EMPLOYMENT TRIBUNALS

Claimant: Mr S Higham

Respondent: Halton Borough Council

Heard at: Liverpool **On:** 12-16 June 2023

Before: Employment Judge Ainscough
Ms L Heath
Miss C Doyle

REPRESENTATION:

Claimant: Mrs Higham (Wife)
Respondent: Ms M Dalziel (Solicitor)

JUDGMENT having been sent to the parties on **10 August 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant resigned from his role as Street Scene Worker on 17 June 2021 and his last day of employment with the respondent was 30 June 2021. The claimant commenced early conciliation with ACAS on 17 June 2021 in which he complained of constructive unfair dismissal and disability discrimination. The claimant received the ACAS early conciliation certificate on 24 June 2021 and lodged his Employment Tribunal claim on 30 June 2021.

2. At a case management hearing on 12 January 2022 Employment Judge Ord set out the complaints and issues. On 9 February 2022 the respondent was able to submit an amended grounds of resistance. The respondent denied that there had been any breach of the implied term of trust and confidence and further that the claimant was disabled person or had been subject to disability discrimination.

Issues

3. The claimant brought complaints of constructive unfair dismissal, direct disability discrimination, discrimination arising from disability, indirect disability discrimination and failure to make reasonable adjustments.

4. The detailed list of issues and supplemental documentation are contained within the Annex to this judgment.

Evidence

5. The parties agreed a joint bundle that ran to 466 pages. During the hearing, the Tribunal were provided with two further documents: an email from Mr Palin to HR dated 23 February 2021 and a letter from the respondent to the claimant dated 13 December 2019.

6. The Tribunal heard evidence from the claimant, Mr Palin (the claimant's second line manager), Mr Burke (the claimant's line manager), Mr Wright (the claimant's third line manager) and Mr Ferraro (an acting team leader) on the claimant's return to work on 26 April 2021.

7. During the hearing it became apparent that the claimant made complaints about the handling of a grievance that occurred after his resignation, and the claimant therefore conceded that it did not contribute to the reason for his resignation. As a result, it was agreed that it was not necessary to consider the witness statement submitted by Katie Woodcock who had been responsible for investigating the grievance and the requirement for her to give evidence was dispensed with.

8. At the end of day two Mr Palin had not completed his evidence but was unable to attend at the Tribunal on day three. It was therefore agreed that Mr Palin would remain under oath and other witnesses would be interjected in the order of evidence during day three, and Mr Palin would finish his evidence at the beginning of day four. Appropriate witness warnings were given.

Relevant Legal Principles

9. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 is Section 95(1)(c) which provides that an employee is dismissed by his employer if:

> "**the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

10. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only 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.

11. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

12. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

13. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

14. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

15. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA 21 July 2015** the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**

> **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

16. Discrimination against an employee is prohibited by section 39(2) Equality Act 2010:

> **"An employer (A) must not discriminate against an employee of A's (B) –**
>
> **(a) as to B's terms of employment;**
>
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment."**

Direct Discrimination

17. The definition of direct discrimination appears in section 13 and so far as material reads as follows:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".**

18. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

Discrimination arising from disability

19. Section 15 of the Equality Act 2010 states that there will be discrimination arising from disability if:

> **"(a) A treats B unfavourably because of something arising in consequence of B's disability and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."**

Indirect discrimination

20. Section 19 of the Equality Act 2010 provides that:

> **"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
>
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
>
> **(c) it puts, or would put, B at that disadvantage, and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim."**

Reasonable adjustments

21. Section 20 of the Equality Act 2010 sets out the following duty:

> **20 Duty to make adjustments**
>
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's 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.**
>
> **(4) ….**
>
> **21 Failure to comply with duty**
>
> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**

> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**
>
> **(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.**

Code of Practice on Employment 2011

22. The Code of Practice on Employment issued by the Equality and Human Rights Commission in 2011 provides a detailed explanation of the legislation. The Tribunal must take into account any part of the Code that is relevant to the issues in this case.

23. In particular the Tribunal has considered:

(a) paragraphs 5.11-5.12 to decide whether the respondent's actions were proportionate to achieving a legitimate aim;

(b) paragraph 5.7 the meaning of "unfavourable".

Burden of Proof

24. The burden of proof provision appears in section 136 and provides as follows:

> **"(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 sub-section (2) does not apply if A shows that A did not contravene the provision".**

25. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867** where Mummery LJ held that "could conclude", in the context of the burden of proof provisions, meant that a reasonable Tribunal could properly conclude from all the evidence before it, including the evidence adduced by the complainant in support of the allegations, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment.

26. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are not without more sufficient to amount to a prima facie case of unlawful discrimination. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

Relevant Findings of Fact

Claimant's Employment

27. The claimant worked for the respondent from 4 September 2017 until 30 June 2021 as a Street Scene Worker. The main purpose of the claimant's job was to maintain the landscape, improve the neighbourhood and cleanse the streets within the Halton Borough area.

28. Whilst the claimant's duties included neighbourhood improvements and street cleansing, from April 2019, the majority of the claimant's time with the respondent was involved in landscape maintenance and in particular riding on a mower cutting grass during the summer months and using a chainsaw in the winter months.

29. The claimant signed a contract of employment which provided that his working hours were Monday to Friday save for on four occasions on a Saturday or a Sunday during the year which he would be required to complete overtime. The claimant's continuous employment from previous Local Authority positions was carried over into this role. In the case of any sickness absence, the claimant was entitled to full pay for a period of six months and half pay for a further six months. The claimant was also required to submit a fit note should his sickness absence last longer than seven calendar days.

30. The contract of employment provided for a grievance procedure, a disciplinary procedure and a capability procedure.

31. The claimant complained of discrimination and a breach of the implied term of trust and confidence between 18 February 2021 until 28 February 2021. During that period the claimant's line manager was Marcus Burke and the claimant's second line manager was Rob Palin. From 20 March 2021 the claimant's team leader was Mike Ferraro. Paul Wright was the Divisional Manager to whom Rob Palin reported. The claimant worked within a team of 46 full-time operatives and ten casual staff.

32. The Tribunal heard evidence that the role of a ride-on mower was one of the more prestigious roles within the team. Both parties accepted during evidence that this role comprised of numerous tasks.

Claimant's Health

33. The claimant had physical impairments of hernias. In 2018 the hernia had been repaired only for it to rupture whilst the claimant was at work and therefore a further repair was required.

34. As a result of the rupture, it was agreed with the claimant's then line manager, Rob Strain, that the claimant would refrain from lifting bins during the course of his duties. This meant that the claimant was not required to work overtime on a Saturday or Sunday four times per year.

35. The claimant was due to have the hernia operation in 2019 but it was cancelled and repeatedly cancelled during the Covid pandemic.

36. The claimant was able to continue in his role, during the pandemic with the restriction in place.

NHS Shielding Advice

37. On 18 February 2021 the claimant received a text message from the NHS informing him that he was deemed clinically extremely vulnerable. The advice given by the NHS to the claimant was that he had "a combination of underlying risk factors or health issues when, when combined, indicates a high risk [of Covid]". The claimant was specifically advised that he did not need to contact his GP about the letter. The guidance was for the claimant to shield and stay at home as much as possible until 31 March 2021, which included advice to work from home if practicable.

38. The letter made clear that this was "advice and not the law" and it was for the claimant to choose what to do.

Respondent's request for further information

39. On receipt of the letter, the claimant contacted his line manager, Marcus Burke. Mr Burke subsequently contacted his line manager, Rob Palin, and it was agreed that the three would meet that day. The claimant returned to the depot following completion of his duties to discuss the matter.

40. During that meeting the claimant was asked why he was clinically extremely vulnerable. The claimant was unsure and said it might be because of his hernias and/or heart murmur. It was agreed that the claimant would obtain clarification from his GP and Rob Palin would take advice from the Employment Relations department. It was also agreed that the claimant would remain absent from work until he had received such clarification. The Tribunal determines that Rob Palin was not angry or frustrated at this meeting.

41. On returning home the claimant was unable to secure an appointment with his GP that day, and he updated Marcus Burke of this fact. Rob Palin spoke to the Employment Relations team, and it was agreed that the claimant would need to obtain a letter from his GP to say that the claimant was fit to attend work and that the GP had no concerns with the claimant attending work. It was also agreed that Rob Palin should complete a risk assessment.

42. Rob Palin subsequently called the claimant on the same day and informed the claimant of the requirement to obtain the letter from his GP before he returned to work.

43. The claimant did speak with his GP on 19 February 2021, who informed him that he was clinically extremely vulnerable because of the planned hernia operation and risks. The GP also advised the claimant that he could return to work if he chose to. The claimant phoned Marcus Burke the same day to inform him of this and said that he would be returning to work on Monday 22 February 2021.

44. On 22 February 2021 the claimant returned to work and carried out his usual shift. At the end of his shift the claimant was approached by Rob Palin who informed

the claimant he should not be in work and that he needed to speak to him in the office.

45. It was reiterated to the claimant by Rob Palin that he required a letter from the GP saying that the claimant was fit to complete his duties before he could return to work.

46. The Tribunal determines that Rob Palin did not suggest that he could obtain the claimant's GP records had the claimant lived in Runcorn, because as a senior manager Rob Palin would know that this was not something the respondent could do without the claimant's consent.

47. The Tribunal determines that Rob Palin did make reference to the claimant completing full duties on his return to work. Rob Palin sent a letter to the claimant recording his recollection of his meeting in which he confirmed that he had been of the understanding that the claimant's restrictions had been lifted.

48. Subsequently, on 22 February 2021 the claimant called Rob Palin to say he could not get the relevant evidence from his GP. The Tribunal determines that as a result of Rob Palin requiring the claimant to complete full duties, the claimant was concerned that he would be subject to a capability procedure, similar to that which was instigated by Mr Palin in 2019 in regard to the claimant's absence record. The Tribunal determines that capability was not raised by Rob Palin at that meeting.

49. On 22 February 2021 at 4.34pm the claimant sent an email to Rob Palin, copied to Paul Wright, in which he said that he would shield until 31 March 2021 because Rob Palin was unwilling to leave him on the light duties away from emptying bins. The claimant also recorded that there had been an assertion by Rob Palin that he would get the claimant on “capability” for being unable to complete full duties. The claimant made reference to speaking to his union and submitting a complaint.

50. On 23 February 2021 Rob Palin forwarded that email to Sharon Raynes in the Employment Relations department. At 3.11pm on 23 February 2021 Sharon Raynes emailed Rob Palin with the advice given by the respondent about shielding:

> “In this instance, the CEV employee should be directed to provide a copy of their NHS letter, along with a signed letter of their own clearly stating that they acknowledge the NHS advice, but that they are disregarding it and will continue to attend work, based on their own risk assessment. This should be retained on file, along with any vulnerable individual risk assessment that has been undertaken.”

51. This advice was not conveyed to the claimant or to Marcus Burke.

52. On 23 February 2021 the claimant met with his GP who informed him that he could not write a note going against Government advice to stay away from work. The claimant was informed by his GP that it was his choice as to whether he returned to work.

53. On 24 February 2021 the claimant sent a text to Marcus Burke querying whether he could return to work. Marcus Burke responded stating that he was still awaiting advice from HR and would update him in due course.

54. Subsequently, on 4 March 2021 the claimant sent an email to Marcus Burke into which Rob Palin was copied. In that email the claimant informed the respondent that his doctor had said it was ok for him to ride on a mower but would not provide a letter to this effect. Neither Marcus Burke nor Rob Palin responded to that email.

55. Following receipt of the claimant's email of 22 February 2021, Rob Palin discussed the matter with Paul Wright. Paul Wright did not respond to the claimant's email of 22 February 2021 as he was content that the matter was being dealt with adequately by Rob Palin.

56. On 12 March 2021 Rob Palin hand delivered a letter to the claimant in response to his email of 22 February 2021. The letter was dated 9 March 2021, which is the date on which Rob Palin started to write the letter, but it was not hand delivered until 12 March 2021. In that letter Rob Palin set out his understanding of the claimant's medical conditions and the need for him to shield. Rob Palin also set out that he was surprised that the claimant had returned to work on 22 February 2021 (albeit wrongly recorded as 18 February 2021), and clarified that following the meeting with the claimant Rob Palin required:

(1) A letter from the doctor saying the claimant was fully fit;

(2) A risk assessment to see what controls should be put in place; and

(3) The claimant was to contact his GP so that Rob Palin would know what condition he was risk assessing.

57. The letter went on to record the subsequent conservation between the claimant and Rob Palin, that the GP was unwilling to provide the letter and that the claimant was distressed at the thought of having to empty bins which could damage his hernia further. Rob Palin asserted that the claimant's hernia had been resolved and was under the impression that restricted duties had been lifted. Rob Palin concluded that he wished to meet with the claimant in light of the content of his email of 22 February 2021 and it was agreed that this meeting would take place on 19 March 2021. It was also asserted that advice would be taken from Occupational Health

58. On 12 March 2021 the claimant responded to that letter by email (in which he also copied Paul Wright) and disputed much of the content. In particular the claimant disputed that Rob Palin had said he would take advice from HR at the meeting on 18 February 2021. The claimant also asserted that at the meeting on 22 February 2021 Rob Palin had asserted that the claimant had to be fit to do full duties. The claimant asserted that his hernia had not been resolved and he was still subject to restricted duties. The claimant alleged that on 22 February 2021 Rob Palin had said he would take the claimant down “capability” for being unable to fulfil the role.

59. Following receipt of the claimant's response, Rob Palin discussed the matter with Paul Wright. Paul Wright confirmed in evidence that he was content that the meeting of 19 March 2021 was the appropriate way to deal with the matter and did not respond to the claimant's email.

Meeting on 19 March 2021 and subsequent actions

60. The claimant met with Rob Palin on 19 March 2021. Both the claimant and Rob Palin acknowledged in evidence that this was a difficult meeting to the extent that the claimant sent an email on 22 March 2021 in which he apologised for his behaviour during that meeting. No notes were taken of the meeting.

61. During that meeting Rob Palin accounted for the inaccuracies with the dates in the letter of 12 March 2021. Rob Palin also confirmed that the claimant remained on restricted duties but that a referral to Occupational Health was required.

62. There was a dispute between the claimant and Rob Palin as to what was said at the meeting on 22 February 2021 and the subsequent phone call. This distressed the claimant, and it was his behaviour exhibiting this distress for which the claimant subsequently apologised.

63. The claimant disputed that there needed to be a referral to Occupational Health in order for him to return to work but did not object to the referral.

64. On 29 March 2021 Rob Palin completed an Occupational Health referral form. This form was sent to Employee Relations who then subsequently forwarded it to the Occupational Health Department.

Claimant's first return to work

65. On 31 March 2021 the period of shielding ended but the claimant did not return to work until 6 April 2021 as a result of prebooked annual leave.

66. On the claimant's return to work, he had not met with Occupational Health. As a result, Marcus Burke and Rob Palin discussed the claimant's return to work and it was agreed that the claimant would be allocated to yard duty.

67. The claimant was informed of this duty on the morning of 6 April 2021. Yard duty is not specified in the claimant's job description, but the claimant can be asked to complete duties commensurate with his role. Marcus Burke gave evidence that yard duty was commensurate with the claimant's role because it involved cleansing and maintenance.

68. The claimant considered this allocation of duties to be a punishment and asked if he could go on the van with the team litter picking. The claimant was informed that he had to remain in the yard doing yard duty. The claimant subsequently left the meeting.

69. The claimant returned to Marcus Burke’s office ten minutes later and began performing yard duty. Approximately ten minutes later he returned to the office and

told Marcus Burke that he could not do those duties and would be speaking to his GP and left the office.

70. On 7 April 2021 the claimant submitted a fit note citing an anxiety disorder which rendered him unfit for work until 21 April 2021.

Occupational Health Assessment

71. On 14 April 2021 the claimant attended the Occupational Health Department and was subject to an assessment.

72. On 21 April 2021 the report was sent to the respondent in which it was recorded that:

- The claimant was fit for work with restrictions.
- The claimant could lift but not more than 10-15 kg.
- The claimant should carry out a dynamic risk assessment in regard to lifting.
- The claimant was currently off sick with anxiety directly related to workplace issues.
- The claimant was fit to use chainsaws and climb on and off ride-on machinery.
- The claimant was safe emptying bins.

Risk Assessment

73. On 22 April 2021 Rob Palin completed a risk assessment. During that risk assessment Rob Palin and Marcus Burke weighed each individual bit of equipment that the claimant had to use. Following this task, it was concluded that the claimant was fit for full duties.

74. Marcus Burke spoke with Rob Palin and informed him that on the claimant's return to work he would be allocating the claimant to a team rather than back to his role on the ride-on mower. Marcus Burke explained to Rob Palin that this was for physical and emotional support and Rob Palin agreed that it was a good idea.

Return to work 26 April 2021

75. The claimant returned to work on 26 April 2021 following receipt of the Occupational Health report.

76. On the claimant’s return, he met with Marcus Burke to discuss the return to work. During that meeting, Marcus Burke made notes of the discussions which were subsequently typed up and signed by the claimant. During that meeting the claimant informed Marcus Burke that he had become so distressed on 6 April 2021 because

of the death of his aunt. The Tribunal determines that there was no discussion between the claimant and Marcus Burke about the claimant's anxiety.

77. Marcus Burke informed the claimant that he would not be returning to the ride-on mower but rather working with the team. The Tribunal determines that the claimant queried why he could not go back on the ride-on mower and Marcus Burke explained to the claimant that the ride-on mower would mean that the claimant worked alone and deployment to working with the team would offer the necessary support.

78. Marcus Burke also discussed the risk assessment with the claimant. He showed the claimant the different types of equipment that had been weighed during the risk assessment, including various bin bags. The claimant was informed that he should not lift anything above 10-15kg and should carry out a dynamic risk assessment. The claimant was also informed that he was to complete a manual handling course, which he did on that day.

79. At the conclusion of the meeting Marcus Burke informed the claimant that he would be subject to the wellbeing review process in order to monitor his sickness absence. Marcus Burke gave evidence that this process had been triggered as a result of the claimant's absence for a period of greater than nine days.

80. Marcus Burke did not conduct a stress risk assessment because he was of the view that had the anxiety disorder been a concern, Occupational Health would have commented upon it in the Occupational Health report and/or it would have been raised by the claimant.

Lone Working

81. On 6 May 2021 Marcus Burke informed the claimant that he would be required to work overtime on Saturday 8 May 2021 subject to the advice about weight restrictions in the Occupational Health report and the risk assessment.

82. The claimant was unable to work on 8 May 2021 and swapped the shift with a colleague to 13 June 2021.

83. On 12 May 2021 the claimant had a discussion with Marcus Burke and queried when he would be able to go back on his ride-on mower round.

84. On 13 May 2021 the claimant was asked by Mike Ferraro to work alone on Friday 14 May 2021.

85. During that conversation the claimant informed Mike Ferraro that he was unhappy at being asked to do this because he had been told he had to remain on a team so that he would not work alone and was unable to return to the ride-on mower.

Claimant's Resignation

86. On 31 May 2021 the claimant was required to shield prior to his hernia operation on 3 June 2021. Subsequently the claimant remained off sick whilst recovering from his operation.

87. Prior to the claimant's return to work, he submitted his resignation on 17 June 2021, in which he stated:

> "Please accept this as my notice period. I will be leaving on 30 June 2021."

88. The claimant sent the email to Marcus Burke, Rob Palin, David Owen at Resources, Unison and Paul Wright.

89. The claimant submitted his resignation on that date because he had secured alternative employment. It was agreed that he would only be required to work two weeks' notice so that he could start his new job.

Claimant's grievance and the respondent's actions prior to termination

90. The claimant submitted a grievance on 18 June 2021 in which he made complaints about his treatment at the hands of his managers.

91. As a result, Paul Wright arranged to speak to the claimant on 29 June 2021. During that conversation the claimant informed Paul Wright that his resignation was a result of the content of his grievance.

92. Paul Wright asked the claimant to reconsider his resignation so that the allegations could be investigated, but the claimant declined.

93. Within the grievance process the claimant confirmed that it was the bullying by Rob Palin that led him to submit the grievance. Within the grievance the claimant cited concerns around the return to work meetings and the meeting on 19 March 2021. The claimant also made complaints about being demoted.

94. At the end of the conversation Paul Wright reiterated the offer to allow the claimant to retract his resignation, but the claimant declined.

95. The claimant's employment terminated on 30 June 2021 and he started his new job on 1 July 2021.

96. The respondent subsequently investigated the claimant's grievance and provided him with a conclusion on 23 December 2021 in which the claimant's grievance was found unsubstantiated.

Submissions

Respondent's submissions

97. The respondent submitted that the claimant had failed to prove that there was a dismissal because the respondent had acted with reasonable and proper cause. The respondent contended that any procedural deficiencies were not enough to cause the claimant to resign.

98. The respondent contended that the claimant had taken the decision to leave and any complaints after the claimant had made this decision could not contribute to his resignation.

99. The respondent conceded that the claimant was a disabled person because of his hernia condition but not because of his anxiety disorder. The respondent also disputed any knowledge of the claimant's anxiety disorder.

100. The respondent submitted that the claimant was not subject to unfavourable or less favourable treatment. The respondent conceded that it applied the provision, criterion or practice but that it did not put the claimant at a particular disadvantage.

Claimant's submissions

101. The claimant contended that the respondent was aware of his disabled status and this was the reason he had restricted duties.

102. The claimant submitted that the ride on mower role was his job and removal from it was both unfavourable and less favourable treatment.

103. The claimant maintained that the respondent failed to adequately manage his absence or follow the correct procedures.

104. The claimant submitted that he needed the restricted duties to manage his condition and the respondent created an unsafe working environment.

Discussion and Conclusions

Constructive Unfair Dismissal

105. The claimant complains that there was a fundamental breach of contract of the implied term of trust and confidence. The question for the Tribunal as whether the respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the employment relationship.

106. The claimant contended that there was a fundamental breach on numerous occasions:

(1) The claimant was ordered to work alone and told he was no longer on restricted duties

107. By 6 May 2021 the respondent had received the Occupational Health report which detailed that the claimant could empty bins provided they were no heavier than 10kg - 15kg. The respondent had conducted a risk assessment which provided the claimant could empty bins with the weight caveat and that the claimant would dynamically risk assess each task.

108. The Occupational Health advice did not say the claimant could not work alone. Marcus Burke had asked the claimant to work in the team as an extra precaution in light of the claimant's emotional state. The respondent was reasonable in asking the claimant to work overtime because this was not contrary to the Occupational Health advice and was only four times per year.

109. The Tribunal makes the same finding about the respondent asking the claimant to work alone on 14 May 2021. This was a reasonable request in

accordance with Occupational Health advice and was infrequent when cover was required.

(2) Managers bullied and harassed the claimant

110. The Tribunal has determined that on 18 February 2021 Rob Palin was not angry and frustrated and did not bully and harass the claimant. The Tribunal has also determined that on 22 February 2021 Rob Palin did not tell the claimant that he, Rob Palin, would be able to contact the claimant's GP directly if the claimant lived in Runcorn.

111. The Tribunal has determined that Rob Palin did make reference to the claimant performing full duties, but it was the claimant who feared this would lead to capability procedures because Rob Palin was the manager who was responsible for such procedures.

112. Rob Palin's failure to understand the status of the claimant's restricted duties was not calculated or likely to destroy or seriously damage the employment relationship.

113. The Tribunal determines that the respondent was reasonable in allocating the claimant to yard duty. The Occupational Health report remained outstanding, and the respondent had concerns about the claimant's underlying conditions and his ability to perform the substantive role.

114. It was reasonable for Rob Palin to complete the risk assessment following receipt of the Occupational Health report without the claimant's input as the claimant had provided input into the Occupational Health report. The risk assessment was discussed on the return to work and explained to the claimant and he signed it.

115. Marcus Burke's decision to allocate the claimant to a team was an added precaution to the restrictions recommended by Occupational Health. Marcus Burke knew that the claimant had been upset in the meeting on 22 February 2021 and there had been a distressing meeting with the claimant on 6 April 2021 from which the claimant went home. Marcus Burke also knew that the claimant had been signed off with an anxiety disorder. The Tribunal determines that it was reasonable for Marcus Burke to assign the claimant to a team where he could work with the support of his colleagues rather than on the ride-on mower where the claimant would work alone for the majority of his shift.

116. The Tribunal has also determined that the request to work on 8 May 2021 was reasonable and in accordance with Occupational Health advice.

(3) That the respondent demoted the claimant

117. The Tribunal has determined that assigning the claimant to a team was a supportive measure and not a demotion. Working in a team was within the requirements of the role and the claimant was never told he could not return to ride-on mower duties.

(4) That the respondent did not ensure a safe working environment

118. The Tribunal determines that it was reasonable for Marcus Burke to accept the Occupational Health advice, and this was superior to any stress risk assessment he could have completed. Occupational Health did not provide advice on the claimant's anxiety disorder, despite Occupational Health knowing of the cause of the claimant's absence. It was therefore reasonable for Marcus Burke to conclude that the stress risk assessment was not required. In addition, the claimant had explained the cause of his distress on 6 April 2021 was the death of a close relative.

119. The Tribunal has also determined that it was reasonable to ask the claimant to perform the duties on 8 May 2021 and 14 May 2021 in light of the Occupational Health advice.

(5) That the respondent did not provide support

120. Whilst it took from 22 February 2021 to 29 March 2021 to make the Occupational Health referral, Rob Palin was not dealing with the claimant's absence in isolation. It was year end, a pandemic and Rob Palin had taken annual leave. The claimant was safe and shielding on full pay during this period. The claimant had sent an email on 22 February 2021 telling the respondent he would shield until 31 March 2021. Following the meeting on 19 March 2021, Rob Palin realised he would need Occupational Health advice and a referral was made on 29 March 2021.

121. The Tribunal determines that this was a reasonable chronology of events and notes in particular that on 22 February 2021 an email was received from the claimant saying that he would shield until 31 March 2021. The next day Rob Palin sent that email to HR. By 9 March 2021 Rob Palin had begun to draft his response to the claimant, and by 12 March 2021 the letter had been hand delivered. A week later Rob Palin met with the claimant and ten days later a referral was made to Occupational Health.

(6) Management of the claimant and his duties

122. On 6 May 2021 the claimant was taken off restricted duties in accordance with the Occupational Health advice, to which the claimant had contributed, accepted and did not dispute.

123. The respondent did not contact the claimant from 22 February 2021 until 12 March 2021. The claimant was not off sick, he was shielding. The respondent had an email from the claimant saying he would shield until 31 March 2021 but did make contact and met with the claimant before the end of the shielding period.

124. The Tribunal determines that far from the respondent not making adjustments on the claimant's return to work, Marcus Burke took the extra precaution of assigning the claimant to a team in light of the claimant's emotional state. Whilst the claimant did not agree with this, the respondent thought it was necessary, and this was a reasonable stance for the respondent to take.

(7) That the respondent did not fully investigate the complaint

125. The claimant’s complaint was contained in two emails that were sent on 22 February 2021 and 12 March 2021 into which Paul Wright was copied. Paul Wright

spoke to Rob Palin and was content with the way in which Rob Palin proposed to deal with the matter. Rob Palin forwarded the email of 22 February 2021 to HR, provided a written response on 12 March 2021 and met with the claimant on 19 March 2021.

126. The Tribunal therefore determines that the respondent did properly investigate the claimant's complaints.

(8) That the respondent did not follow the sickness procedure

127. The Tribunal has determined that the respondent's request for the claimant to work on 8 May 2021 was in accordance with the Occupational Health advice and would not have been adverse to the claimant's health and wellbeing. From 22 February 2021 to 31 March 2021 the claimant was absent from work because he was shielding.

128. The Tribunal determines that in such circumstances the respondent was not required to check on the claimant's welfare over and above the contact the parties had on 12 March 2021 and 19 March 2021. The Tribunal has already determined that a stress risk assessment was not necessary. The respondent had no opportunity to conduct a wellbeing review meeting with the claimant on 31 May 2021 as he was shielding before his operation. By 17 June 2021 the claimant had resigned and therefore the respondent acted reasonably in not scheduling any further wellbeing review meetings.

Conclusion

129. The Tribunal therefore concludes that there was no fundamental breach of the claimant's contract, such that the claimant was entitled to resign and claim constructive unfair dismissal. The claimant's claim of constructive unfair dismissal is unsuccessful.

Disability Discrimination

Was the claimant a disabled person and did the respondent have knowledge?

130. The respondent conceded that the claimant's hernia condition meant that the claimant was a disabled person for the purposes of the Equality Act 2010. The Tribunal has therefore concluded that the respondent had sufficient knowledge of the claimant's disabled status caused by the hernia condition.

131. There was evidence from the claimant's GP that confirmed that the claimant had a mental impairment. There was also evidence from the claimant's disability impact statement that the mental impairment had a substantial and adverse impact on the claimant's normal day-to-day activities. The Tribunal has considered and taken note of the Statutory Code of Practice on Employment from 2011 and notes that if a person has a recurring condition it can amount to a disability if it is likely to recur in that it might well recur.

132. The Tribunal has determined that the claimant is also a disabled person for the purposes of the Equality Act 2010 as a result of an anxiety disorder.

133. The GP letter confirmed that prior to the recurrence of this disorder in April 2021, the last time the claimant was treated for anxiety was 2015. The claimant did not provide evidence that he had informed the respondent of his disorder prior to submission of the fit note in April 2021. The Tribunal does not determine that the respondent should have known the claimant had an anxiety disorder or that he was a disabled person by noting the claimant's demeanour.

134. The respondent did not have knowledge, nor could be reasonably expected to know that the claimant was a disabled person as a result of his anxiety disorder. It was not raised by Occupational Health and not investigated by Occupational Health. The claimant explained that his distress on 6 April 2021 was caused by a bereavement rather than any long-term disorder.

Failure to make reasonable adjustments claim

135. Schedule 8 of the Equality Act 2010 provides that the respondent will not have a duty to make reasonable adjustments if the respondent did not know, or could be reasonably expected to know, that the claimant had a disability and was likely to be placed at a substantial disadvantage.

136. The claimant complained that the respondent operated a practice of requiring employees to work alone on a weekend lifting heavy bins. The respondent did not dispute such a practice.

137. The claimant contended that such a practice put him at a substantial disadvantage because there was a risk he would exacerbate his hernia condition.

138. The Tribunal has determined that the respondent did not know and could not be reasonably expected to know that the claimant would be at such a disadvantage in light of the Occupational Health report and the risk assessment.

139. Rob Palin had carried out a thorough risk assessment and concluded that the claimant would not be required to lift more than 10kg-15kg in any aspect of his job and should that need arise, the claimant could dynamically risk assess the situation.

140. The respondent had no knowledge of the alleged substantial disadvantage and therefore was under no duty to make reasonable adjustments and the claimant’s claim for failure to make reasonable adjustments is unsuccessful.

Indirect Discrimination

141. The respondent conceded that there was a provision, criterion or practice that the claimant was required to work occasional overtime, lifting heavy bins alone. The application of this requirement could put those with an abdominal disability or more specifically, those with a hernia disability at a disadvantage if performing overtime would exacerbate their condition.

142. The Tribunal concludes that the provision, criterion or practice did not put the claimant at a particular disadvantage of greater risk to health in light of the Occupational Health advice and the risk assessment. It was the respondent’s

position that such overtime was necessary to provide services to the area and to meet contractual requirements. The claim of indirect discrimination is unsuccessful.

Discrimination arising from disability

143. The Code of Practice on Employment 2011 defines “unfavourable” as “to put at a disadvantage”.

144. The Tribunal has determined that the allocation to yard duty and assignment to a team was unfavourable. The claimant was anxious to return to the ride-on mower and considered the other roles to be punishment. The yard duty and assignment to a team exacerbated the claimant's anxiety and he went off sick.

145. The claimant contends that this unfavourable treatment was because he was required to shield, something which arose because of his disability. However, the assignment to a team was not because the claimant was required to shield. Marcus Burke gave clear evidence that it was a precaution because of the claimant's emotional state.

146. The allocation of yard duty did arise because of the claimant's requirement to shield. However, the Tribunal accepts that the respondent had a legitimate aim of making sure the claimant was safe in his role, which meant waiting for the Occupational Health advice. Allocation to yard duty placed the claimant in the least physically demanding role whilst allowing him to return to work and was therefore, proportionate.

147. The claim of discrimination arising from disability is unsuccessful.

Direct Discrimination

148. There has been some confusion over the comparators in this case. The claimant provided names of five comparators, but the respondent submitted they were not appropriate because there were material differences between them and the claimant. The Tribunal was not provided with any real evidence about the actual comparators save for the claimant's document at pages 99-100 in which the claimant asserted that all returned to work to their previous duties when absent because of sickness or shielding.

149. The respondent’s position was that the material difference between the claimant and these employees was that the respondent had knowledge of the conditions of the five comparators and therefore each could safely return to their previous duties. The respondent asserted that neither the respondent nor the claimant had a proper understanding of the claimant's condition and enquiries needed to be made.

150. The Tribunal has therefore determined that the five named comparators are not appropriate comparators and has relied on various hypothetical comparators for the purposes of the direct discrimination claim.

Less favourable treatment detailed by the claimant in the further and better particulars

Allocation to yard duties

151. The claimant has complained that the allocation to yard duty was less favourable treatment. The Tribunal has determined that the hypothetical comparator was a Street Scene Worker with a medical condition, about which the respondent was unclear, who was not disabled.

152. The Tribunal has concluded that this comparator would be allocated to yard duty because the respondent would also be unclear about their condition and would need further advice to safely deploy the comparator. The claimant was not treated less favourably than a hypothetical comparator.

That Rob Palin threatened to contact the claimant's GP

153. The Tribunal has determined that this did not happen.

The assignment to a team

154. The claimant complained that assignment to a team was less favourable treatment. The Tribunal has determined that the hypothetical comparator was a Street Scene Worker, with a physical disability who was absent because of an anxiety disorder, who returned to work, who was not disabled.

155. The Tribunal has concluded that Marcus Burke would have taken a similar precaution with the hypothetical comparator because he would have been similarly concerned that the majority of time on a ride-on mower amounted to lone working. The claimant was not treated less favourably than the hypothetical comparator.

That there was a failure to check on the claimant's welfare

156. The claimant contends that the respondent's failure to check on his welfare whilst absent from work was less favourable treatment. The Tribunal determines that the hypothetical comparator was a Street Scene Worker, who returned to work from sickness absence, was required to shield and then subsequently resigned, who was not disabled.

157. Marcus Burke scheduled a wellbeing review one month after the claimant's return to work. In the intervening period, there were informal chats between the claimant, Marcus Burke and Mr Ferraro. At the time of the wellbeing review the claimant was required to shield and did not return to work before he resigned. The wellbeing review was not rescheduled because of the claimant's resignation.

158. The Tribunal has determined that had the hypothetical comparator resigned, the respondent would not have rescheduled the review. It was the claimant's resignation that caused the respondent not to reschedule not the claimant's disabled status. The claimant was not treated less favourably than the hypothetical comparator.

The removal of restricted duties on 22 February

159. The claimant complains that the respondent removed his restricted duties status on 22 February 2021. The Tribunal has determined that the hypothetical comparator was a Street Scene Worker with a medical condition, about which the respondent was unclear, who was not disabled.

160. The Tribunal has determined that the respondent was likely to make the same assumption that the hypothetical comparator could also perform full duties due to the uncertainty of the restrictions imposed by the medical condition. The claimant was not treated less favourably than the hypothetical comparator. It was the lack of knowledge about the medical condition that caused the incorrect assumption to be made.

Removal of restricted duties on 6 May

161. The claimant complains that he was allocated to work alone and lift heavy bins on 6 May 2021. The Tribunal has determined that the hypothetical comparator is a Street Scene Worker who, Occupational Health advise can lift up to 10kg-15kg who is not disabled. The hypothetical comparator would be allocated the same duties. The claimant has not been treated less favourably than the hypothetical comparator.

Failure to seek HR advice on 22 February

162. The Tribunal has determined that HR advice was sought, and it was given. The Tribunal has also determined that there was no delay in obtaining the Occupational Health report.

Reference to a capability procedure on 22 February

163. The Tribunal has determined that this did not happen.

Conclusion

164. The Tribunal therefore concludes that the claimant has not proven facts from which the Tribunal could conclude, in the absence of any explanation from the respondent, that the alleged less favourable treatment could amount to direct disability discrimination and the claim is unsuccessful.

Credibility of Witnesses

165. The Tribunal determines that all witnesses were credible. The claimant mistakenly believed that the respondent's actions were unsupportive of his disability and as a result this exacerbated his anxiety and led to his resignation. The Tribunal accepts that the claimant was entitled to form the views that he did from his perspective as a disabled person who was clinically extremely vulnerable during a global pandemic.

166. The respondent did not know about the claimant's anxiety disorder. The respondent was equally entitled to investigate the claimant's health to ensure it was

safe for him to return to work. The respondent was operating an essential service during a global pandemic, and it is likely that because of increased staff absence there was a breakdown in the usual normal levels of communication. However, the respondent did not act unlawfully.

Employment Judge Ainscough
Date: 23 November 2023

REASONS SENT TO THE PARTIES ON
28 November 2023

FOR THE TRIBUNAL OFFICE