



EMPLOYMENT TRIBUNALS

Claimant: Mr A Haidarpour

Respondent: John Lewis PLC

REASONS

Background

1. The Claimant was employed as a Warehouse Operative by the Respondent and worked at its Regional Distribution Centre in Aylesford from 18 December 2013 to 18 January 2021 when he resigned without notice.
2. He pursues claims of unfair constructive dismissal; direct disability discrimination; disability related harassment and a failure to make reasonable adjustments fully explained in the agreed List of Issues prepared by the parties for this hearing. There was an Agreed Bundle of 843 pages (**Exhibit R1**), an Agreed List of Issues incorporated into the agreed Bundle (**Exhibit R2**) and an Agreed Cast List and Chronology (**Exhibit R3**).
3. The Tribunal received evidence from the Claimant who gave evidence in chief by written statement (**Exhibit C1**) and five witnesses who gave evidence in chief on behalf of the Respondent. The Respondent's witnesses and relevant written statements are as follows:
 - Mr P Crisp, Warehouse Manager (**Exhibit R4**);
 - Mr T Barker, Transport Manager (formerly Ambient Warehouse Manager (**Exhibit R5**);
 - Ms M Ridley, Grievance Appeals Manager (**Exhibit R6**);
 - Mr K Wickes, De-Kit Warehouse Operative (**Exhibit R7**); and
 - Mr K Dean, De-Kit Warehouse Operative (**Exhibit R8**).

Mr Hobbs, Counsel for the Respondent submitted a written skeleton argument (**Exhibit R9**) which he supported with oral submissions, and the Claimant submitted oral submissions to the Tribunal.
4. In summary, the Claimant alleges that his work colleagues harassed him

and discriminated against him by reason of his disability and that the Respondent failed to consider the complaints and grievances which he submitted in respect of this behavior. The Claimant's case is that this culminated in an incident at work on 16 January 2021 which was the last straw which triggered his resignation.

5. The Respondent denies all claims pursued by the Claimant. It submits that there was no discrimination on the grounds of disability or any breach of contract during the course of the Claimant's employment and that the Claimant resigned of his own volition on 18 January 2021 to start a new job. The Respondent accepts that, at all material times, the Claimant suffered from longstanding degenerative changes in his spine and left knee causing him pain and which amounted to a disability within the meaning of the Equality Act 2010.

Findings of Fact

6. The Tribunal made the following Findings of Fact after consideration of the oral and documentary evidence placed before it and the submissions received from Mr Hobbs and the Claimant.
7. The Claimant suffered two accidents at work during his employment with the Respondent. The first was in or about July 2015. There is very little information available in respect of this incident because the accident report has been lost. The second accident occurred in April 2017 when the Claimant fell off a double decker trailer which exacerbated pain in his left knee and resulted in a prolonged absence from work.
8. The injuries suffered by the Claimant in that accident kept him away from work for many months and in February 2018 he was dismissed by the Respondent on capability grounds because of that absence. The Claimant successfully appealed against his dismissal and he was reinstated to his job in May 2018. Warehouse Operatives undertake demanding physical work and what is termed 'picking' is one of the heaviest tasks undertaken by them. It was for this reason that on his reinstatement the Respondent made a permanent adjustment to the Claimant's job. This was that he would no longer be required to "pick goods" for more than two hours on each shift he worked.
9. At the commencement of the hearing, the Claimant confirmed with the Tribunal that although he had submitted two earlier grievances, on 24 February and 5 July 2016 it was the difficulties at work after his accident on 18 April 2017 which resulted in his resignation. Therefore, it was not necessary for the Tribunal to consider the circumstances of the earlier grievances.
10. There are at least three warehouses on the Respondent's Aylesford Site. These are as follows: The Ambient Warehouse deals with products that can be stored at room temperature. The Chill Warehouse deals with products

that need to be kept cool. The De-Kit Warehouse deals with product returns (and the like).

11. The Claimant was reinstated to work on the night shift in the Chill Warehouse on which shift Mr Crisp was the Night Manager. Four Shift Line Managers reported to Mr Crisp on the night shift and there was also a Senior Warehouse Operative who reported to the Shift Line Managers. The Respondent's Planning team are responsible for work planning on each shift which involves allocating tasks for Warehouse Operatives working on those shifts. The Shift Line Managers are responsible for ensuring that the Warehouse Operatives carry out the tasks assigned to them and are the first port of call for Warehouse Operatives who are having to deal with any difficulties on their shift. Mr Crisp had and has no involvement as the Night Manager in the allocation of work to warehouse operatives.
12. On 11 March 2019 the Claimant attended a disciplinary meeting facing allegations of serious misconduct of unauthorized absence and serious breach of the Respondent's rule and procedures for which he received a first written warning on 15 March 2019. He pursued no appeal against that sanction.
13. The Claimant submitted grievances on 15 March and 4 April 2019. These two grievances were referred to Mr Holyome, Warehouse Operations Manager. His investigations of these grievances are well documented. The relevant documents confirm that he interviewed the Claimant as to his concerns and completed thorough investigations into both grievances interviewing others who could assist him in his investigations when it was necessary to do so. The grievances and their outcomes are now briefly summarised by the Tribunal.
14. In the earlier grievance the Claimant complained that he had not received as much training as other Warehouse Operatives in the Chill Warehouse and that all his other colleagues were being trained in specialist areas apart from him. Mr Holyome established that the Claimant had received training in all the main functions undertaken by Warehouse Operatives in the Chill Warehouse and that his allegation that others were being trained in more specialised areas apart from him was inaccurate. This part of the Claimant's grievance was rejected by Mr Holyome for those reasons. He did uphold the Claimant's grievance that his truck driving licence should have been renewed more quickly following its expiry and took steps to ensure that the renewal was undertaken.
15. In the second grievance the Claimant complained about a conflict of personality with Mr Crisp. He asserted that Mr Crisp had refused to make a referral to Occupational Health which he had requested after his return to work following a short stay in hospital, and that Mr Crisp had then refused a phased return to work for him. Mr Holyome's investigations confirmed that Mr Crisp had made a referral to Occupational Health shortly after receiving the Claimant's request to do so and that the Claimant had been allowed to make a phased return to work following his attendance on Occupational

Health. Mr Holyome did not uphold this grievance for those reasons.

16. The Claimant made another allegation in respect of Mr Crisp's conduct towards him in the Agreed List of Issues. This is that in March 2019 Mr Crisp allocated jobs to him on the nightshift which required him to push and pull heavy goods and caused him to suffer a rib injury. He also alleged in the course of his evidence that he suffered a heart attack as a result of these jobs but subsequently conceded that he had not suffered such an attack.
17. The Claimant also made further unparticularised allegations against Mr Crisp during his oral evidence. He alleged that Mr Crisp allocated work to him unfairly and showed prejudice towards him in the work arrangements he organised in the Chill Warehouse. Mr Crisp denied these allegations.
18. The Claimant conceded that Mr Crisp was not responsible for allocating work on the nightshift. He confirmed that it was Shift Line Managers, who reported to Mr Crisp who are responsible for practical management of the work which was allocated to the night shift each night by the Planning Team. He had not submitted any complaints to either the Shift Line Managers, Mr Crisp or any third party about this alleged conduct, or difficulties created for him and had pursued no grievance/grievances in respect of these allegations. The Tribunal concluded, on the evidence before it that these were unfounded allegations made by the Claimant in an effort to strengthen the claims he is pursuing in these proceedings.
19. Mr Barker is currently employed as Transport Shift Manager (Nights) at Aylesford RDC. In this job he is responsible for overseeing the transport elements of the RDC and the Warehouse Operatives (around 1,000 employees) that work at the RDC on night shifts. He had been employed on the site as a Warehouse Shift Manager (Nights) covering the Ambient Warehouse before taking up his current job.
20. The Claimant alleged that he had been physically assaulted by Mr Aaron Simmons, a Warehouse Operative, in the Chill Warehouse on 23 November 2019. The Claimant submitted an initial written statement on 25 November 2019 after the incident. Two Floor Line Managers in the Chill Warehouse, Ms Thorpe and Mr Brown, took statements from eight witnesses who were present and witnessed the alleged incident. On 29 November Mr Barker wrote to the Claimant inviting him to a grievance meeting on 3 December 2019. The Claimant was provided with the right to be accompanied by a colleague or trade union representative but attended by himself.
21. In the interview with Mr Barker the Claimant alleged that Ms Vesna (a Floor Line Manager) had asked him to split trays and that he had informed her that he could not do so because of his disability. He told Mr Barker that Ms Vesna then said he was "fucking disabled" and swore at him after which Mr Simmons, Ms Vesna's partner, threatened, grabbed and assaulted him. He

wanted Mr Simmons to be dismissed. He also questioned why no CCTV footage was available. He alleged that there had been a cover up in this regard because relevant camera footage would corroborate his claims.

22. Mr Barker was able to read the statements provided by the Claimant, Ms Vesna and Mr Simmons. There was no doubt that there had been an altercation involving these three employees in some way apparently initiated by a request which Ms Vesna made to the Claimant to assist her lifting items. Ms Thorpe and Mr Brown had taken statements from eight other employees who had witnessed the incident. Mr Barker was able to consider those statements and discussed the Claimant's circumstances with Mr Crisp and investigated the position in respect of CCTV footage.
23. Mr Barker provides a most helpful explanation of what his investigation disclosed as to the position in respect of CCTV footage in the Chill Warehouse at the relevant time. The warehouse spans an area of around 20,000-30,000 square feet. Security cameras around the warehouse are not designed to capture employees' activity. The cameras are present for security purposes. The majority of the cameras are focused on the perimeters of the warehouse. Mr Barker ascertained that the Respondent did have two or three cameras in the warehouse itself but that these spin through 360° on a timed basis and are not designed to capture all areas of the warehouse and all employee activity. He further explains that there is no business need to have cameras everywhere in contrast to the Respondent's branches where cameras are needed to detect theft. He also ascertained that CCTV footage on the system is overwritten after around three months from first recording. There is therefore limited CCTV coverage of employee activity in the warehouse in the first instance and Mr Barker was satisfied that in relation to the area in which the alleged assault took place, there was no coverage.
24. Mr Barker concluded on the evidence before him that the Claimant's grievance could not be upheld. His evidence to the Tribunal was as follows:

"On reviewing this information, I felt satisfied that Mr Haidarpour's grievance should not be upheld because there was no evidence to support Mr Haidarpour's claim. In particular, none of the witnesses who gave statements could substantiate Mr Hairarpour's claims that Mr Simmons physically assaulted him. The witnesses' contemporaneous statements even contradicted Mr Haidarpour's version of events. For example, a number of Partners stated that Mr Haidarpour was acting in an aggressive manner towards Ms Vesna (pages.....) and swearing at her....."
25. Mr Barker gave a full explanation of his decision to the Claimant in the letter in which he sent to him on 18 December 2019. He informed the Claimant that he had the right to appeal against his decision. The Claimant pursued an appeal against Mr Barker's decision, This was referred to Ms Tracy McCreadie, Manager Appeals.

26. The Claimant's appeal referred to a number of previous incidents in 2015, 2016 and 2017 where CCTV footage had not been available to support his grievances, comparing this to the CCTV footage that had been available to those dealing with the disciplinary procedure on 15 March 2019 in which he had been sanctioned. He maintained that such prejudice had been continued when no CCTV footage of the incident on 23 November 2019 had been available notwithstanding that Mr Barker had established that there was no such CCTV footage available.
27. Although under no obligation to do so in investigating an incident that occurred on 23 November 2019 Ms McCreadie conducted a substantial investigation into the previous incidents referred to by the Claimant. This included interviewing those Managers who had been involved in those incidents at the relevant time where she was able to do so. She also interviewed Mr Brennan, the Respondent's Security Manager, at the Aylesford RCD.
28. In the outcome letter which she sent to the Claimant on 3 March 2020 Ms McCreadie states, inter alia, as follows:

"Having investigated each of the incidents that you raise I have found no evidence that there is any CCTV footage available that has not been taken into account and I have found that, because of the way in which the CCTV cameras patrol, it is unlikely that they will capture many of the incidents that occur in the chambers at Aylesford RDC. In each of the cases you raise with me I spoke to the investigating managing involved where possible and I am satisfied that they took reasonable steps to secure CCTV footage if it was available. The fact is, unfortunately, it was not. I am, therefore, not upholding your appeal. I do not consider that the essential facts are in doubt or that any relevant circumstances have not been taken into account and I believe the Partnership's procedures have been properly followed and you are not being treated unfairly or any differently from other partners in closely similar circumstances".
29. Ms McCreadie explained to the Claimant in respect of the incident that had resulted in disciplinary action being taken against him on 15 March 2019 that the CCTV camera from which footage was taken in respect of that incident was a fixed static camera at the entrance through which the Respondent's employees enter the warehouse. The purpose of this camera is to record all movements into and out of the warehouse.
30. The Claimant moved to the De-Kit Warehouse in or around April 2020. Mr Barker explained that the Claimant transferred to the De-Kit Warehouse following an occupational health referral. He was transferred because it was considered that work in the De-Kit Warehouse would provide further assistance to him in respect of his difficulties with his left knee as a result which the Claimant struggled with pushing, pulling and heavy lifting.
31. Mr Barker explained that in other warehouses a Warehouse Operative has

only two basic tasks – picking boxes into cages and then loading those cages onto lorries. This can be labour-intensive and involve an element of heavy lifting. In De-Kit there are other tasks that Warehouse Operatives can undertake which include bailing cardboard and stacking trays. These are not heavy lifting tasks. Furthermore, the work in De-Kit is untimed. This means that it can be undertaken at an employee's own pace.

32. This means that working in De-Kit Warehouse is a varied job and could support the adjustments which the Claimant required because of his left knee. The De-Kit Warehouse supports a number of other Warehouse Operatives in dealing with similar difficulties. It was within Mr Barker's knowledge that the Claimant was fully accommodated in the De-Kit Warehouse and was supported by Mr Blower who was an excellent First Line Manager who gave him substantial support when he was working in the De-Kit Warehouse.
33. The Claimant told the Tribunal that he had been extremely happy to be transferred to the De-Kit Warehouse. However, within a short period he had pursued a grievance about the conduct of Mr Wicks, a fellow Warehouse Operative, working on the night shift in the De-Kit Warehouse. He initially submitted a complaint about Mr Wicks by email to Mr Blower, his First Line Manager. Mr Blower arranged a mediation meeting between the Claimant and Mr Wicks which was also attended by Mr Buckell, which took place on 27 May 2020. The Claimant submitted a grievance on 29 May 2022 arising from that mediation meeting which was referred to Mr Barker for investigation.
34. Mr Barker arranged to meet the Claimant on 11 June 2020 to discuss his grievance. The Claimant told him that he felt bullied and harassed by Mr Wicks. He alleged that Mr Wicks had not been prepared to help him undertake various tasks and that at the mediation meeting arranged by Mr Blower, and attended by Mr Buckell, Mr Wicks had become aggressive and told the Claimant that he hated him. However, he also informed Mr Barker that things had greatly improved in the De-Kit Warehouse since the mediation meeting and that he had no reason to fear working in the De-Kit Warehouse, and that he was taking steps to avoid speaking to Mr Wicks to avoid any further difficulties between them.
35. After this meeting Mr Barker attended on Mr Blower and Mr Wicks. Mr Wicks could not recall any conversation in which he had stated that he hated the Claimant. Mr Blower explained that he had been mediating between the Claimant and other Warehouse Operatives working in De-Kit because the Claimant had been questioning every action and process within the De-Kit operation and had been questioning his colleagues to why they were going for breaks and when, and what tasks they are doing and that this had alienated him from others in the team to the extent that the Claimant had stopped speaking to colleagues he was working with. However, notwithstanding this difficulty Mr Blower told Mr Barker that he was satisfied that the workplace environment in the De-Kit Warehouse was not unsafe as the Claimant had alleged and Mr Barker from his own

knowledge of working arrangements in the De-Kit Warehouse was satisfied that this was the case.

36. Mr Barker partially upheld the Claimant's grievance. This was because of the difficulties in communication between the Claimant and his work colleagues which his enquiries had revealed. He suggested to Mr Blower and the Claimant that they should continue to meet to enable Mr Blower to address any concerns the Claimant had as they arose.
37. Mr Barker did not uphold the Claimant's complaints against Mr Wicks. He found that there was no evidence to support the Claimant's allegations that Mr Wicks hated him or that Mr Wicks had treated him differently because of the physical limitations which prevented the Claimant undertaking some work in the Warehouse. The Tribunal note that in the course of the Claimant's oral evidence during this hearing he accepted that Mr Wicks had not stated that he hated him during the mediation meeting that had taken place on 27 May 2020. Mr Barker was satisfied that Mr Wicks' actions and behaviour towards the Claimant had not been bullying behaviour and that he had not refused to assist the Claimant as he had alleged.
38. Mr Barker was aware of the support which Mr Blower had given to the Claimant since his arrival in De-Kit. This was within Mr Barker's knowledge because of the location of his office and his close contact with those who reported to him. He knew that Mr Blower had worked hard to ensure the Claimant's successful integration into the De-Kit Warehouse. He also confirmed to the Tribunal that Mr Blower continued to offer support to the Claimant after he had completed his grievance investigation. He had observed that the Claimant frequently attended on Mr Blower after the grievance investigation had been concluded and that he continued to receive continuing and substantial support from Mr Blower after that.
39. Mr Barker explained the outcome of the grievance to the Claimant in a discussion which he held with him (which the Claimant has denied took place) on 13 July 2020. This is confirmed by the fact that Mr Barker arranged a further mediation meeting with the Claimant and other Warehouse Operatives on 17 July 2020 which was specifically arranged to address that part of the grievance that he had upheld as to communication between the Claimant and his colleagues.
40. Mr Barker's outcome letter was not received by the Claimant until 4 November 2020. He had prepared this outcome letter and sent it to the Personnel Department on 4 August 2020 for them to send it to the Claimant in accordance with required procedures. However, unfortunately the introduction of a new personnel system, unknown to Mr Barker prevented his letter being uploaded by the Personnel Department and sent out to the Claimant until 4 November 2020. The Respondent accepts this was a serious delay in communication of the outcome letter to the Claimant.
41. Mr Wicks has worked for the Respondent as a Warehouse Operative at its

Aylesford site for over 15 years. The Claimant has made a number of allegations against Mr Wicks during the course of his employment and in these proceedings. Mr Wicks also has physical limitations on work he can undertake due to a back problem. He was employed in the same position as the Claimant. He had no management responsibility towards the Claimant.

42. He explained that he had not been impressed by the Claimant's attitude towards various matters which the Claimant had discussed with him. He denies the allegations made by the Claimant that from May 2020 he bossed the Claimant around and got him to do all the work while he drank coffee and laughed at him, or that on a date not particularized by the Claimant he told him he would dismiss him and that he would be leaving his employment with the Respondent soon.
43. Mr Wicks recalled that in May 2020 the Claimant asked him for help with lifting a heavy load. Mr Wicks explained to the Claimant that he could not assist him in this because of his back trouble but would seek, and then did seek, further assistance for him. He accepts that Mr Blower, arranged a mediation between him and the Claimant because he was concerned about their relationship. He was frank in informing those present at the meeting that he did not like the Claimant because of his attitude towards various matters and that he did not consider they would ever be friends. However, he also made clear that this would not affect how he did his job and how he worked with the Claimant. The Claimant has now conceded that Mr Wicks did not say that he hated him during this meeting.
44. The Claimant has also asserted that on a date he could not confirm Mr Wicks attacked him in a forklift truck. Mr Wicks denies this allegation. The Claimant did not submit a complaint or a grievance about the incident after it occurred. The oral evidence provided to the Tribunal by the Claimant in support of his allegation was contradictory, exaggerated and unsatisfactory. It caused the Tribunal considerable concern. The allegation made by the Claimant in his written statement is that Mr Wicks chased him with a forklift truck forcing him to shelter behind a column to avoid being run over.
45. In his oral evidence the Claimant alleged that Mr Wicks had been trying to kill or maim him by running him over in the forklift truck he was driving. The Claimant stated he had been in fear of his life. His first description of the event was that Mr Wicks had been driving the forklift truck chasing him inside the De-Kit Warehouse. The Claimant then told the Tribunal that Mr Wicks had pursued him outside the De-Kit Warehouse in an area strictly designated for forklift truck operations. He described being chased around this area by a forklift truck being driven by Mr Wicks who was continually bleeping the truck's horn as he pursued the Claimant. The Claimant provided two different locations in this part of his evidence in both of which such an incident, if it had occurred, would have been viewed by a number of other employees working in those areas and put their own safety at risk.

46. The Claimant eventually conceded that the area he was referring to was exclusively reserved for forklift truck operations and that there were strict procedures to manage the entry of any pedestrians into that area. He also confirmed that he had left the warehouse and walked into that area without contacting the forklift drivers working in that area by radio as he was required to do.
47. The Tribunal accepts Mr Wicks' detailed description of how and where this incident occurred. The Claimant agreed that he entered the forklift truck area from a ramp which leads down from the warehouse. As he did so the forklift truck driven by Mr Wicks appeared turning into his path previously unsighted by the Claimant. The Claimant would also not have been in Mr Wicks' line of sight before this. It was Mr Wicks' rapid reaction that enabled him to stop the forklift truck when he saw the Claimant walking towards him. Mr Wicks would not have been aware of the Claimant's presence in the forklift truck area and the Claimant would not have been in his line of sight when he walked down the ramp into this area.
48. Mr Wicks' quick reaction avoided a serious accident. He described this as a near miss. It had been caused entirely by the carelessness of the Claimant in failing to give advance warning that he was entering the yard. In failing to do so he had acted in breach of well-established safety procedures. The Claimant's description of this incident was exaggerated and untrue. Such an untenable allegation was not to his credit and it substantially damaged his credibility before the Tribunal.
49. On the night shift of 19/20 September 2020 the Claimant complained to Mr Blower that on 14 September Mr Wicks had altered loading instructions prepared by the Claimant when he covered for the Claimant's break from working on the C3 screen and that two other Warehouse Operatives had refused to assist him and made false allegations against him on 17 September 2020. He subsequently submitted a grievance which was referred to Miss Kent, Personnel Services Adviser under the Respondent's triage procedure. In summary, the grievance accused Mr Wicks of bullying and referred to previous alleged incidents that had been the subject of investigation by Mr Barker on which written outcome was still awaited and the Claimant would have a right of appeal. The Claimant did not name the other two Warehouse Operatives in his grievance.
50. Miss Kent concluded that this grievance could not be taken forward because the earlier grievance remained outstanding and closed the grievance on 29 September 2020. She explained her position to the Claimant in email correspondence and also spoke with him on the telephone. The Claimant agreed that the grievance should not be taken forward pending completion of the outstanding grievance procedure. The Claimant also informed the Tribunal that he received further assurance from the Personnel Services Team on 23 November 2020 that if further matters remained outstanding following completion of the appeal procedure now being followed in the earlier grievance, then he would be assisted in lodging a further grievance.

51. After receipt of Mr Barker's outcome letter on 4 November 2020 the Claimant submitted an appeal against his decision on 6 November 2020. This appeal was referred to Ms Ridley. She held a grievance appeal meeting with the Claimant to discuss his appeal on 30 November 2020. This meeting had to take place via telephone because of the Covid lockdown arrangements. The Claimant had raised five matters in his appeal, only two of which had been investigated by Mr Barker. Ms Ridley's appeal was restricted to considering those matters.
52. These were that Mr Wicks had failed to assist the Claimant undertaking work in moving pallets and that he had stated that he hated the Claimant in front of Mr Blower. She did not consider any new allegations that had not been previously discussed at the initial grievance. The Claimant also complained about the length of time it had taken for Mr Barker's outcome letter to be sent to him. He did not raise with Ms Ridley any allegations that he had been subjected to discrimination by reason of his disability. The appeal hearing focused on accusations of bullying relating to the matters which the Claimant had pursued in his grievance in May 2020.
53. After her meeting with the Claimant Ms Ridley spoke to Mr Barker, Mr Wicks and Mr Blower. Mr Wicks' position remained as it had been before. Ms Ridley concluded that the Claimant rubbed Mr Wicks up the wrong way and that he disliked the Claimant's attitude towards a number of matters which he fully explained to Ms Ridley who concluded that Mr Wicks' dislike of the Claimant did not relate to the Claimant's disability and physical limitations. This was a problem which Mr Wicks had to contend with himself. It related to how Mr Wicks perceived the Claimant's attitude and his personality. Ms Ridley also spoke with Miss Kent who had closed the grievance which the Claimant had submitted in September 2020. She was satisfied that the decision made by Miss Kent had been implemented with the Claimant's knowledge.
54. Ms Ridley concluded there were no grounds on which she could reasonably intervene in the decision reached by Mr Barker. Her findings are recorded in the appeal outcome letter which was sent to the Claimant on 18 December 2020 and sets out in detail the extent of her investigations and her findings. Ms Ridley concluded there was no evidence to suggest Mr Wicks did not help the Claimant because of the Claimant's physical difficulties. He could not assist the Claimant because of his own difficulties. His refusal to help the Claimant was based on his own physical limitations which he had explained to the Claimant and did not constitute bullying.
55. Ms Ridley concluded that the way in which Mr Wicks spoke to the Claimant during the mediation meeting on 27 May was unacceptable. She noted that Mr Blower had followed this up appropriately with Mr Wicks after the meeting. She found no evidence to suggest Mr Wicks had said he "hated" the Claimant. She noted that Mr Wicks accepted that he had said he did not like the Claimant. She was satisfied this was not because of the Claimant's physical limitations. It was due to Mr Wicks' view of the Claimant's attitude and behaviour which he had fully explained to Ms Ridley.

56. Ms Ridley went on to give some advice to the Claimant encouraging him to speak to his managers at the point at which an issue became a concern so that such matters could be looked into in a timely manner. She also recommended considering mediation if the situation was still not resolved. In her view, she was trying to set out steps that would benefit the Claimant and allow him to obtain better and timely resolutions instead of continually returning to the grievance process.
57. On 2 December 2020 Mr Blower raised a request with the Respondent's Personnel Service Centre to investigate concerns which the Claimant reported to him that he was being underpaid by the Respondent and had been categorized as working part-time rather than full-time.
58. The query as to underpayment arose as a result of the Claimant commencing a new shift pattern from 1 November 2020. This involved him working the same number of hours (37.5) but working on a Sunday which entitled him to be paid at time and a half. He was not paid the new rate taking into account the Sunday payment in November and December but this error was resolved and on 6 January 2021 a back payment of £534.68 (gross) was made to him to ensure he received all wages due to him under the new shift pattern for November and December.
59. The Claimant was referred to Occupational Health on 11 December 2020. This was with his consent and he approved the referral form submitted to Occupational Health. The referral was seeking medical advice as to whether or not the Claimant's difficulties with his left knee meant that he should not operate a forklift truck. The Occupational Health report was sent back to the Respondent, copied to the Claimant on 5 January 2021. It stated in its summary as follows:
- "I advise that Amir refrains from operating a forklift truck where possible and also avoids pushing or pulling strenuous loads up an incline"*
60. The Case Management Order made on 9 September 2022 confirms that the Claimant relies upon the "last straw" event triggering his resignation as being as follows:
- "The last straw was on 16 January 2021 when Mr Wicks and another colleague Keith Dean criticized the Claimant for having a drink in the Warehouse which was not true and was not supported by CCTV"*
- The Claimant expanded the list of matters relied upon when finalizing the Agreed List of Issues but maintained that the last straw was as stated above in the Case Management Order.
61. This was an incident that had not been referred to in either the Claimant's resignation letters or his ET1. It is also not referred to in his witness statement. During the course of his oral evidence the Claimant accepted that he was not at work on 16 January 2021. He confirmed that no such

incident had taken place on that day. He also confirmed that this incident was not the cause of his resignation.

62. The Claimant resigned by email with immediate effect at 22.31 on 18 January 2021. He subsequently sent a letter with enclosures setting out his reasons for resigning which was received by the Respondent on 21 January 2021.
63. The Claimant had seen a job advert online about four weeks before he submitted his resignation. The job advertised was with BP. He applied for the job and was interviewed by telephone. He was then offered the job and completed the Employment Contract and other documentation sent to him which enabled him to commence his employment with BP two days after leaving the Respondent's employment. The Claimant was paid higher wages for working in this job.

The Law

64. The Claimant pursues a claim of constructive dismissal within the terms of s.95(1)(c) Employment Rights Act 1996. The question before the Tribunal in respect of this claim is: Did the Claimant resign without notice in circumstances in which he was entitled to terminate his contract with the Respondent without notice?
65. The Claimant relies on a breach of the implied term of trust and confidence. The burden is on the Claimant to establish that, when viewed objectively, there was a repudiatory breach of his contract of employment. Even if there has been such a breach in order to succeed on such a claim the Tribunal also has to determine that the Claimant left because of the breach (or if there was more than one reason to resign, the repudiatory breach must be at least a substantial part of the reason) and that the Claimant did not waive the breach by delaying his resignation for too long or doing anything else that indicated acceptance of the ongoing employment relationship.
66. In this case the Claimant relies not on a single event but on a series of events dating back to (on the basis of what he confirmed to the Tribunal at the commencement of this hearing) 2017. He asserts that cumulatively those matters caused a repudiatory breach entitling him to resign on 18 January 2021. The Claimant relies on the last straw event he has described to trigger his resignation.

67. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a last straw incident even though the last straw by itself does not amount to a breach of contract. It has been established there is no need for there to be proximity between the last straw and the previous act of the employer relied upon. The last straw does not have to be of the same character as earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will so do. However, it must contribute however slightly to the breach of the implied term of trust and confidence and the test of whether an employee's trust and confidence has been undermined is objective. This means that an entirely innocuous act cannot be a final straw even if an employee genuinely, but mistakenly, interprets it to be so.
68. Mr Hobbs referred the Tribunal to the cases of **Omilaju v Waltham Forest Council [2004] EWCA Civ 1493** and **Kaur v Leeds Teaching Hospitals [2018] EWCA Civ 978**. In the latter case Underhill J LJ proposed that tribunals should ask themselves the following questions:
- What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered his or her resignation?
 - Has he or she affirmed the contract since that date?
 - If not, was that act (or omission) by itself a repudiatory breach of contract?
 - If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the **Malik** term?
 - Did the employee resign in response (or partly in response) to that breach?
69. It was also stated by Underhill J that if the conduct in question is continued by a further act or acts in response to which the employee resigns he or she can still rely on the totality of the conduct to establish a breach of the implied term.
70. This means that where there is a genuine last straw that forms part of a cumulative breach of the implied term of trust and confidence there is no need for any separate consideration as to a possible previous affirmation because the effect of the final act is to revive the right to resign. The focus of enquiry should be on whether the act which precipitated the resignation was part of a cumulative breach (as opposed to a one-off event) rather than on whether past breaches had been waived.

71. The Claimant also pursues claims of direct discrimination contrary to s.13(1) Equality Act 2010 which states as follows:

"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".

The Tribunal has to question whether or not there was less favourable treatment shown to the Claimant and if there was what the reason for that was. The Claimant relies on a hypothetical comparator.

72. Mr Hobbs has helpfully drawn the Tribunal's attention to s.23(1) Equality Act 2010 which states that when constructing hypothetical comparators in direct discrimination cases *"there must be no material difference between the circumstances relating to each case"*. S23(2) adds a proviso that is specific to direct discrimination in disability cases as follows: *"The circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13 the protected characteristic is disability"*. Mr Hobbs correctly reminds the Tribunal that the effect of this above provision is that the hypothetical comparator must have the same abilities as the Claimant.

73. The Claimant also pursues claims of harassment contrary to s.26(1) Equality Act 2010 which states as follows:

"A person (A) harasses another (B) if –

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and*
- (b) the conduct has the purpose or effect of –*
 - (i) violating B's dignity, or*
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B".*

The Claimant submits this claim by repeating the seven alleged acts of direct disability discrimination and suggesting that, in the alternative, these amount to harassment. He also adds two further allegations of alleged harassment to that list.

74. The Tribunal must first determine whether any of the nine events took place as described and if they did must then determine whether any of them amounted to unwanted conduct related to the protected characteristic of disability and thereafter determine whether they had the purpose or effect which is set out s.26(1)(b) Equality Act 2010.

75. The Claimant's final head of claim added by the Claimant after the Case Management Hearing held on 9 September 2022 is a failure to make reasonable adjustments contrary to s.20(3) Equality Act 2010. This imposes a duty to make reasonable adjustments where a provision criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage.

Conclusions

76. The Findings of Fact have established that the Claimant's evidence to the Tribunal was unsatisfactory in a number of respects and substantially damaged his creditability before the Tribunal. His serious allegations against Mr Crisp were unfounded and untenable. He admitted during the course of the hearing that Mr Wicks did not say he hated him in the mediation meeting on 27 May; and the meeting that he alleged took place on 16 January 2021 did not take place.
77. The other allegations against Mr Wicks remained unparticularised. The Tribunal has found those allegations to be unfounded preferring the evidence of Mr Wicks to that of the Claimant. Furthermore, the Tribunal found that the allegation that Mr Wicks chased him in a forklift truck intending to kill or maim him either in the warehouse premises as he initially alleged or in an open working area is untrue. The Claimant's claims have to be considered in the context of the unsatisfactory evidence he has given in these proceedings.
78. The Claimant pursued a successful appeal against his dismissal. His reinstatement provided substantial adjustment to his working arrangements to take account of the physical limitations he had to deal with arising from difficulties with his spine and left knee. Furthermore, the evidence before the Tribunal confirms that the Respondent and its managers continued to support him after his reinstatement. The transfer to the De-Kit Warehouse is a good illustration of this. Further, the Tribunal is satisfied that Mr Baxter and Mr Blower provided valuable support to him after his transfer to their management.
79. The Respondent's investigations, and the outcomes, of the Claimant's grievances are supported by the documentation considered in, and generated by, those investigations. Those involved attended on the Claimant in each case and on relevant witnesses in these grievances. All the investigations were conducted carefully and diligently. The outcomes explained to the Claimant were supported by the available evidence.
80. The appeals conducted by Ms McCreddie and Ms Ridley were also carefully and diligently pursued. It is to Ms McCreddie's credit that she fully examined the Claimant's allegations in respect of CCTV footage from earlier incidents by pursuing enquiries with those who had been involved in the incidents at the time. Her enquiries demonstrated that the Claimant's

suspensions/allegations were unfounded. Ms Ridley fully tested the evidence of Mr Wicks as did these proceedings. Ms Ridley reached conclusions with which the Tribunal agreed. He has been an honest and frank witness.

81. The failure to provide Mr Barker's outcome letter to the Claimant until 4 November 2022 was a serious failure in procedure. However, Mr Baxter had explained the outcome to the Claimant and had then taken action himself to deal with the communication issue which the grievance had uncovered which was within the Claimant's knowledge. Furthermore, Mr Blower continued to support the Claimant.
82. Miss Kent's decision to close the grievance which the Claimant submitted on 20 September was made within the Respondent's triage procedure. She explained her decision to the Claimant in correspondence and in a telephone conversation with him. On the Claimant's own evidence he agreed to the closure. He was also given reassurance by the Respondent that those matters could be re-opened by a new grievance if he considered it was necessary to do so after the outstanding grievance procedure had been completed. The Tribunal finds that these steps did not prejudice the Claimant's position.
83. The Tribunal was informed by the Claimant that he did not resign because of the incident that he had described as the last straw throughout the proceedings until this hearing. There is no evidence of a last straw before the Tribunal. He resigned because he had secured new employment which enabled him to commence a new job two days after his departure. Furthermore, the Claimant's witness statement and oral evidence, unsatisfactory as it was, has not established that the alleged conduct on which he relies related to his disability.
84. The Tribunal now summarises its conclusions as to the allegations set out in the agreed list of issues on which the Claimant relies in pursuing his claims in these proceedings. He set out twelve allegations in the Agreed List of Issues which he submits demonstrates that the Respondent breached the implied term trust and confidence it owed to him. The first allegation is that the Respondent acted in breach of contract by dismissing him in February 2018. This was not a matter it was the subject of evidence before the Employment Tribunal. The Claimant was reinstated following his appeal within the Respondent's disciplinary procedure. The Respondent could not have acted in breach of contract in reinstating the Claimant to his job which he sought in his appeal.
85. Furthermore, they include allegations against Mr Crisp and Mr Wicks which the Tribunal has found to be unfounded and, in some cases untrue. The Respondent did not fail to act on the Claimant's grievances as he has alleged. The steps that were taken, the findings that were made and the reasons for those findings are set out in the Findings of Fact above. The fact that the Claimant does not agree with the outcome of those grievances does not establish his claim that the grievances were not properly considered by the Respondent.

86. The investigations undertaken by Mr Baxter and Ms McCreddie established that there was no failure to provide CCTV footage in respect of the events to which the Claimant has referred. The Claimant continues to allege otherwise. The Tribunal also now knows that the last straw incident upon which the Claimant relies did not take place.
87. Miss Kent did not delete the Claimant's grievance as he alleges. The Tribunal has found that she closed the grievance with the Claimant's knowledge and agreement. The Claimant was not paid part-time in November and December 2020. The Respondent mistakenly omitted to include in his full-time wage a Sunday supplement that was payable to him because of a change in working days from 1 November 2020 onwards. This unintentional error was addressed immediately by Mr Blower and rectified by the Respondent.
88. The Respondent was in error in failing to send Mr Baxter's outcome letter in respect of the second grievance he investigated until 4 November 2020. The Claimant had been informed of the outcome of his grievance by Mr Baxter and would have been aware of the actions which Mr Baxter had taken following the grievance. He was not prejudiced by this delay because he was able to pursue an appeal against the decision and that was duly and carefully considered by Ms Ridley.
89. The Respondent now examines the grounds on which the Claimant has pursued his claims of discrimination as set out in the agreed List of Issues. He relies on the unparticularised allegations he has made about Mr Wicks' conduct, Mr Simmons' alleged assault against him on 23 November 2019, the failure to dismiss Mr Simmons and the questions submitted to Occupational Health in December 2020 to establish that the Respondent directly discriminated against him by treating him less favourably by reason of his disability. The Tribunal has found the allegations made against Mr Wicks to be unfounded. The Respondent took no disciplinary action against either the Claimant or Mr Simmons following its investigation of the November incident. The Claimant's allegations against Mr Simmons and Ms Vesna were contradicted by independent evidence. The contents of the Occupational Health Referral were agreed by the Claimant. The Claimant has failed to establish that he was treated less favourably by reason of his disability.
90. The Claimant relies on the same grounds to establish harassment with the addition of alleging that Mr Brown's investigation of CCTV coverage of the incident in November 2019 subjected him to unparticularised physical and mental abuse, and that Mr Holyome's outcome letter of 9 May 2019 was an act of bullying. There is, on the evidence before the Tribunal no merit in these claims. The Claimant was not subject to harassment by the Respondent contrary to s.26(1) Equality Act 2010.
91. The claim that the Respondent failed to make reasonable adjustments was not pursued until preparation of the agreed List of Issues. The Claimant pleaded no PCPs and those alleged by him are further allegations about the

Respondent's conduct on which he gave no evidence to the Tribunal. The alleged reasonable adjustments are unparticularised; they refer to an unidentified Occupational Health Report and unexplained matters relating to accidents in which the Claimant was involved in February 2015 and April 2018 which were not matters which the Claimant was asked to consider. The Tribunal find that the Respondent did not fail to make reasonable adjustments to work arrangements for the Claimant as he has alleged. This claim is without merit and is dismissed.

92. The Tribunal's Findings of Fact established that the series of events on which the Claimant relies to pursue his claim of constructive dismissal did not either individually, or cumulatively, cause a repudiatory breach of his contract of employment entitling him to resign, and the Claimant has accepted that the last straw event on which he relied to trigger his resignation did not take place. The reason for his resignation was that he had decided to leave the Respondent's employment and had found a new job.
93. The Tribunal has found that the Respondent did not behave in a way that was calculated, or likely, to destroy, or seriously damage, the trust and confidence between the Claimant and the Respondent. The Claimant did not resign from the Respondent's employment in circumstances in which he was entitled to terminate his contract with the Respondent without notice. This means that his claim of constructive dismissal must fail and is dismissed. The claims of direct disability discrimination and harassment and failure to make reasonable adjustments are also dismissed.

Employment Judge Craft
Date: 3 August 2023