should not have been required to return to the workplace but should have remained on furlough.

19 We accept the evidence given by Mrs Cheshire that all drivers were brought back from furlough (sometimes in rotation) save for those who had received letters from their GP or from the NHS advising them to shield. Those drivers were left on furlough. The claimant never produced any evidence of a need to shield or of advice to do so. All drivers were required to be flexible during this period, and Mrs Cheshire was adamant that the claimant was treated no different from anyone else in terms of the allocation of routes and shifts.

20 We accept the evidence given by Mrs Cheshire and Mr Lang that all social distancing and PPE measures were taken in accordance with rapidly changing government advice.

21 On 7 May 2020, the claimant made a complaint against Mrs Cheshire stating that she was unfair to him and that he felt discriminated against by her. The main points of the complaint were as follows:

(a) That the claimant had not received the merit award.
(b) That the claimant's duties were often changed at the last minute and he was given the less desirable routes. Other drivers were treated more favourably.
(c) That other drivers of comparable age to him had been left on furlough whereas he had been required to return to work. He stated that at the age of 64 years he was particularly vulnerable to the virus.

22 In response to this complaint, Mr Lang had a meeting with the claimant to go through the issues and explain in particular he explained that all drivers were experiencing similar frustrations it was Mr Lang's evidence which we accept that at the end of the meeting the claimant indicated that he accepted the explanations.

23 In June 2020, the claimant requested a period of leave to enable him to visit Poland. He was granted the requested leave from 27 June 2020 - 11 July 2020, and was provided with a letter confirming that he was a key worker in the UK - without such a letter he would not have been permitted to travel back into the UK at the end of his period of leave. We accept Mrs Cheshire's evidence that when she handed the claimant the letter she also pointed out to him that he had already utilised the whole of his annual leave allowance for that year and that this would therefore be unpaid leave. Within our bundle we have the documents showing the leave previously taken by the claimant, and he did not dispute that he had already taken the whole of his annual leave allowance.

24 Upon the claimant's return from that period of leave, he raised a query as to why it was not to be paid. This led to something of a confrontation between the claimant and Mrs Cheshire on 15 July 2020. And on that day the claimant tendered his resignation with immediate effect. In her evidence, Mrs Cheshire described how the claimant had screwed up his payslip (showing the unpaid period of leave) and had thrown the duty board at her which hit her in the face. Unknown to Mrs Cheshire, the claimant was recording their interaction on that day and he produced the recording to us in an effort to undermine Mrs Cheshire's credibility. He stated that the recording showed that she was telling lies. In fact the recording does no such thing: it clearly records that there was a confrontation - but it is wholly inconclusive as to precisely what happened.

25 In evidence, the claimant told us that the reason for his resignation was the failure to pay his wages during the period of leave.

26 The medical certificate from Dr Ewa followed an examination of the claimant on 28 November 2022 - some two years and four months after the claimant's employment with the respondent was terminated. The certificate indicates that the claimant is undergoing treatment for chronic illnesses: Chronic

Obtrusive Pulmonary Disease; Hypertension; Hypercholesterolaemia; Type 2 Diabetes; Multiple Joint Osteoarthritis; and Hypothyroidism. The certificate states that regular medication and rehabilitation are necessary.

The Law

27 *Constructive Dismissal*

The Employment Rights Act 1996 (ERA)

Section 94 - The right [not to be unfairly dismissed]

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 95 - Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice) - *Direct dismissal,*
(c) 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 - *Constructive dismissal.*

Decided Cases – Constructive Dismissal

There are many decided cases which provide guidance to employment tribunals with regard to the law of dismissal and of constructive dismissal. We found the following to be particularly relevant when considering the facts of this case:-

Western Excavating (ECC) Ltd, -v - Sharpe **[1978] IRLR 27 (CA)**
An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

The employee must make up his mind to leave soon after the conduct of which he complains if he continues the any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

Garner -v- Grange Furnishing Ltd. **[1977] IRLR 206 (EAT)**
Conduct amounting to a repudiation can be a series of small incidents over a period of time. If the conduct of the employer is making it impossible for the employee to go on working that is plainly a repudiation of the contract of employment.

Woods -v- WM Car Services (Peterborough) Ltd. **[1981] IRLR 347 (EAT)**
It is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that it's cumulative effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.

WE Cox Toner (International) Ltd. –v- Crook **[1981] IRLR 443 (EAT)**
The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation in which case the contract is at an end. The innocent party must at some stage elect between those two possible courses. If he once affirms the contract his right to accept the repudiation is at an end, but he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract, but if it is prolonged, it may be evidence of an implied affirmation. Affirmation of the contract can be implied if the innocent party calls on the guilty party for further performance of the contract since his conduct is only consistent with the continued existence of the contractual obligations.

Waltons & Morse –v- Dorrington **[1997] IRLR 488 (EAT)**
It is an implied term of every contract of employment that the employer will provide and monitor for employees, so far as is reasonably practicable, a working environment which is reasonably suitable for the performance by them of their contractual duties.

BCCI –v- Ali (No.3) **[1999] IRLR 508 (HC)**
The conduct must impinge on the relationship of employer and employee in the sense that, looked at objectively, it is likely to destroy or seriously damage the

degree of trust and confidence the employee is entitled to have in his employer. The term "likely" requires a higher degree of certainty than a reasonable prospect or indeed a 51% probability.

GAB Robins (UK) Ltd. –v- Gillian Triggs **[2007] UKEAT/0111/07RN**
The question to be addressed is whether, taken alone or cumulatively, the respondent's actions amount to a breach of any express and/or implied terms of the claimant's contract of employment amounting to a repudiation of that contract.

Bournemouth University Higher Education Corporation –v- Buckland **[2010] IRLR 445 (CA)**
The conduct of an employer, who is said to have committed a repudiatory breach of the contract of employment, is to be judged by an objective test rather than a range of reasonable responses test. Reasonableness may be one factor in the employment tribunal's analysis as to whether or not there has been a fundamental breach but it is not a legal requirement.

Once there has been a repudiatory breach, it is not open to the employer to cure the breach by making men, and thereby preclude the employee from accepting the breach as terminating the contract. What the employer can do is to invite affirmation, by making or offering amends.

Waltham Forest LBC -v- Omilaju **[2005] IRLR 35 (CA)**
This case clarified the position where a complainant was lying on the "final straw" principle: if the final straw is not capable of contributing to a series of earlier acts which may cumulatively amount to a breach of the implied term of trust and confidence, then there is no need to examine the earlier history. If an employer has committed a series of acts which amount to a breach of the implied term; but the employee does not resign his employment In response thereto; he cannot subsequently rely on those acts to justify a constructive dismissal in the absence of a later act which enables him to do so. If the later act is entirely innocuous It is entirely unnecessary to examine the earlier conduct as the later act will not permit the employee to invoke the final straw principal. An entirely innocuous act on the part of the employer cannot be a final straw.

29 By reference to Section 108(1) ERA, the claimant is not time served to bring a claim for unfair dismissal. The exception to this is if the reason for the dismissal falls within Section 108(3) ERA. Accordingly the claimant can only succeed in a claim for unfair dismissal if the reason for his dismissal was the making of protected disclosures pursuant to Section 103A ERA. This would require us to find that the reason why the respondent acted in fundamental breach of the employment contract sufficient to enable the claimant to resign was because of the claimant having made protected disclosures.

28 *Wrongful Dismissal*

On the facts of this case, the only determination for the tribunal to make is whether or not the claimant was in fact dismissed. This we will do applying the case law set out above. For the purposes of the wrongful dismissal claim we do not need to determine the reason for the dismissal: if the claimant was dismissed he would be entitled to statutory notice pay unless the respondent could establish that at the time of the dismissal the claimant was himself in fundamental breach of the employment contract. No such breach has been alleged in this case.

29 *Protected Disclosures*

(1) The burden is on the claimant to prove that he made the relevant disclosure and that it was protected within the meaning of Section 43B ERA, which provides as follows:

> "*In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(a) That a criminal offence has been committed, is being committed or is likely to be committed.*
> *(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.*
> *(c) That a miscarriage of justice has occurred, is occurring or is likely to occur,*
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered.*
> *(e) That the environment has been, is being or is likely to be damaged. Or*
> *(f) That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.*"

(2) Section 47B ERA provides that a worker has the right not to be subject to any detriment done *on the ground* that the worker has made a protected disclosure. Section 103A ERA renders it automatically unfair for an employee to be dismissed for having made a protected disclosure. Section 48(3) sets the timetable within which a detriment claim must be brought - time is calculated from when the detriment (or the final detriment) is visited upon the work time is not extended merely by the repetition of the disclosure.

(3) What is protected is the "*disclosure of information*". It is not sufficient for a worker to simply express their opinion or make bare allegations or assertions.
Cavendish Munro Professional Risks Management Ltd v Geduld **(Rev 1) [2009] UKEAT 0195/09/0608 (6 August 2009).**

(4) It is necessary for the worker to have a "reasonable belief" both that the disclosure is in the public interest and that it tends to show one of the six categories of "failure" set out above. The information does not actually need to be factually and
substantively correct and the test is a subjective one. As a result, the individual characteristics of the worker need to be taken into account and the relevant test is not whether a hypothetical reasonable worker could have held such a reasonable belief. This was affirmed by the EAT in ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** **[2011] UKEAT 0424/09/1208**.

(5) Reasonable belief and the public interest involves a two-stage test:

(i) Did the Claimant have a genuine belief at the time that the disclosure was in the public interest?
(ii) If so, did he or she have reasonable grounds for so believing?

(6) In ***Chesterton Global Ltd & Anor v Nurmohamed & Anor*** **(Rev 1) [2017] EWCA Civ 979** the Court of Appeal held (in a case where the disclosure affected commission payments for 100 employees) that the issue was not whether the disclosure was, per se, in the public interest but whether the worker had a reasonable belief that the disclosure was being made in the public interest. Further, it was not necessary to show that a disclosure was of interest to the public as a whole, as opposed to a section of it. In a case of mixed interests, it is for the tribunal to rule as a matter of fact as to whether there was sufficient public interest to qualify under the legislation. Underhill LJ held in paras 27 to 30:

> "(a) First, the tribunal has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.
> (b) Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured … All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker.

(c) Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to so be not of the essence. Of course, if the employee cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. … all that matters is that his (subjective) belief was (objectively) reasonable.

(d) Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: … I am inclined to think that the belief does not in fact have to form any part of the worker's motivation … but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

(e) Finally … I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression.

30 *Direct Discrimination*

(1) Section 13(1) of the Equality Act ("EqA") 2010 provides that:

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

(2) Section 136 EqA provides, so far as is relevant:

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

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

(3) At the first stage of this test, the Claimant must show more than a difference in status and a difference in treatment to establish a prima facie case of discrimination (***Madarassy***). There must be something to suggest that the treatment was due to the Claimant possessing a protected characteristic before the burden can shift. In ***Royal Mail Group Ltd v Efobi*** **[2021] UKSC 33**, the Supreme Court has recently affirmed the continued application of this two stage

test. In terms of the standard of proof at the first stage of the test, ***Efobi*** encapsulates the
position at Paragraph 30:

> *"… an employment tribunal may only find that "there are facts" for the purpose of Section 136(2) EqA if the tribunal concludes that it is more likely than not that the relevant assertions are true. This means that the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. This is not the whole picture since, as discussed, along with those facts which the claimant proves, the tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. But that does not alter the position that, under Section 136(2) EqA, the initial burden of proof is on
> the claimant to prove facts which are sufficient to shift the burden of proof to the respondent."*

(4) ***Efobi*** also confirms at para 28 that:

> "… *it did not matter if the employer had acted for an unfair or discreditable reason provided that the reason had nothing to do with the protected characteristic.*" see also ***Glasgow City Council v Zafar*** **[1997] 1 WLR 1659, 1663; *Bahl v The Law Society* [2004] IRLR 799.**

(5) The tribunal must set out primary findings of fact upon which any inference must be based - ***Chapman and another v Simon*** **[1994] IRLR 124**.

(6) A worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An "unjustified sense of grievance" is not enough: ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** **[2003] IRLR 285**.

30 *Disability*

(1) **Equality Act 2010**

Section 6: Disability

(1) A person (P) has a disability if—

(*a*) P has a physical or mental impairment, and

(*b*) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Schedule 1: Disability Supplementary Provision
Part 1: Determination of Disability

1 ***Impairment***

Regulations may make provision for a condition of a prescribed description to be, or not to be, an impairment.

2 ***Long-term effects***

(1) The effect of an impairment is long-term if—

(*a*) it has lasted for at least 12 months,
(*b*) it is likely to last for at least 12 months, or
(*c*) it is likely to last for the rest of the life of the person affected.

4 ***Substantial adverse effects***

Regulations may make provision for an effect of a prescribed description on the ability of a person to carry out normal day-to-day activities to be treated as being, or as not being, a substantial adverse effect.

5 ***Effect of medical treatment***

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(*a*) measures are being taken to treat or correct it, and
(*b*) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

The Claimant's Case

31 The claimant's case is that the incidents of vandalism to his car and his pedal cycle were racially motivated attacks from which the respondent had a duty to protect him.

32 The claimant further alleges that the reason why he did not receive the merit award within the first six months of his employment was because of his Polish nationality.

33 The claimant further alleges that Mrs Cheshire selected him for the least favourable routes and subjected him to changes in duty at short notice to his detriment in favour of other drivers because of his Polish nationality.

34 It is the claimant's case that by reason of the health difficulties set out in the letter from his Polish GP, he is a disabled person. As such, he was at particular risk during the COVID-19 pandemic; and like other drivers he should not have been required to return to work should have remained on furlough. His case is that returning him to work was an act of disability and/or age discrimination.

35 It is the claimant's case that his complaints about PPE were protected disclosures and that he is entitled to be protected from detriment and dismissal for having made them.

36 It is the claimant's case that the manner in which he was treated as set out in Paragraphs 31 - 35 above cumulatively amounted to a fundamental breach of the employment contract in response to which he was entitled to resign without notice. However, his case is that the final breach of contract came with the failure to pay him for the holiday he took when he returned to Poland in June/July 2020. He told us in evidence that it was response to this breach that he resigned. If he is to establish that he was unfairly dismissed, it would be necessary for him to satisfy us firstly that the failure to pay for the holiday was a breach of contract and secondly, that the reason why the respondent decided not to pay for that period of holiday was because the claimant had made protected disclosures.

Discussion & Conclusions

37 Firstly, we have considered whether on the evidence adduced before us we find that the claimant was at the material time a disabled person as defined in the Equality Act 2010. The definition is set out in Paragraph 30 above. The claimant has provided no evidence whatsoever as to his medical condition at the material time - namely in the period from March - July 2020. The GP report we have was prepared following an examination in November 2022. The GP report

refers to a number of chronic conditions, and it may not be unreasonable for us to conclude that the claimant was suffering from some of those symptoms two years earlier. But there is no evidence as to the effect of these medical conditions on the claimant's ability to undertake normal day-to-day activities - and he has provided no evidence of any restriction on such ability at the relevant time. He was working in demanding employment as a bus driver and in demanding circumstances during the COVID-19 pandemic, and yet he has produced no evidence of any effects of his medical conditions on his ability to do his job or anything else. In these circumstances, the evidence before us quite simply is such that we cannot find that the claimant was a disabled person. Accordingly, his claim for disability discrimination cannot succeed and is dismissed.

38 There is not a shred of evidence that the incidents involving vandalism to the claimant's car or pedal cycle were linked to the respondent or any of its employees or that these attacks were in any way racially motivated. We are satisfied that Mrs Cheshire did what she could to investigate and had evidence as to the identity of the culprits emerged appropriate action would have been taken. The claimant did not assist in that he failed to provide details of precise dates and times when the damage had occurred. There is nothing from this incident which establishes facts from which the tribunal could infer acts of race discrimination.

39 The claimant did not receive the merit award during the 14 months or so of his employment. He has provided no details of anyone else who did receive the award and has established no facts from which we could conclude that the failure to make the award to the claimant was related to his Polish nationality. We accept the explanations provided by Mrs Cheshire and Mr Lang and again there is nothing within these allegations from which we could infer acts of race discrimination.

40 It is the claimant's case that Mrs Cheshire generally disadvantaged him in terms of the allocation of duties and bus routes. But he has provided no comparative information; no details of anybody being treated more favourably; and has established no facts from which we could conclude that Mrs Cheshire did treat him unfairly. Still less, that any such treatment was related to his Polish nationality.

41 The claim for discrimination on grounds of disability and/or age and/or race with regard to the recall to duty after a period of furlough is confusing and contradictory. We have found that the claimant was not disabled and so a claim for disability discrimination simply cannot succeed. So far as age discrimination is concerned, the claimant's case is that because of his age she should have been left on furlough. But he makes the case by reference to other drivers of a similar age who he says were left on furlough but that he was not in the "privileged

group". If it is the case that those within the "privileged group" were of comparable age to the claimant, it must follow that age was not a factor in any differential treatment - and thus age discrimination cannot have been in play. This leaves the possibility that race discrimination was in play, but as the claimant has provided us with no details of race or other information relating to those with whom he would compare himself there is no basis for us to conclude that race was a factor. Further we accept the evidence given by Mrs Cheshire that the drivers who were left on furlough with those who had received a letter from their GP or from the NHS advising that they should shield. The claimant accepted that he had produced no such letter, and this appears to be the sole reason for any differential treatment.

42 From the documents we have seen, the suggested protected disclosures were requested by the claimant for the provision of PPE - and such requests were responded to positively. The required equipment was provided. Nothing we have seen suggests that the claimant disclosed any information as required by Section 43B ERA, and we therefore conclude on the evidence before us that the claimant made no disclosures qualifying for protection.

43 Even if the claimant did make disclosures qualifying for protection, there is no evidence at all of the claimant having been subjected to any detriment by reason of having done so. None of the unfavourable treatment about which he complains (we find that there was none) was connected in any way to his PPE requests.

44 In evidence, the claimant accepted that he had used his entire holiday allocation. But he nevertheless appeared to believe that he was entitled to be paid for the additional period of holiday which he took in June/July 2020. We accept Mrs Cheshire's evidence that when that holiday period was granted it was explained to the claimant that it would have to be taken unpaid. Accordingly, failure to pay for that period of leave was not a breach of contract. It cannot of itself have grounded a claim for constructive dismissal and there were no earlier breaches which could be added to it under the principles set out in ***Omilaju***. We find that there was no breach of contract. But even if the claimant had somehow been entitled to be paid, we certainly could not conclude that the reason for failing to pay him was relating to the alleged protected disclosures. Even if it was a breach of contract entitling him to resign, it could only ground a claim for "ordinary" unfair constructive dismissal and not a claim for automatic unfair dismissal pursuant to Section 103A ERA. As stated, the claimant was not time served to bring a claim for anything other than automatic unfair dismissal.

45 We find that the claimant was not dismissed and accordingly his claim for wrongful dismissal is dismissed.

46 There are no unpaid wages, holiday pay, or notice pay outstanding. Accordingly, the claims for unlawful deduction from wages and unpaid holiday pay are also dismissed.

47 In the circumstances, and for the reasons given above, the claims are dismissed in their entirety.

Employment Judge Gaskell

Date: 30 May 2023