



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Kennett

**Respondent (1):** The Automobile Association Developments Ltd  
**Respondent (2):** Mr N Foxall

**HELD at Birmingham by CVP**

**ON: 4, 5, 6 and 7 May 2021**

**BEFORE:** Employment Judge Dean  
**Members:** Mr D Falconbridge  
Mrs R Pelter

## REPRESENTATION:

**Claimant:** Mr J Duffy of Counsel  
**Respondents:** Mr M Curtis of Counsel

**JUDGMENT** having been sent to the parties 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

1. By way of background in this case the claimant was employed by the respondents latterly as a roadside technician working on patrols from 10 November 2003 until the termination of his employment with effect from 5 April 2019.
2. By a claim form presented on 10 May 2019 following a period of early conciliation from 12 March to 12 April 2019 the claimant brought complaints of disability discrimination and constructive unfair dismissal. The claim that is made is essentially about whether or not the claimant has been subjected to disability discrimination by no longer allowing him to sign in at Tamworth and requiring him to sign on at his original place at home in Birmingham. In

summary the respondent's defence is that there was good reason to require the claimant to sign in at Birmingham.

3. The issues to be determined by the Tribunal were those identified by Employment Judge Butler at a case management discussion on 14 October 2019 (page 48 and onwards) as amended by the claimant's withdrawal of complaints of harassment and direct disability discrimination.
4. The law to which I have regard is helpfully set out by both counsel in this case setting out the statutory requirements, the burden of proof and the leading authorities to which the Tribunal have had regard and I do not at this stage repeat the detail of the law which is clearly described in counsels written submissions and which equally set out the legal principles and authorities which we have considered in reaching our conclusions. In brief summary we have had full regard in respect of the unfair dismissal complaints to s95 (1) (c) of the Employment Rights Act 1996 and the leading authorities in relation to constructive dismissals including
  - a. Western Excavating (ECC) Ltd v Sharp [1978] ICR221 and
  - b. Malik v BCCI [1997] ICR 606 and
  - c. Kaur -v- Leeds Teaching Hospitals NHS Trust [2018] IRLR 841
  - d. R(Nottinghamshire County Council v Meikle [2004]IRLR 703.
  - e. Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT
  - f. IBM UK Holdings Ltd v Dalgleish [2017] EWCA Civ 1212, [2018] IRLR 4
5. In regard to the complaints of unlawful disability discrimination we have considered the provisions of s19 Equality Act 2010 in respect of Indirect Discrimination and s 20 and 21 in respect of the complaint of a failure to make reasonable adjustments, to the burden of proof provisions at s136 and to the Statutory Code of Practice and the relevant authorities to which we have been referred including:
  - a. Environment Agency v Rowan [2008] IRLR 20, EAT at §27
  - b. Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)
  - c. Cosgrove v Ceasar and Howie [2001] IRLR 653, EAT
  - d. The Home Office (UK Visas and Migration) v Kuranchie [UKEAT/0202/16](#)

## The Issues

6. The issues are those identified by Employment Judge Butler at a case management preliminary hearing held on 14 October 2019 [48] as amended by the claimant following his withdrawal of complaints of harassment and direct discrimination.

## The Evidence

7. In terms of the evidence in considering the complaint we have heard evidence from the claimant and from Mr Totty who until June 2018 was the regional manager who was the claimant's direct line manager. We have heard also from Mr Foxall the second respondent who was the claimant's line manager from June 2018. We have been referred to an agreed bundle of documents that is indexed and extends over some 349 pages. We have been provided by written witness statements from the three witnesses which in large part been adopted

as their evidence in chief. They have been subject to cross-examination and clarification.

8. In light of the evidence that we have heard we have made the following findings of fact to enable us to determine the issues before us.

### **Findings of Fact**

9. The first respondent is part of The Automobile Association Group a British motoring association and a public limited company. It provides car insurance, driving licence, breakdown cover and assistance, loans, motoring advice and a variety of other services. The respondent employs the staff of approximately 8000 throughout the UK. The second respondent Mr Foxall was the claimant's line manager at all material times. The claimant was continuously employed by the respondent from November 2003 as a roadside technician on patrol. He remained in the respondent's employment until he gave notice of his resignation on 8 March 2019 of his intention to work notice to end his employment on 5 April 2019.
10. The claimant was employed under a contract of employment dated 1 April 2007 (page 60) which amongst other things provided at Clause 8 that the sign off and training requirements were that:
 

*“Patrols normally sign in within their own or an adjacent patrol groups area (PGA). The only requirement for you to stay away from home is when attending training courses.”*
11. At the relevant time the claimant worked within the Customer Performance Manager (“CPN”) area AM45 and within that area the Patrol Group Area (“PGA”) was central Birmingham. Mr Foxall the second respondent was the claimant's line manager and his role was that of a performance leader. Mr Foxall spent 50% of his time on management and the remaining time he worked himself on patrol.
12. The claimant lives in Farnhurst Road, Washwood Heath, Birmingham within B36. It is a suburb of Birmingham on the outskirts of the city centre. During his entire period of employment until May 2018 the claimant signed on for work duties from his home address where his patrol vehicle was based. In his patrol role the claimant was expected to complete jobs assigned to him within 35 minutes. The length of time on a job was dependant upon the type of job that was required and although there were no specific targets there was an expectation that technicians would try and acquire new members, at least one new member a month and was expected to conduct battery sales when a customer's battery was not up to standard. Those sales were described as expert advice.
13. Sadly the claimant did not enjoy good health. He had a number of conditions and the relevant condition upon which the claimant relies in his complaint of discrimination because of his disability was that of the claimant's anxiety and depression of which the respondents acknowledge they had knowledge. The claimant's manager since 2012 was Mr Totty the then area manager who was the line manager until June 2018. We have heard evidence from Mr Totty whose account of working with the claimant has been an even handed one. The claimant is described as very technical patrol. Mr Totty describes the claimant's performance as being within the lower 10% of the team. His attendance was not good and his performance was managed through welfare meetings but a dip in his performance was seen. The claimant expressed

concerns that some of callers on the service were abusing the membership service and he was unhappy with their attitude.

14. Mr Totty as an area manager managed 50 patrols within Birmingham, Wolverhampton, Tamworth and Lichfield and the surrounding areas. Mr Totty has described that there were six to eight patrols with whom he had issues including the claimant. Mr Totty was aware that there were patrols covering the region of the Tamworth area that had vacancies and in April he suggested to the claimant that he might prefer to sign on and start his day in the Tamworth area which might mean that his job assignments would lead him more to start patrols in the Tamworth area so that he would not begin the day in Birmingham. It is clear from Mr Totty's evidence and accepted by the claimant that that did not mean he would not be required to work in Birmingham if the calls required him to do so. Mr Totty allowed the claimant to sign on at Tamworth and leave his home address 10 minutes early so that he could get to Tamworth and sign on for duties there. The parties provided us with data which identifies that the journey from the claimant's home to Tamworth is a journey of approximately 13 miles and has a travel time that varies between 18 and 40 minutes, dependent upon the time of the day and the route taken and no doubt the volume of the traffic. The effect of Mr Totty's arrangement with the claimant was that although he would start his day in Tamworth he may still be required to work in Birmingham when jobs were allocated to him. It was plain from the evidence we heard that Mr Totty informed the claimant that the arrangement or adjustment was a temporary one and that he hoped that it would give the claimant a respite from beginning and spending a large part of his day within the city centre and the surrounding area.
15. Mr Totty was subject to a reorganisation within the respondent's business who removed the position of area manager and Mr Totty became redundant in June 2018. Thereafter Mr Foxall became the claimant's line manager. He was performance leader and he worked as a roadside patrol as well as having management responsibilities. Mr Foxall reported into a Mr Willets who was described as the CPN and Mr Willets' area covered Birmingham, Wolverhampton and surrounding areas but did not significantly include Tamworth which was reallocated to a region managed by Mr Moberley. The claimant has given an account that he encountered hostile members when he was working in Birmingham. However he did not lodge formal complaints.
16. The claimant has referred us to a limited number of instances that he considered as significant being:
  - a. An incident in September/October 2014 that occurred in Cape Hill, Birmingham where he had been to all intents and purposes given the run-around by a customer who changed the proposed drop off locations as detailed at paragraph 6 of his witness statement.
  - b. An occasion in September 2010 in the Birmingham suburb of Erdington in his account at paragraph 8 where a customer called the police because he was not happy with the claimant's directions for towing instructions to him. It transpired that the customer was unable to read and the incident was resolved by the police who conciliated between the customer and the claimant.
  - c. An occasion in mid-December 2017 that occurred in the Hall Green suburb of Birmingham when unfortunately three men wearing balaclavas

attempted to hit the claimant over the head with a shovel as they tried to steal a vehicle on top of the towing mechanism.

- d. We are referred also to an occasion when a particular family group known as the Khan family were generally unpleasant and aggressive to the claimant as they were known to have been to a number of other patrol managers.
  - e. The claimant has referred to an occasion on 15 March 2019 when he was originally allocated to answer a call from the Khan members, the claimant as he had been directed to do by Mr Foxall declined to attend the call which was then reallocated.
  - f. Finally we have been referred to an occasion that occurred on 25 February 2019 (witness statement paragraph 11) occurring in the Castle Vale area of Birmingham when a lady not the customer complained to the claimant that he had parked his vehicle across her drive and a dispute ensued.
17. Mr Foxall confirmed in his evidence that there are some geographical areas of Birmingham in which members can behave in an intimidating and challenging manner. We have been referred also to a table of abusive and violence reports (page 157) which summarises the total instances reported of abuse and violence in 2018, the most significant part of the year in question, and we note that that report indicates that the area managed by Mr Willets within which Birmingham falls had 10 reports of abuse in the year compared to the area overseen by Mr Moberley the area which includes Tamworth which had reports approaching 20 instances of abuse and violence during the year. Of those reports there are 10 areas of the respondent's business which has significantly higher reports of instances of abuse and violence in the year.
18. Mr Totty's evidence is that the move for the claimant signing on in Tamworth meant that the claimant, certainly at the start of the day, was more likely than not to be allocated jobs on patrol in the Tamworth/Stafford areas and areas based in the north east of Birmingham. However, dependant on the proximity of the claimant's patrol vehicle the respondent's job allocation system would detail him or schedule him to jobs that were also within the Birmingham area. We have been provided with limited information of statistics about where the jobs were undertaken but it is evident from all of the evidence before us that on very many occasions during the course of the day the claimant would be required to attend patrol jobs in and around the Birmingham area, either moving into and out of Birmingham or remaining in Birmingham for the large part of the day.
19. We remind ourselves that the evidence is that the boundaries responsibility changed in June 2018. Mr Totty was no longer the area manager and the claimant's line management fell to the new role of performance leader. Mr Foxall reports to the CPN, the customer performance manager who is Mr Willets. Within Mr Foxall's remit he had management of 17 roadside patrols and one apprentice patrol. His time was split 50/50 between management and being on patrol himself. The claimant was unusual. He was operating an arrangement whereby he signed on in Tamworth an area that was not within Mr Foxall's area. His patrols covered the area of central Birmingham and south of Birmingham to Coventry. The other patrol officers within the Tamworth area were managed under the CPN Mr Moberley covering Tamworth and the north.

20. The claimant began his journey from home at a time near the sign on and Mr Totty had arranged that he should leave home 10 minutes before his shift start time so that he would be on the way to the journey to Tamworth to sign on using the G1 docking system at the start of a shift or thereabouts. When he was sent his first job by AA Help he would be given an ETA to the members waiting for a patrol manager to attend and it is accepted that in respect of that first job there may have been occasions when the claimant had not signed into the G1 docking system and the ETA may not have been accurate in respect of the claimant's first job of the day. Other than the first job of the day the claimant signing on had no adverse effect on estimated time of arrival on the patrol jobs.
21. We have heard evidence from Mr Totty that the claimant's approach and demeanour seemed to improve when he signed on at Tamworth. The claimant says that he was better able to sleep knowing that he would be starting the day at Tamworth and that he was not likely to spend the entirety of his day working in the Birmingham area. The claimant has accepted that notwithstanding signing on at Tamworth he may well be required to work in Birmingham but he perceived that he was at a lower risk of exposure to challenging members. We would add that on the evidence that has been presented to us objectively the claimant's perception that he was at a lower risk of exposure to challenging members is perhaps misconceived. Mr Foxhall has however accepted that there are some areas of Birmingham, although by no means all, in which locale a number of members of the AA do present challenging behaviours. In the event Mr Totty having introduced the new arrangements in April was no longer working for the respondents from early June and is not able to give an account of any changes or improved performance.
22. It is evident that the sign on arrangements in Tamworth were never intended to be a permanent arrangement. They were an exceptional arrangement and the claimant was aware that the position would be subject to review. Although Mr Foxall did not receive a full briefing handover from Mr Totty, Mr Foxall was of the view that he would see how the signing in arrangements worked in practice and would review the situation in due time. Mr Foxall identified within a few months that the claimant's performance was below the team average, a view that was echoed by Mr Totty in his assessment of the claimant's performance.
23. We have been referred to a number of statistics in relation to November 2018. Of the 17 patrols of which Mr Foxall had management, the claimant's scores for Detail to arrive (D2A") was 26.6. There were four people within the 17 managed by Mr Foxall who had a worse D2A score than the claimant. The parties agree that that scoring was adversely influenced only in respect of the first job that the claimant performed in so far as on occasions he may not already be based at Tamworth before an ETA was given to the member.
24. The claimant was not subjected to performance management by Mr Foxall under the work standards. However in December 2018 the claimant had a one to one meeting with Mr Foxhall (page 106). At the one to one meeting the claimant's banding was identified in certain areas to be 6 which was the lowest area of performance. It was clear that the claimant's performance matrix were in need of improvement and only in respect of expert advice on the November score band was his performance marked at 1 against the previous score of 6 in the rolling 12 month period.
25. The discussion was held at the one to one in relation to the claimant's performance matrix. The fact that the claimant had had a hernia operation and

been out of the business from the end of August through September and in October, and it was agreed that the claimant would be referred for an occupational health assessment to consider any work adjustments and to explore possible changes to arrangements. During the course of the one to one the claimant expressed concern that the banding of six may be subject to performance management. Those areas of improvement we find were not affected by the claimant signing on in Tamworth. At page 106 Mr Foxall asked the claimant what he could do to help the claimant make the needed improvement and he informed the claimant that he would be reviewing the claimant's working routine that had been agreed by Mr Totty and that review having been identified by Mr Totty when the arrangements were put in place was proposed to be reviewed by Mr Foxall.

26. An occupational health report was undertaken on 10 December 2018 (pages 110 to 112). The report identifies that certain aspects of the claimant's health had improved. The claimant was receiving testosterone injections. His mental health and depression was improved by the prescription of better anti-depressants and it was observed that the claimant reported that he had moved to Tamworth and his stress was reduced and his mood improved. He reported that when based in Birmingham it did have a negative effect on his mood but in conjunction with not having had effective medication to stabilise his mood he had been absent from work due to this. Sadly, we have not been provided with the claimant's record of absences, nor indeed of any of his medical records to be able to assess the effect of work on the claimant's mood with any degree of accuracy.

27. The occupational health report referred also to the claimant having sleep apnoea condition which together with his depression was likely to be considered a disability. The occupational health report made recommendations (page 112) which confirmed:

*"Based on today's assessment in my opinion James remains fit for work. It would appear that working from Tamworth, in conjunction with his treatment, is having a positive effect on his mental health and general well-being. In my opinion it would be beneficial if this could remain his sign-on point if feasible for the company to support.*

*James did advise that his sleep pattern could be quite irregular due to different shifts at times and he can feel quite fatigued due to his sleep apnoea. Consideration of a regular shift pattern may help manage this."*

*It concluded that:*

*"It should be noted that any recommendations for workplace adjustments that may or may not be considered as reasonable or advisory. Anyway the decision as to whether to implement any workplace adjustments remains the responsibility of management."*

28. Subsequently on 28 January 2019 a risk assessment was undertaken when the claimant returned from a short period of sickness. He had been absent from work on 21 to 24 January for five days for reasons related to cold or flu. That absence was in addition to a period of sickness absence when he was absent because of his hernia operation recovery from 29 August to 20 October for 38 days. The claimant's total sickness absence was 43 days over two periods and that prompted a sickness absence and attendance review. The risk assessment identified a number of matters to be taken into account. The risk

assessment identified in respect of hazard areas that the claimant confirmed that he had support that his work was planned dynamically by AA Help and he confirmed that he did not put unnecessary constraints on himself (page 118). The claimant confirmed that he had support of colleagues and managers and that he had supported feedback.

29. In respect of hazard 4 (page 119) the claimant identified that he was to inform Mr Foxall, as his performance leader, that he should on occasions remove himself from situations and provide accurate feedback through G1 and he was informed of the grievance process if he had any concerns. He was reminded of the absence and abuse at processes and policies copies of which were handed to the claimant.
30. The claimant has identified to the Tribunal the number of instances of violence and abuse and the concerns about the abusive processes by members and we find the claimant was told that he should inform his line manager of any occasions when he was abused and take steps to remove himself from the situation. The claimant's own evidence to the Tribunal is that he managed to use the respondent's policies and could remove himself from a situation and appropriately diffuse a situation. However, the claimant says that as a result of those occasions of conflict he found that it increased the stress upon him.
31. The risk assessment confirmed that there was a discussion about health issues and the claimant was reminded to contact Mr Foxall when hardship arose (page 120).
32. In respect of external issues identified as hazard 7 (page 121) there was discussion about other issues affecting the claimant's health including his ability to deal with his health issues relating to his son. It was noted that the claimant has two autistic children at school and that the claimant was to communicate with Mr Foxall when flexibility was required and to inform Mr Foxall as soon as possible if there were any difficulties or to discuss with him shift arrangements that could be moved where possible. The risk assessment identified a risk overall to be low.
33. We find that the assessment identifying the risk as low was one that did not recognise the concerns that had been expressed by the claimant to Mr Totty and the suggestion made by Mr Totty that the claimant might find it easier if he moved to sign on and start his day in Tamworth. We find that a more accurate assessment on the risk assessment would have been to identify the claimant as being at medium risk. We find however that Mr Foxall, notwithstanding the low risk assessment, did take steps to identify a number of means by which the claimant could be supported reinforcing good practice and reminding him of the support available from Mr Foxall.
34. We have been referred to a number of text exchanges (pages 148 to 154) which we find reflect that the relationship between the two was supportive on the part of Mr Foxall and good natured.
35. The claimant has sought to suggest that his good natured text messages were simply indicative of his attempts to put on a brave face and provide a jocular response in communications. We find however that the words are to be taken at face value and there is nothing within the text exchange to suggest that Mr Foxall was not providing support and assistance to the claimant.
36. On 5 February 2019 (page 122) the claimant was invited to a meeting to discuss the claimant's sickness absence. The meeting was scheduled for 15 February. There are notes taken of the meeting on 15 February (pages 125 to 128). The



meeting was identified to be one to discuss the claimant's absence and how he might improve his attendance and although that was the purpose of the meeting as identified in advance by Mr Foxall, the meeting did in fact go on to consider a review of the reasonable adjustments that were currently in place or that may be required. We find that the claimant was caught unawares and he had not expected to be talking about the adjustments. We observe however it is not entirely unreasonable that Mr Foxall would have had that discussion about adjustments in the February meeting as he had been told by Mr Foxall that the discussion would be had when he had the one to one meeting with the claimant and Mr Foxall in December. However, the claimant was unprepared to discuss any adjustments in any detail at the meeting on 15 February. The claimant in any event was informed by Mr Foxall that he was not able to extend the adjustment that had been put in place by Mr Totty for a number of reasons.

37. There were six reasons outlined why the temporary adjustments could not continue [126] a key reason being that the respondent was:

*“Unable to control the work available and no reasonable adjustments can be made to totally remove the risk of violence or abuse from members of the public or AA members James has been given the process to follow when dealing with difficult situations, James has full support to remove himself from any scene where abuse or violence is happening. Guidelines on dealing with violence and abuses handed to James.”*

38. We find that the decision by Mr Foxall that the claimant would not be able to continue to sign in at Tamworth was a fait accompli. The adjustment that had been introduced to ease the stress of working Birmingham by Mr Totty was one that Mr Foxall felt could no longer be sustained. We have observed that of the six reasons identified by Mr Foxall during the course of the meeting on 15 February 2019 as noted only one of those concerns logically related to the claimant signing on at Tamworth. Whilst it is true that the claimant could and not infrequently did answer jobs allocated in Birmingham, it would appear that the claimant had a psychological view that if his day started in Tamworth it was more than likely to be one where he would be allocated jobs in and around Tamworth.

39. We find that the reality was that the claimant did nonetheless still do jobs in Birmingham and on occasions spent large parts of the day there. We find that the claimant's account was that when he explained to occupational health his view was that his mental health was positively affected by not starting his stay in Birmingham. However occupational health note that his improvement was also linked to the change in his medication regime.

40. Sadly as the claimant was caught unawares by the decision communicated to him that he would not be allowed to continue to sign on in Tamworth the claimant became upset and informed Mr Foxall that he would not work in Birmingham again due to the levels of stress that that would cause him. We find that that observation made by Mr Kennett at the meeting was one which contradicted the evidence that the claimant has given to the Tribunal. He had not refused to work in Birmingham per se, he simply did not want to start the day working in Birmingham and that there was no suggestion by Mr Kennett that he would not work in Birmingham as that had never been the agreement reached even with Mr Totty nor was that the reality of his working relationship.

41. The claimant said that at the meeting on 15 February 2019 he had a minor panic attack in contrast Mr Foxall had described it as "*Mr Kennett becoming upset*". Mr Foxall wanted the claimant to reschedule the meeting and after the claimant left he sent the claimant an email asking to rearrange the meeting. It is evident that the reaction to the information communicated to him by Mr Kennett was one in which subsequently the claimant sent a text to Mr Foxall (page 134) indicating that he had calmed down and that he would want to arrange a meeting as soon as possible.
42. We observe at this stage that on Saturday 16 February 2019 the claimant applied for employment with a company known as Farrell to work as an agricultural technician. The claimant attended an interview on 20 February 2019 with Farrell and reports to us that he was offered a job on that day. The letter was sent by Farrell to the claimant on 21 February 2019 confirming the job offer. The claimant has indicated that he did not accept the job immediately as he was hopeful that the issue at the AA would be resolved and he would be able to continue with what he described as his adjustment to sign on in Tamworth.
43. Subsequently a meeting was rescheduled to continue on 8 March. The claimant was accompanied to the meeting on 8 March 2019 by his trade union representative who had been referred to the respondent's notes which are of the continuing meeting (pages 126 to 128) and to notes taken by the trade union representative (pages 136 to 137). The reconvened meeting recapped upon discussions that had previously been had and the occupational health report which confirmed that the claimant was fit to do all aspects of his work. The claimant during the recap confirmed that working in Birmingham triggered his stress levels although we note that there has been no medical evidence to support the claimant's assertion and there was a discussion about an incident that had occurred on 25 February 2019 at Castle Vale where a member of the public rather than the AA member had complained about the claimant having blocked her drive.
44. Mr Foxall during the course of the meeting suggested that the claimant should be re-referred to occupational health as the claimant had suggested that occupational health had not been asked the correct question and the occupational health should be asked to comment upon the claimant's fitness to work in Birmingham or to sign the start of his working day there. The claimant refused the proposal that there should be a new referral to occupational health.
45. It is accepted that Mr Foxall offered a number of proposals to the claimant reminding him that whenever he felt threatened he should leave a scene and contact the control service and decline the job. He offered the claimant a second break. He offered to adjust the shift arrangements to a fixture of 9 to 5 Monday to Friday to avoid particular stress times. The claimant indicated that he did not think any of those adjustments would help. Mr Foxall asked the claimant what he thought might help him and the claimant responded that it would be to move to signing on at Tamworth permanently. The claimant suggested that there were other patrols who had that arrangement of signing on outside their area. We have heard evidence of only one occasion where a patrol did that, where a patrol person signed on in Wolverhampton and in different weeks from North Wales where he had had to travel to look after his children in split custody arrangements. The meeting adjourned at 12.32 and

reconvened at 13.28 when on return Mr Foxall confirmed that a first written warning would be issued and he went on to discuss areas of support.

46. Although Mr Foxall offered a further reference to occupational health we note the notes of the meeting taken by the trade union representative (page 137) which confirmed that Mr Kennet's occupational health assessment was not specific in stating the claimant was fit to work and did not state if he was fit to work in Birmingham or Tamworth area. It noted:

*Mr Foxall: well that won't change the outcome. I've offered a second break, shift altering to avoid you flare up times. Will that help?*

*Mr Kennett: no just relocation at Tamworth.*

*Mr Kennett: We'll have to agree to disagree".*

47. The claimant has suggested that Mr Foxall commented at the meeting on 15 February that Mr Foxall had allegedly said:

*"I've had other patrols who have depression and they work in Birmingham so why shouldn't you?"* (see ET1 paragraph 9 page 14)

and further

*"you'll sign where I tell you to sign on".*

48. The comments were not reported in the trade union notes of the meeting on 8 March. Nor were they in the notes taken by Mr Foxall for the meeting that started on 15 February and continued on 8 March 2019 as those were notes signed by the claimant (page 128). We observe however that the claimant did make reference to the comments in his letter of resignation (page 139).

49. We find that the comments the claimant asserts Mr Foxall made are not supported in the notes of the meeting and we find that on balance it is more likely than not that they have not been made as the claimant had signed the Foxall notes and there is no reference to the comment in the trade union notes. We observe also that during the course of the meeting on 8 March 2019 the claimant was offered employee assistance support. We conclude that Mr Foxall had in great extent reached a pre-determined view that the claimant would be required to sign on in Birmingham because he was engaged to work within the Birmingham region and Tamworth was no longer an area within the area managed by the claimant and in the wider area managed by his manager himself. We find that the contract of employment foresees sign on in the patrol's group area (PGA) or in the adjacent patrol area. We note Mr Foxall's evidence that since all patrols sign on from home if in fact an individual looks to relocate they need to confirm whether or not the area that they are relocating their home to has capacity for a patrol manager. It is Mr Foxall's evidence that even when a patrolman relocates a quarter of a mile away in their home address they need to inform the company of that fact.

50. In the event, following the meeting on 8 March 2019 the claimant wrote an email on 10 March tendering his resignation (pages 138 to 139). The claimant identified the effect of date of termination to be 9 April. The claimant accepted the offer of new employment with Farrell on 11 March 2019 which he took up following termination of his employment with the respondent. The claimant asserts in his resignation letter that the comments made by Mr Foxall and the removal of the reasonable adjustment meant that he was unable to continue to work for the respondents.

51. We observe that there is no medical evidence that has been put before us. Surprisingly if the claimant describes in his impact statement that he is in

contact with his GP who he regularly sees once every two months, there have been no disclosure of any GP records to suggest that the claimant is in receipt of any psychological treatment and nowhere in his impact statement does the claimant make reference to the fact that being required to sign on in Birmingham and to work predominantly in Birmingham caused him to suffer an exacerbation of his symptoms of anxiety and depression.

52. We find that the claimant's letter of resignation was accepted by Daniel Willetts the customer performance manager for the Birmingham North area and that acceptance was sent by email on 11 March (page 140). The claimant was informed that he had to sign on from home with effect from 11 March and on 19 March Mr Foxall wrote to the claimant (page 147) confirming the arrangements and informing the claimant of his right to appeal the decision that he should be issued with a written warning in accordance with the respondent's absence procedures. The claimant was offered employee assistance by the respondent. The claimant did not appeal the decision taken by Mr Foxall. However after a period of annual leave the claimant was certified unfit to work from 25 March until 8 April 2019 and he did not return to duties.
53. We find that whilst the claimant perceives that he was less likely to be exposed to violence and confrontation from members by signing on in Tamworth, there is no evidence other than the claimant's account of the five instances he encountered in his employment that suggests that he in particular was subjected to violence and confrontation any more than others in the respondent's employment. The respondent's evidence of company wide report review (page 157) leads us to conclude that Birmingham was by no means the worst affected area. There were 10 areas in the country that were more significantly affected by violence and abuse and reports including the area covered by CPN Mr Moberley, the areas which included the Tamworth region.

## **Conclusions**

54. In light of the findings of fact that we have made we look to the arguments that have been produced by both parties orally and in writing and applying the law to which we have regard. We consider first the complaint of indirect discrimination.
55. The list of issues that we have to determine reminds us of the statutory steps to be considered. The respondent accepts that they applied a provision criteria or practice (PCP) of requiring Birmingham based staff to sign on at their homes in Birmingham and that that was a practice that applied to all persons including the claimant of the relevant time. We are asked to consider whether the PCP put persons with a disability ie those suffering with stress and anxiety, at a more particular disadvantage when compared to persons who did not share the characteristic, that is by exacerbating the symptoms of the claimant's disability due to exposure to more chances of violence or confrontation.
56. In these terms we consider whether or not there has been group disadvantage established in relation to the PCP. We have been provided with no empirical evidence upon which we are able to conclude that people who are disabled by stress and anxiety are subjected to a particular disadvantage in so far as signing on from their home in Birmingham would cause an exacerbation of symptoms of disability due to more chances of violence and confrontation. The claimant has not brought forward any expert or statistical evidence regarding how people with his disability are affected. On the contrary the statistical evidence

to which we have been referred by Mr Foxall in his evidence ( statement para 19) and the evidence before us does not support the claimant's assertions and set against a landscape of reports of violence and abuse statistics.

57. In the absence of establishing a group disadvantage we are led to conclude therefore that notwithstanding the claimant's perceptions his perception is not based on a reality and, absent a group disadvantage, whether the claimant has a real or misconceived perception the respondent has not caused the claimant to suffer indirect disability discrimination. In any event we are not able to conclude that the claimant was as an individual put at a lower chance of exposure to abusive or violent incidents starting his working day in Birmingham and moreover the fact that he signed on for a limited period from Tamworth did not prevent him being allocated to work in the Birmingham area.
58. We turn to consider whether or not the respondent has failed to make reasonable adjustments. The same PCP is relied upon by the claimant in this matter. We require to consider whether or not the disadvantage has arisen to a substantial disadvantage in relation to the relevant matter in comparison to people who are not disabled at the relevant time in so far as signing on in Birmingham exacerbated the symptoms of disability due to more chances of violence or confrontation. This is a more personal issue of whether or not the claimant has been caused a substantial disadvantage. To the extent that a substantial disadvantage is to be considered it is a disadvantage that is more than minor or trivial.
59. We are mindful that the claimant was a patrol person. He worked on average about 10 jobs a day and on the basis that he works five days a week a conservative estimate is that undertaking 50 jobs a week, over in excess of 40 weeks in a year he might encounter 2000 members as he goes about his work. The claimant has reported to the Tribunal five or six instances of violence and conflict over the last nine years to the extent that any other instance or disagreements with members might have occurred they have not been identified as being so serious as to warrant personal reference. Statistically five or six instances of conflict or abuse we find is not a significant or even anything more than a minor incidence of conflict.
60. The claimant's mindset suggests that he thought that the sign-on move, albeit temporary, meant it would make it more likely that he would not be working within the Birmingham area on a day. However, it is clear that the claimant did in truth, notwithstanding signing on in Tamworth, still work in Birmingham. The claimant's impact statement says that he saw his GP every two months ( page 30). However there are no medical records before us to suggest that the claimant was placed at a disadvantage that was more than minor or trivial in respect of the impact on his mental health. Absent any objective information and considering the minimal extent of the occurrences of conflicts to which the claimant has referred, we conclude that there is no medical evidence or evidence from the claimant that leads us to conclude that the symptoms of his disability were exacerbated due to there being more chance of him encountering violence or confrontation when he was required to sign on in Birmingham. There is no evidence to show that signing on in Birmingham would have meant that he was more likely than not to have begun his day with a patrol within the Birmingham area and encounter conflict or violence albeit that he may be taken out of the area during the course of the working day.

61. The occupational health report reflected what the claimant had told the occupational health physician, in so far that he was of the view that working in Birmingham had had a negative effect on his mood, but he remained fit to undertake all aspects of his role. The reference to working in Tamworth affecting his mood positively was in conjunction with the other treatments that the claimant had in respect of his medication for depression and his hormone therapies.
62. The claimant has not shown that he suffered a substantial disadvantage as a result of being required to sign on from his home in Birmingham and the fact was that the claimant worked in Birmingham. Although the claimant has suggested that the requirement to sign on from his home in Birmingham increased his anxiety after he had had the encounters there is no medical evidence to support that conclusion.
63. We conclude that the arrangements made by Mr Totty were temporary arrangements, that the claimant's performance was generally not to standard and whilst the claimant might subsequently have been subject to performance management by Mr Foxall it is evident that Mr Foxall sought to put in place adjustments that would assist the claimant. In particular Mr Foxall had proposed not only a re-referral to occupational health for more specific advice but also to amend his shift times to avoid pressure times working 9 to 5, reminding the claimant of his ability to refuse jobs and referring concerns to the performance leader. The claimant had refused those additional adjustments.
64. We conclude that in this case the respondent have not failed to make reasonable adjustments to assist the claimant mitigating the effect of his disability and moreover such adjustments as were proposed by the respondents were refused by the claimant. We find that the respondent has not failed in its obligation to make reasonable adjustments.
65. Finally, turning to the claimant's complaint of constructive and unfair dismissal. The claimant was employed under a contract of employment to work as a patrol person and the terms and conditions of his employment. The claimant asserts that the respondents have broken the implied mutual trust and confidence or without reasonable or proper cause conduct itself in a manner calculated or likely to destroy or seriously the damage the relationship of trust and confidence between it and the claimant or alternatively did the respondent breach the implied term implied into the claimant's contract through custom and practice that the reasonable adjustment of signing on at Tamworth would continue and if so did the claimant affirm the contract of employment before resigning.
66. The conduct the claimant relies upon as a breach of trust and confidence term is Mr Nick Foxall stating, during a meeting on 15 February:

*"I have no other patrols who have depression and work in Birmingham so why shouldn't you?"*

Mr Foxall stating on 8 March

*"you'll sign on where I tell you to sign on"*

and no longer allowing the claimant to sign on at Tamworth but requiring him to sign on in Birmingham.

67. In light of the findings of fact that we have made and the observations we have made in respect of the complaints of indirect discrimination and in particular the alleged failure to make reasonable adjustments it is apparent that the claimant

was aware that the arrangements suggested by Mr Totty the claimant's previous line manager were arrangements that were known by him to be a temporary arrangement that would be subject to review. The review undertaken by Mr Foxall was in accordance with the arrangements made for his initial signing on in Tamworth and the removal of that arrangement was not a removal that was in breach of contract, was not in breach of any custom and practice, rather was a removal that had been contemplated as a potential option when the arrangements were put in place. There has been no unreasonable removal of an adjustment to prevent a substantial disadvantage.

68. Furthermore our findings of fact are that the comments attributed by the claimant to Mr Foxall made on 15 February and on 8 March were comments that we are unable to find were made by Mr Foxall on the balance of probabilities and in the circumstances the breach of trust and confidence upon which the claimant seeks to rely are not found.
69. In the circumstances we conclude the claimant resigned having decided that he did not wish to continue in the respondent's employment if he was no longer able to sign on in Tamworth and have the benefit, potentially of beginning his working day in patrol jobs assigned in that and surrounding areas. We find that the claimant resigned not in response to the respondent's breach of contract and we conclude that the claimant's complaint that he has been constructively and unfairly dismissed does not succeed.
70. The Judgment of the Tribunal is unanimously that the claimant was not constructively or unfairly dismissed by the respondents.
71. The claimant's complaints that the respondent discriminated against him by the prohibited conduct of indirect discrimination and a failure to make reasonable adjustments does not succeed. The claimant's complaints are dismissed.

Employment Judge Dean

9 January 2024

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