Case No: 2400894-22
2404704-22

EMPLOYMENT TRIBUNALS

Claimant: Mr D Verdin

Respondent: M and S Transport

Heard at: Liverpool **On:** 22 - 26 January 2024

Before: Employment Judge Aspinall
Mr Graham Pennie
Mr Andrew Wells

Representation
Claimant: In person supported by his wife
Respondent: Mr Flood, Counsel

JUDGMENT having been sent to the parties on 1 February 2024 and written reasons having been requested on 14 February 2024 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a claim form dated 10 February 2022 (CF1) the claimant brought a complaint for disability discrimination, unauthorised deduction from wages and failure to provide written terms and conditions.

2. The respondent defended the complaint by its response form and disputed that the claimant had a disability. There was a case management hearing before Employment Judge Ross on 23 August 2022. By a Reserved Judgment dated 27 April 2023 EJ Hodgson decided that the claimant was not disabled for the purposes of the Equality Act 2010 at the material times. His claims for direct discrimination and harassment failed. His complaint of victimisation continued. The claimant appealed against the decision that his condition did not amount to a disability and that matter remains before the Employment Appeal Tribunal as at the date of these Reasons.

3. By a second claim form dated 12 June 2022 (CF2) the claimant brought a

complaint of unfair dismissal. He made an application in CF2 for the claims to be consolidated and heard together which they were.

4. There were case management hearings at which orders were made to prepare the case for final hearing including orders for disclosure of documents and preparation of a bundle and exchange of witness statements and agreement as to a List of Issues.

5. The matter came to final hearing in person at Liverpool at which time the claimant's appeal remained outstanding.

Opening discussion

Reasonable adjustments

6. The claimant has Emotionally Unstable Personality Disorder (EUPD). He had had a familial bereavement at the weekend before the case began and had also lost a much loved family pet. He did not wish to make an application for postponement. He said that the stress of the case hanging over him would be worse for him than getting on with the hearing this week.

7. It was agreed he would have additional reading time, as needed, support from his wife to read documents to him as needed, highlighter pens to assist with identifying chunks of text, breaks as often as needed and that we would assist one another finding documents in the bundle and reading them.

8. The claimant was a litigant in person. The Tribunal explained the support that it would give, having regard to the Equal Treatment Bench Book, to ensure so far as possible that the parties were on an equal footing. The Tribunal would assist the claimant to put his case as set out in his Claim Forms and Witness Statement but would not construct his case for him.

9. During the afternoon of day two the claimant became distressed and was using tools and techniques such as clicking his pen and holding a stone to help him manage his anxiety. He did not wish to have an additional break and was keen to carry on. His wife agreed that it was better for him to continue. As he did not want to adjourn, steps were taken to slow things down, read aloud for him and the Tribunal supported him in identifying areas for questioning from the List of Issues.

10. On the morning of day three the Tribunal had an email to say the claimant was running late and had been feeling unwell. It was concerned to review the adjustments in place and the hear from the claimant as to his ability to continue. The Tribunal convened a private case management hearing because there were observers attending the public hearing and the respondent's witnesses had been present throughout the hearing. Mr Flood attended without his witnesses. The claimant and his wife attended. The panel remained present though the non legal members played no part in the case management hearing. The Employment Judge enquired as to the claimant's health. There were personal external matters affecting him alongside his stress about this case. He did not wish to make an application for postponement. His primary concern for the hearing was that as his anxiety increased he may become aggressive and he did not want this to happen in court

in front of the respondent and the Tribunal. The claimant and his wife were able to describe how his symptoms present and how a deterioration evolves. The following measures were agreed to support the claimant:

11. If the claimant started burrowing or ranging (giving too much detail about a thing or going off to talk about different things) then the Judge would listen for a while to see if the claimant came back to more relevant content and if not would subtly hold up her pen so that the claimant could see this signal, pause and breathe and take and drink. The Judge would then explain that she needed time to catch up her notes and this would give the claimant time to slow down and refocus on his questions. Mr Flood agreed this was a helpful and appropriate adjustment in which the claimant could control the pace.

12. Mrs Verdin could conduct the cross-examination in that she would ask the questions that the claimant had prepared and Mr Verdin could focus on listening to the answers and then conferring with his wife if there was a follow up question. They were not to worry about taking time to confer, it gives the Judge time to make notes.

13. Mr Verdin was to take as much time as he needed to read and if he was struggling he could use the highlighter pens to mark the text, could ask his wife to read material to him or ask the Judge to read things aloud. He could then have thinking time. There is no need to fill space in the court room, quiet time for thinking and reading and writing is normal.

14. Mr Verdin and the witnesses could refer to each other by their first names as they had done at work so as to reduce formality.

15. Together the claimant, his wife and the Tribunal would try to recognize any deterioration and intervene by taking a break. The Judge had noticed the claimant clicking his pen as a coping mechanism. The claimant also had a stone in his pocket that he used and an elastic band he snapped. The claimant said they were all good coping mechanisms. If they were not enough to allow the claimant to stay focused then the claimant could take a break and we could consider alternate copying mechanisms. The claimant had a consultation room reserved for him and could use that room to lay on the floor, breathe, stretch or do whatever he needed to do to soothe and manage his emotions.

16. The claimant was anxious about becoming aggressive and damaging his own case. He was told by the Judge that he was not to worry if he became aggressive in Tribunal, the Judge would intervene gently if this happened just to describe what she was seeing and explain it to others as a symptom of a condition that could resolve quickly with some time for soothing strategies and would call for a break. No one would think any less of the claimant if this symptom occurred. He could be sure of support. This assurance seemed to rapidly remove the claimant’s anxiety.

17. The planning and timetable would be reviewed after each witness, with significant breaks between witnesses. The claimant need only think about the next witness and managing the hearing in small chunks.
18. All of the above adjustments were agreed by the respondent.

Extra documents from the respondent

19. The respondent wished to add a further 4 sides of text, being handwritten notes. They were added by consent.

Extra documents from the claimant

20. At the start of the hearing the claimant wished to introduce a further 28 sides of text. They were added to the bundle by consent. During the lunch break of day 2 reference had been made to a letter inviting the claimant to a disciplinary meeting. The first page of the letter was obtained and included in the bundle by consent. The claimant had been talking about the letter to his wife during the lunch break whilst he was on oath. The Judge explained the importance of following guidance that had been given about not talking about the case to anyone whilst still on oath and about giving only your own evidence. The claimant apologised saying he had not understood that talking about getting a full copy of the letter would count as part of the oath warning that had been given. Mr Flood agreed that there was nothing sinister in the claimant having tried to obtain a copy of a document he had referred to.

Covert recordings from the claimant

21. The claimant said he had made four recordings. Two of them had been transcribed and were in the bundle. Recording 3 was from 21 October 2021 and the claimant says it showed that Mr Brian Carter had lied; that he had had a conversation with the claimant on 21 October 2021 and had handed the claimant the invitation to disciplinary process. Recording 4, the claimant said, was not relevant.

22. Case management orders were made for the production of the recording and a transcript to the respondent urgently or for an apology to be given if in fact, on re-listening, the audio did not prove what the claimant said it did. On the morning of day 3 the claimant confirmed he did not wish to add the recordings or transcripts into the bundle, he apologised to the Tribunal and Mr Carter and said that having listened again more carefully the recording did not show what he had alleged.

Lack of witness evidence

23. In his opening comments Mr Flood said that the claimant had no evidence in relation to his constructive unfair dismissal complaint nor his victimisation complaint in his witness statement documents. Mr Flood warned the claimant that he would not be asking questions about those areas. Mr Flood submitted that without any *evidence* the claimant could not succeed on those claims. The Tribunal explained the implications of this as follows:

- That the claimant has a burden of proof to meet to show that he was entitled to treat himself as dismissed because of something the respondent did. He had not said in his witness statement what that was. In order to succeed in victimisation the detriments he suffered would have to have been done to him because he did his protected acts. He had not said that in his witness statement.

- The claimant had sent to the Tribunal emails dated 8 January 202 (part 1: 3 pages) and 8 January 2024 (part 2: 8 pages). They had subheadings of failure to provide written statement of particulars and unauthorised deduction though they included broader commentary. There was also a detailed narrative Grounds of Complaint in C1 (13 pages) and CF 2 (4 pages).

- The Tribunal in supporting him as a litigant in person, would help him to put his case as set out in the List of Issues and in his statement documents and CF's 1 and 2 but would not construct his case for him.

24. The Tribunal suggested asking the claimant to swear to the truth of those narrative claim form attachments as part of his evidence in chief. Mr Flood objected to that approach. He said the claimant had had ample opportunity, following four case management hearings, to have put his evidence together in his statement and had chosen not to do so. The respondent had prepared the case on the basis of the witness statement disclosed and would be prejudiced if the claimant were allowed to add to his evidence.

25. The claimant said he had telephoned the Tribunal and been told that only his unauthorised deduction and failure to provide terms and conditions complaints were going ahead this week.

26. Following an adjournment the Tribunal decided to allow the claimant to swear to the truth of paragraphs 54 and 55 of CF1 s part of his witness statement on the victimisation complaint. The Tribunal accepted that the claimant had mistakenly believed that his victimisation complaint was not being heard because he had been found not to have been disabled at a preliminary hearing. The claimant did not want to postpone to have more time to collate the content of his grounds of complaint and his emails into a formally presented witness statement.

27. The Tribunal reminded the parties of its own ability to regulate its procedure at rule 41, which provides that the Tribunal is not bound by any rule of law relating to the admissibility of evidence before the courts and of the obligation to seek to avoid formality. It referred to rule 2 and commented that it could not see any prejudice to the respondent in the Tribunal a) taking into account all of the content of the Claim Form narratives and attaching such weight to it as it saw fit, whether it had been sworn to (and was therefore on Mr Flood's submission "*evidence"* or not and b) assisting the claimant to put his case as set out in the narrative parts of CF1 and CF2. The Tribunal view was that this was more of an objection based on form of presentation than content and that there was little or no prejudice to the respondent in the claimant relying on, and as appropriate, swearing to the truth of content it had seen. Mr Flood was free to cross-examine as he chose but the Tribunal would take into account the content of the Claim Forms and determine the issues on the agreed List. The Tribunal decided that what little prejudice, if any, may be felt by the respondent would be addressed in not proceeding to cross-examination that day but in giving Mr Flood a half day to revisit his planned cross-examination in the light of the decision of the Tribunal that it would have regard to the narrative CF 1 and CF 2 and to the emails that taken together amounted to a

witness statement and the paragraph contents of CF1 that would be sworn to.

Timetable agreed

28. It was agreed that the claimant would give evidence first. Adjustments were made to the timetable to allow for the respondent's witnesses to be called at times that were convenient for them.

29. Day 1 was adjourned before lunch to allow time for the respondent to prepare for cross-examination. Evidence began with the claimant on day 2. The respondent's witnesses were called on day 3. Day 4 had the respondent's closing submissions at 10am with a long break during the middle of the day for the claimant to have preparation time and his closing submissions at 2pm. The Tribunal then began deliberation and delivered its oral judgment at 12 noon on day 5.

The List of Issues

30. The following list had been agreed during a case management hearing which took place before Employment Judge Mellor on 13 June 2023. It consolidates the issues in both case numbers.

1. Time limits

1.1. Is the Claimant's complaint of victimisation out of time?

1.2. If so, did the out of time acts form part of a continuing act or would it be just and equitable to extend time?

2. Victimisation

2.1. Has the Claimant done a protected act? The protected acts replied upon are as follows:

2.1.1. The Claimant's complaint to Stuart on 17th August 2021 – the Respondent denies that this amounts to a protected act;

2.1.2. The Claimant showing Brian Carter his grievance in person on 17th August 2021 – the Respondent denies that this amounts to a protected act;

2.1.3. The Claimant's written grievance of 10th November 2021 – the Respondent denies that this amounts to a protected act;

2.1.4. The Claimant's written grievance of 17th November 2021 – the Respondent denies that this amounts to a protected act;

2.1.5. The Claimant's written grievance of 24th November 2021 –the Respondent denies that this amounts to a protected act;

2.1.6. The Claimant's written grievance of 7th December 2021 –the Respondent accepts that this amounts to a protected act.

2.2. If the Claimant has done a protected act(s), has the Claimant been subjected to detriments as a result? The following detriments are replied upon:

Detriment A On 17th August 2021, the Claimant suddenly being asked by Stuart that he provide a doctor's letter to see what medication he was on and to have an understanding of what his mental health condition was. The Claimant was surprised by this and immediately said that he was not on medication and did not understand why Stuart was assuming he was.

Detriment B On 7th October 2021, the Claimant was informed by Brian Carter that his grievance had been dismissed before he had even attended a grievance meeting;

Detriment C On 27th October 2021, the Claimant received a disciplinary letter to say that the Claimant was being investigated for gross misconduct on the basis of a loss of trust and confidence, as it was alleged the Claimant had been 'medically disqualified from driving' without informing the Respondent;

Detriment D On 18th November 2021, the Claimant received an email from the Respondent to say that they had received 'constant grievances' from him over the past few weeks;

Detriment E From 1st December 2021 onwards, the Respondent insisting that the Claimant drive an 18 tonne vehicle, and sending the Claimant home unpaid without being able to do so;

Detriment F The Claimant not receiving an outcome to his grievance of 7th December 2021;

Detriment G The Claimant not receiving a grievance appeal hearing for his grievance outcome from 21 October 2021.

3. Constructive Dismissal

3.1. Was the Respondent in repudiatory breach of contract? The Claimant relies on the implied term of trust and confidence and alleges the last straw was:

3.1.1. On 7 February 2022 the respondent 'offered' to discuss the claimant returning to work and 'his proposal of moving to a 7.5 tonne driver' despite the claimant already having this in place previously, therefore leaving the claimant feeling that this was disingenuous; and

3.1.2. The claimant still not receiving the outcome to his grievance outcome appeal.

3.2. Did the Claimant resign as a direct result of the alleged breach?

3.3. Has the Claimant affirmed the breach?

4. Unauthorised deduction from wages

4.1. Has the Claimant been subjected to unauthorised deductions on 16 August 2021 and from 1 December 2021onwards?

4.2. How much is the claimant owed?

5. Section 1 Employment Rights Act.

5.1. Had the Claimant at the date on which the Tribunal claim was brought received a contract of employment from the Respondent?

The Hearing

Documents

31. The parties had prepared a bundle of 444 pages to which were added, by consent, the 3 extra pages from the respondent and the 25 extra pages from the claimant.

Oral evidence

32. The Tribunal heard oral evidence from the claimant. He gave his evidence in a helpful way and knew the detail of his case well. He was forceful in his responses and seeking to be persuasive as to what had happened to him. He was adamant that he had had in place a verbal agreement to only drive 7.5 tonne vehicles.

33. The Tribunal heard oral evidence from Mr Towers who was clear and consistent about the terms on which the claimant had been engaged and remained employed. He was entirely credible when it was put to him that he had agreed that

the claimant could drive 7.5 tonne only on 18 tonne pay when his response was that he had not said that and *what would he have told the other lads if the claimant were getting higher pay than them for the same work.*

34. The Tribunal heard oral evidence from Mr Carter. He gave his evidence in a straightforward way. He had tried to get the claimant to come back to work in January and February and he was credible when he said the offer to drive 7.5 tonne on return in February 2022 was a genuine offer. He had chased the claimant on a number of occasions by email, had arranged a meeting date to discuss a return and had written to offer a possible return on the terms the claimant wanted, permanently driving at 7.5t. He could not have known that the claimant was going to resign. He was also credible because he spoke of the difficulty recruiting and retaining drivers and that being why efforts were made to meet driver preferences subject to business need from time to time.

35. The Tribunal heard oral evidence from Mr O Donohue. He was the grievance appeal officer. He explained that he had met with the claimant by Teams on 14 December 2021. The delay in his outcome letter, which was not sent until 8 March 2022, after the claimant had resigned, was because the claimant had delayed getting notes to him until 18 January 2022 and Brian Carter had been absent from work and he had needed to talk to Brian as part of his investigation.

36. The Tribunal heard oral evidence from Mr Harland. He gave his evidence in a guarded way.

The Facts

37. The claimant was an HGV driver recruited by the respondent in 2019 at a time when it was difficult to recruit and retain drivers. The respondent needed drivers for 18.5 tonne vehicles and 7.5 tonne and smaller vehicles.

38. The claimant agreed to work for the respondent and was paid the higher rate salary for drivers whose workload includes 18.5 tonne vehicles. He was initially allocated a 7.5 tonne route, and drove 7.5 tonne loads most of the time, but it was agreed that he could be required to drive 18.5 tonne routes at the direction of the respondent.

39. The claimant had had driving accidents when driving the 18.5 tonne vehicles which caused him stress. In June 2021 he informed the respondent that he did not want to drive the 18.5 tonne vehicles anymore. The respondent agreed to continue to allocate him to 7.5 tonne driving as often as possible, but still required him to drive 18.5 tonne from time to time, or in Mr Towers words “as and when” which the claimant did.

40. Mr Harland was the claimant’s operations manager who allocated him to routes and loads. Mr Harland was responsible for ensuring adequate cover for the work and if a driver was absent he needed to know by 3pm each day whether to book agency cover or not for the next day. An agency cover driver, once booked, had to be paid even if the salaried driver returned to work. Mr Carter was the Health and Safety and Compliance Manager. Mr Towers was the owner of the business.

41. The claimant and others had altercations at work from time to time. There were heated exchanges and the drivers sometimes swore at one another and were verbally aggressive. Mr Carter managed this by having a word with them, getting them to accept they had spoken in the heat of the moment and to apologise to one another. Sometimes Mr Carter would tell a driver to go home to cool off or the driver would storm off. If the driver was sent home or stormed off in those circumstances then that was deemed to be unauthorised absence for which he would not be paid. Mr Carter would ring to keep in touch and when things had calmed down the driver came back to work. This was tolerated because it was very difficult to recruit and retain HGV drivers.

42. On 13 August 2021 the claimant was off sick. The usual practice was to notify the respondent by telephone (preferably on the landline) of any absence and give an update each day, unless covered by a fit note, so that the respondent could plan for the next day. The claimant had notified the respondent of his absence on 13 August. He had a missed call to his mobile phone on 13 August at 14.05 from the work mobile phone. He was in the car with his wife on his way to an appointment when he missed the call. He dictated a reply which his wife sent for him by text at 14.07 to the work mobile phone number that had called him, saying he would be back at work on 16 August 2021. On 16 August 2021 he looked at his phone for his work allocation an hour before he was due to start and found no work was allocated to him. He called and spoke to Mr Harland who said he did not know the claimant would be back that day, that he had not had a text and so had had to arrange cover. Mr Harland said that there was no work for the claimant that day. On 17 August 2021 the claimant went to work and asked for confirmation that he would be paid for 16 August 2021. Mr Harland said he would have to speak to Mr Towers. Normal gross weekly pay was £450. A lost today's pay was approximately £90. The claimant asked for and was sent a copy of the Handbook.

43. The claimant did not, on 17 August, show Mr Carter a grievance he was planning to submit against Mr Harland.

44. On 19 August as part of his regular compliance check Mr Carter asked the claimant for a code so that he could access the DVLA record for the claimant. Mr Carter saw that the claimant's licence had expired in February 2020. The claimant said he had reapplied and was waiting for its renewal and that he could drive under a special extension provision (referred to as Section 88). Brian Carter told the claimant he would need to see a doctor's note saying the claimant was fit to drive to reassure Mr Carter that the claimant had met the criteria for the section 88 extension.

45. On 26 August 2021 the claimant sent a grievance (GR1) complaining about:

- abuse and unfair treatment from colleague Scott
- verbal and insulting treatment from colleague Leon
- unfair treatment from Mr Harland

- being violently attacked by a customer, being set upon by a customer and family member

46. The claimant said he was considering his position within the company and seeking advice on his employee rights.

Grievance investigation discussion

47. On 31 August 2021 the claimant met with Mr Towers, Brian Carter was the notetaker, to discuss the grievance. The claimant again asked for the Employee Handbook and asked Brian Carter how he could bring a grievance against Mr Harland. Mr Towers went away to further investigate the grievance.

48. On 7 September 2021 the claimant sent a letter to Mr Carter providing further detail about his grievance. The claimant again said he was considering his future with the respondent. On 22 September 2021 the claimant sent a second grievance (GR2) to the respondent. It complained about unfair treatment from Mr Harland. On 27 September 2021 the claimant sent a third grievance (GR3). It complained that Mr Harland had spoken to the claimant in an aggressive and inappropriate manner.

49. On 7 October 2021 Mr Carter did not tell the claimant that Mr Towers had engaged lawyers and that it had already been decided that his grievance would not be upheld.

50. On 10 October the claimant submitted his fourth grievance (GR4) and later that same day a fifth grievance (GR5) and made a subject access request. The 10 October grievances complained:

- the claimant had not yet had minutes from the 31 August 2021 meeting
- the claimant had not had copies of the investigation statements
- the claimant had chased up progress on his grievance on 5 October 2021 and Brian Carter said that he would speak to Steve Towers about it but he had still had no outcome
- that Brian Carter told the claimant that the respondent was waiting for a doctors note from the claimant
- that as the claimant hadn't had an outcome to GR1 he wasn't able to lodge an appeal at that time and this was in breach of his employment rights
- that Stu Harland had caused the claimant such stress and anxiety that the claimant had only one option which was to seek legal advice on what steps he needed to take going forward.

Grievance hearing

51. On 21 October 2021 the claimant met with Mr Towers for his grievance

hearing. Following that hearing Mr Towers put his findings in a letter to the claimant. His GR1 was not upheld.

52. There was discussion that day at the end of the grievance meeting about the claimant's licence. The respondent was concerned that the claimant may have been driving from February 2020 to date without a licence and without having proved that section 88 applied to him, that is that his doctor said he was fit to drive during that period. It was concerned both about the current position and his ability to drive going forward and the long gap between February 2020 and present date.

53. On a date between 21 and 27 October 2021 Brian Carter gave the claimant a letter inviting him to a disciplinary meeting. The allegation was that there was a breach of trust and confidence because the claimant had not told the respondent that he had been "medically disqualified" from driving from February 2020 and had continued driving after that date (during the long gap). The respondent said it had found this out on 21 October 2021.

54. The claimant was aggrieved that he was being accused of being "medically disqualified". He felt the true position to be that his licence had expired, was being renewed, and through no fault of his own was taking a long time, that he was allowed to drive under Section 88 and that it was not fair to him that this position was being described as "medically disqualified" which he had never been and that he was being disciplined for withholding information about that.

55. On 22 October 2021 the claimant attended work but was sent home because the respondent could not let him drive until it was clear about his licence status and he was told by Brian that there was an investigation under way as to his licence issues. The claimant went off sick from 1 November 2021. He tried to contact DVLA many times to resolve issues with his licence.

56. On 10 November 2021 the claimant sent an email to Mr Carter attaching a letter from his GP confirming his EUPD diagnosis from 2011 and saying that he had not had medication for the condition for some years.

57. He sent a second letter that day which he said was a formal letter of grievance (GR6). It related to verbal aggression from colleague SC during a phone call. The claimant said it had left him feeling threatened and not wanting to return to work.

58. The claimant received a letter from DVLA dated 10 November 2021 telling him that as his medical condition could affect his ability to drive his licence, which was granted and should be received within the next two weeks, would be subject to medical review.

Disciplinary investigation meeting

59. His disciplinary investigation meeting was arranged for 16 November 2021 and the claimant was informed he could bring someone with him to that meeting. At the meeting the claimant confirmed that he had known since February 2020 that his licence had expired and that there was a delay in its renewal due to more information being required about his medical condition.

Appeal against GR1 outcome

60. After that meeting, on 16 November 2021, the claimant sent a written appeal against the grievance outcome dated 21 October 2021 of GR1. He also complained that the content of his GR3, being spoken to by Mr Harland in an aggressive and inappropriate way, had not been dealt with.

61. Mr Carter replied on 18 November:

> *"Darren, I have received constant grievances from you on a daily basis over the past few weeks that the company will look at and review one at a time. I need to attain {ascertain} whether your HGV licence expired and you were still able to drive during that period, once this information is received we can move on to the next step in your grievances.*
>
> *I suspended our last meeting offering you the opportunity to provide this information which you still have not provided in order to get you back into work with minimum disruption to your working duties.*
>
> *Can I remind you that you are not suspended from work or have you been notified that you are suspended but taking authorised time off with pay to allow you to provide the information requested.*
>
> *However you will be required to return to work on Monday, 22 November 2021."*

62. On 20 November the claimant sent an email stating that his HGV licence expired when he had a medical in 2020 but that he was waiting on his application being processed so he could have a new licence. He said he had called DVLA numerous times to be told that he can drive under section 88. The claimant informed Brian Carter that he had spoken to the Office of the Traffic Commissioner. This was because there was a concern that previous criminal convictions of the claimant's might be relevant to his licence.

63. On 22 November the claimant went to work. The respondent, not having been reassured about his driving licence status, either current or during the long gap, arranged training activities for him. The claimant arrived and had an altercation with SC. He had previously lodged a grievance about a telephone call with SC on 10 November 2021 (GR6). Following the altercation on 22 November the claimant went to see Brian Carter and said that he needed to go home as the altercation put him in a vulnerable position where he felt threatened in the workplace. The claimant spoke to Mr Harland and informed him that he was going home and would sue the company. The claimant wrote to Mr Carter at 09:54 having gone home, to raise a grievance about the matter (GR7) and to ask if he would be paid for that day.

64. On 24 November 2021 the claimant asked by email to Mr Carter if he could be kept off work on full pay until his grievances (GR6 and GR7) against SC were resolved. As an alternate he asked if his work start time could be delayed to avoid having to meet SC. In response to that letter to Mr Carter, Mr Towers intervened

and said that the claimant should send all his grievances to Mr Towers going forward. Mr Towers said:

- All your grievances have been addressed, you have had an outcome and appealed it.

- You still haven't produced evidence that you have renewed your licence that expired in February 2020, and that you failed to inform us when you knew in February 2020 that your licence had expired.

- Your grievances against SC have been investigated and SC has offered to apologise that he swore at you because he was frustrated by your continuous complaints against the company, but you have declined the apology. The company would not suspend SC or change anyone's working hours.

- Mr Towers said that as the claimant had walked out on 22 November 2021 saying he would sue the company, his absence was being treated as unauthorised absence and he would not be paid for it.

65. On 24 November 2021 the claimant sent a long letter to Mr Towers objecting to the way his grievances had been handled and saying that he had passed two letters to Mr Carter, one from the Office of the Traffic Commissioner and one from DVLA confirming he had been granted his licence. The claimant said:

> *"I take it from your email that because Brian has stated that I allegedly said I won't be back and I'm going to sue you that there is no longer a position at M and S Transport for me."*

66. On 25 November 2021 the claimant obtained a letter from his GP saying he was suffering with stress having made an allegation of bullying against a colleague. Mr Towers wrote to the claimant that day saying *until I see your licence I cannot allow you to drive an HGV.* He explained that there were other duties the claimant could do if he came to work but if he stayed off it would be unauthorised absence and therefore unpaid.

67. The claimant wrote to Mr Towers on 25 November 2021 at 13.37 quoting the letter he had had from the Office of the Traffic Commissioner saying that his licence has been granted. He wrote again at 13,54 stating, amongst other complaints, *I find the company are in breach of my trust and confidence.*

68. On 26 November 2021 the claimant emailed Mr Towers to say he would be back at work on Monday. He attached the GP letter requesting altered start and finish times, so as to avoid SC.

69. On 29 November 2021 the claimant attended work and was told he was having a training day. Brian Carter required him to read files around training issues and then to do some driving on an 18 tonne truck later that day. When he came back from driving Brian Carter presented him with a written contract to sign. It included the job title HGV driver. The claimant refused to sign it saying that it did

not record an agreement that he had with Mr Towers about only driving an 18 tonne for a one day emergency cover and ordinarily driving 7.5 tonne.

70. Brian explained to the claimant that he would be needed to drive an 18 tonne vehicle for the whole of December. The claimant said he would not. He was told by Brian that in that event there was no work for him. Brian sent the claimant home without pay.

71. On 1 December 2021 the claimant went to work but was sent home by Mr Carter because he would not drive an 18 tonne vehicle. He contacted Mr Carter to ask if he would be paid. Mr Carter replied on 2 December 2021:

> *"The reason for being sent home was due to your self refusing to carry out a reasonable request from the management team. Until you return to work on the duties of driving an 18tn vehicle you will be unpaid."*

72. The claimant responded saying he had an agreement in place agreed by Mr Towers from June 2021 by which he only had to drive an 18tn for 1 day emergency cover until agency cover could be provided. Mr Carter replied at 11.23 saying that he had spoken to Mr Towers and the only agreement is that the claimant would remain on 18t pay but would be allocated 7.5tn as often as possible but would be required to drive an 18tn "as and when" required. There was no "one day emergency cover only" agreement. Mr Carter said that there was a need for an 18 tonne driver during December. Mr Carter said this was a reasonable request reflected by the claimant's pay.

<u>The protected act for victimisation</u>

73. On 7 December 2021 the claimant wrote to Mr Towers saying:

> *"This is a formal letter of grievance, victimisation, bullying, disability discrimination …."*

74. The letter goes on to detail the discrimination that the claimant says he has suffered.

75. The claimant did not return to work. During December there were correspondences about data subject access requests. The claimant asked for his contract and employee handbook and Mr Carter said:

> *"I cannot provide your contract or employee handbook as you have still not signed a copy of the ones you took away to get your legal advice on."*

<u>The appeal against the grievance outcome GR1</u>

76. On 14 December 2021 a meeting took place by Teams to hear the appeal against the outcome dated 21 October 2021 of the claimant's grievance (GR1).

77. The letter convening the meeting dated 7 December 2021 had said the hearing would be limited to matters raised in the claimant's appeal letter dated 16

November 2021. The claimant said in an email to Mr O Donohue, external solicitor engaged to hear the appeal, that he had lost his trust with the company.

78. The appeal meeting was short. The claimant protested after the meeting that Mr O Donohue was biased as he had been the solicitor from whom the company had taken legal advice about his grievance prior to the outcome of 21 October 2021 which he was appealing. Mr O Donohue wrote to say that he had had no involvement in this case prior to the appeal. He asked the claimant to provide a transcript that the claimant said he had of the investigatory interview into the grievance on 31 August 2021. The claimant agreed to do this and said he would need some time to type it out.

79. On 4 January 2022, in response to a chase up, the claimant emailed Mr O Donohue to explain that he had had some problems at home and had taken time to have the transcript ready but would send it first class before the weekend.

80. On 4 January 2022 the claimant asked the respondent by email for copies of his payslips so as to support his application for universal credit.

81. On 11 January 2022 Mr Carter wrote to the claimant to say:

> *"You have been on unpaid leave ……………...with no expected return date. We are therefore writing to you to explain the current duties that are available to you and assist you return to work.*
>
> *Whilst we appreciate that you have expressed a preference to work with the 7.5 tonne vehicles, unfortunately there is no such work available at this time. However, we are able to provide you the following duties, 18 tonne delivery and collections. Should work become available at the 7.5 tonne vehicles we will advise you of the same. We should be grateful if you can confirm whether you would be willing to undertake the above duties and when you expect to return to work. If there is anything that we can do to facilitate your return. Please do not hesitate to contact us."*

82. On 18 January 2022 the claimant sent the transcript of the grievance investigation meeting to Mr O'Donoghue.

83. The claimant replied to Mr Carter's 11 January 2022 letter on 28 January 2022. The claimant said that he had no desire to drive an 18 tonne wagon. He said he was happy to take a drop in pay to 7.5 tonne rate. The claimant said that he was being kept off work without pay unless he obeyed the respondent's demands to drive an 18 tonne wagon. He said:

> *"You have also stated there is no work for me to drive a 7.5 tonne wagon if that is the case why are you having agency drivers into driver 7.5 tonne wagons. Due to the actions of the company I've lost all trust and confidence within them."*

84. On 2 February 2022 Brian Carter wrote again to the claimant asking would it be possible to arrange a meeting to discuss the options of returning to work with the

option of driving a 7.5 tonne vehicle. Mr Carter chased the claimant again on 7 February 2022 and said that he had set a meeting date for Wednesday, 9 February 2022 to discuss options of returning to work and proposal of moving to a 7.5 tonne driver role.

85. The claimant replied on 7 February 2022 saying that he had tried on numerous occasions to return to work but the company had looked for every excuse to stop his return. The claimant said he would not be attending a meeting and that he was suffering with stress and anxiety because of the way the company was treating him. He said:

> *"You are in breach of the Health and Safety at Work Act 1974. I am currently seeking legal advice regarding this."*

86. On 3 February 2022 the claimant chased Mr O'Donoghue for his appeal outcome. On 8 February 2022 Mr Carter wrote:

> *"Can I make it clear under no circumstances has the company stopped you returning to work, you yourself chose to stay off work during the busy Christmas period due to refusing to drive an 18 tonne vehicle which you are contracted to do. After the Christmas period there was little requirement for 7.5 tonne work. Now, things are returning to normal volumes the company has offered you the opportunity to discuss the potential for moving your contract or more permanent 7.5 tonne role, which you again have refused.*
>
> *We need to arrange a meeting to discuss your concerns of the company which then will hopefully allow you to feel you can then return to work."*

87. On 8 February 2022 the claimant wrote to Mr O'Donohue saying that he had no correspondence from him since sending the transcript 18 January 2022 despite numerous chase ups about his appeal outcome.

88. The claimant sent a letter of resignation on 13 February 2022. He said:

> *"I have lost all trust and confidence within the company after the way you conducted yourself during my grievance complaints and my disciplinary……. I feel I'm being pushed out of the company….. I feel I am being treated this way just because I am raising the grievances in the first place…… I understand you've now offered me the possibility of permanently driving 7.5 tonne vehicles….. I don't understand this and do not feel it is genuine. This was already in place then once I'd raised the grievances you took this away from me and said there was no work for me that I had to go home. You then said you would consider my request and now say you are offering make this permanent. On this basis I no longer have trust in your actions and do not feel I can return and agree to this permanent arrangement as who is to say that you will take it away from me again. This has caused a breakdown in our employment relationship….irrevocably broken down and I resign as a result of the fundamental breach of the employment contract."*

89. On 16 February 2022 Mr Carter wrote to the claimant asking him to reconsider his resignation and his position within the company. Mr Carter sent a

detailed letter addressing, in each paragraph, matters that the claimant had been complaining about. During February 2022 there were disputes between the parties as to whether the claimant had ever received his payslips or not. On 25 February 2022 Mr Carter wrote the claimant reluctantly accepting his resignation. The letter dealt with matters that had been contained in the claimant's grievances and it said that the claiman'st payslips had been provided.

90. On 9 March 2022 Mr O'Donohue wrote to the claimant setting out the outcome of the grievance hearing. The grievance appeal against the GR1 outcome was not upheld. The letter explained that the reason for delay in outcome was because of the time it took the claimant to provide transcript notes and because Mr Carter, who Mr O'Donohue had needed to talk to, had been absent from work for a period during January.

91. The claimant had contacted ACAS on 30 November 2021 and achieved a Certificate on 10 January 2022. He lodged his Tribunal complaint on 10 February 2022 and then submitted a second Tribunal claim form for unfair dismissal on 12 June 2022, having been to ACAS regarding his constructive unfair dismissal on 12 May achieving a certificate the same day.

Relevant Law

92. The claimant's unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 95(1)(c) 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."**

93. 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 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.

94. The term of the contract upon which the claimant relies 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 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."**

95. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls said 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."

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.

96. 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."**

97. In some cases, the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. The decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal affirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**.

98. In 2020 Auerbach HHJ in the Employment Appeal Tribunal in **Williams v The Governing Body of Alderman Davies Church in Wales Primary School** applied **Omilaju** and **Kaur**:

> "**28. The starting point is that there will be a constructive dismissal, that is to say an dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996 where a) there has been a fundamental breach of contract by the employer b) which the employee is entitled to treat us terminating the contract of employment and c) which has materially contributed to the employee's decision to resign. As to the first element, the fundamental breach may be a breach of the Malik term. That may come about either by a single instance of conduct, or by conduct which, viewed as a whole, cumulatively crosses the Malik threshold. As to the third element, the conduct amounting to a repudiatory breach does not have to be the only reason for resignation, or even the main reason, so long as it materially contributed to, or influenced the decision to resign.**
>
> **30. If there has been conduct which crosses the Malik threshold, followed by affirmation, but there is then further conduct which does not, by itself, cross that threshold, but would be capable of *contributing* to a breach of the Malik term, can the employee then treat that conduct, taken with the earlier conduct, as terminating the contract of employment?"**

99. The answer comes at paragraph 34.

> **"34. ... so long as there has been conduct which amounts to a fundamental breach, the right to resign in response to it, has not been lost and the employee does resign at least partly in response to it, constructive dismissal is made out. That is so, even if other, more recent conduct has also contributed to the decision to resign. It would be true in such a case that *in point of time* it will be the later conduct that has "tipped" the employee into resigning: but as a matter of causation, it is the combination of both the earlier and the later conduct that has together caused the employee to resign…"**

100. Section 95(1)(c) provides that the employee must terminate the contract *by reason of* the employer's conduct. The question is whether the repudiatory breach played a part in the dismissal. It need not be the sole factor but can be one of the factors relied on. If, however, there is an underlying or ulterior reason for the employee's resignation, such that he or she would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal.

101. Where there are mixed motives the Tribunal must decide whether the employer's conduct was an effective cause of the resignation. The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in **Wright v North Ayrshire Council [2014] IRLR 4.** If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause. That is particularly clear from the decision of the Court of Appeal in **Nottingham County Council v Meikle [2005] ICR 1**. At paragraph 20 of **Wright** Langstaff P summarised it by saying:

> "**Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."**

102. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract **W E Cox Turner (International)Limited v Crook [1981] IRLR 443**.

103. **Section 207(A) Trade Union and Labour Relations (Consolidation) Act 1992** provides that, where an employee brings a claim **under section 111 Employment Rights Act 1996** for unfair dismissal, an award for compensation can be increased or reduced by up to 25% if the employer has unreasonably failed to comply with the relevant code of practice relating to the resolution of disputes.

104. The relevant code of practice will have been issued either by ACAS or the Secretary of State. **ACAS Code of Practice 1: Disciplinary and Grievance Procedures 2015** is a relevant code of practice. The ACAS code is not engaged unless a grievance is raised in writing.

105. The ACAS code provides the following keys to handling grievances in the workplace

1. let the employer know the nature of the grievance
2. hold a meeting with the employee to discuss the grievance
3. allow the employee to be accompanied at the meeting
4. decide on appropriate action
5. allow the employee to take the grievance further if not resolved

106. In relation to deciding on appropriate action the code provides that a decision should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.

107. Employees have the right to be given written particulars of the terms of their employment within 2 months of starting their employment**. Section 1 Employment Rights Act 1996** provides that there is requisite information that an employer must provide to an employee. **Section 11 Employment Rights Act 1996** provides that an employee may bring a claim to a Tribunal alleging that his or her employer has not complied with these obligations. The employee has a right to a remedy from Tribunal in respect of the section 11 claim, where, when the proceedings were brought the employer was in breach of the duty to give written particulars. Under **section 38 Employment Rights Act 1996** the Tribunal may make an award of 2 weeks' pay unless it would be unjust and inequitable to do so, and it may, if it considers it just and equitable in all the circumstances make an award of 4 weeks' pay.

108. Schedule 5 to the Employment Act 2002 sets out those complaints which a section 38 claim may attach to. It includes claims for unauthorised deductions from wages under section 13 and 23 Employment Rights Act 1996.

<u>Unauthorised deductions</u>

109. Section 13 Employment Rights Act provides:

Right not to suffer unauthorised deductions:

(1) An employer shall not make a deduction from wages of a worker employed by him unless —

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised —

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

110. Section 27 defines wages:

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including —

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

(2) ….

(3) Where any payment in the nature of a non-contractual bonus is (for any reason) made to a worker by his employer, the amount of the payment shall for the purposes of this Part —

(a) be treated as wages of the worker, and

(b) be treated as payable to him as such on the day on which the payment is made.

<u>Victimisation</u>

111. Victimisation in this context has a specific legal meaning defined by section 27:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because -

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

112. If it is shown that a protected act has taken place then the Tribunal will consider what detriments have occurred. Detriment is not defined in the Equality Act 2010 but is considered akin to unfavourable treatment, disadvantage or a "bad thing" happening to the claimant and is to be given the ordinary meaning of the word in the sense that the act complained of is detrimental to the claimant.

113. In Warburton v Chief Constable of Northamptonshire [2022] ICR 925 Griffiths J in the EAT restated the test on detriment:

> **"The key test is: "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL applied. Detriment is to be interpreted widely in this context."**

114. If detriment is established then the question arises as to the relationship between the protected act and the detriment. Use of the term causation is to be deprecated. In Warburton the EAT at paragraphs 61 – 75 set out the relevant case law and restate the correct test. It is one of "significant influence". **"The question was whether the protected act had a significant influence on the outcome**. Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947 HL, Nagarajan v London Regional Transport [2000] 1 AC 502, Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425 and Page v Lord Chancellor [2021] ICR 912 CA were considered and applied.

Applying the Law to the Facts

Time limits

Is the claimant's complaint of victimisation out of time?

115. The claimant went to ACAS on 30 November 2021. Complaints before 1 September 2021 were therefore out of time. The claimant's alleged detriments occurred on:

a) 17 August 2021

b) 7 October 2021

c) 21- 27 October 2021

d) 18 November 2021

e) 29 November / 1 December 2021

f) ongoing from 7 December 2021 to termination of employment

g) ongoing from 14 December 2021 to termination of employment

116. Detriment a) is out of time. The other detriments are in time.

Did the out of time detriment form part of a continuing act or would it be just and equitable to extend time?

117. The Tribunal considered that the alleged detriment to the claimant at a), relating to the requirement to provide medical evidence of his condition to Mr Harland, was part of a course of conduct extending over a period of time. The respondent asked for medical evidence in later alleged detriments so that the alleged detriment was of the same kind as in-time acts and formed part of a course of conduct extending over a period of time. There was an ongoing expectation of the respondent that the claimant should have provided medical evidence about his condition so that it could consider how best to support him and about the impact, if any, of his condition on his ability to drive and to obtain a licence.

118. **Victimisation**

Has the Claimant done a protected act?

119. Section 27(2) sets out what amounts to a protected act.

PA1: The claimant's case was that the claimant showing Brian Carter his grievance in person on 17th August 2021 amounted to a protected act.

The Tribunal finds that the claimant did not show a grievance document to Mr Carter on 17 August 2021. That day the claimant came to work and was concerned about getting paid for 16 August 2021. He had asked for the handbook and had it sent to him. There are no facts from which the Tribunal could conclude that a document shown to Mr Carter amounted to a protected act.

PA2: The claimant's written grievance of 10 November 2021 was GR6 which related to SC.

The claimant said he had been verbally abused in an aggressive manner. The letter does not amount to a protected act within section 27 because it does not make the link that the treatment has been because of a protected

characteristic, it makes no link either explicit or implicit to a discrimination complaint.

PA3: The claimant's written grievance of 17 November 2021 (p176-77) is an email in which he asks why a previous complaint (dated 27 September 2021 that Mr Harland had spoken to him in an aggressive and inappropriate manner) was not added to his last grievance.

The 17 November email even if the 27 September 2021 complaint is incorporated into it, does not amount to a protected act. It does not make that link between treatment and protected characteristic. It does not complain about discrimination. At its highest it refers to bullying and hurt feelings but does not link that allegation to Equality Act complaint or any protected characteristic.

PA4: The claimant's letter of 24 November 2021 in which the claimant writes asking the respondent to either keep him at home on full pay or alter the start times so that he need not meet SC

does not amount to a protected act. It does not raise a complaint about discrimination.

PA5: The claimant's written grievance of 7 December 2021.

This amounted to a protected act. The letter is headed in bold text, *This is a formal letter of grievance, victimisation, bullying, disability discrimination.* The letter goes on to detail the discrimination that the claimant says he has suffered. The specific allegation that brings the letter within the Equality Act is an allegation of failure to make reasonable adjustment for disability. This amounts to a protected act under Section 27 (2) (c) and (d).

<u>If the claimant has done a protected act(s), has the claimant been subjected to detriments as a result?</u>

120. In <u>Warburton v Chief Constable of Northamptonshire [2022] ICR 925</u> Griffiths J in the EAT restated the test on detriment:

> **"The key test is: "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL applied. Detriment is to be interpreted widely in this context."**

121. If detriment is established then the question arises as to the relationship between the protected act and the detriment. Detriments must post date the protected act they rely on. Mr Flood described the *because of* requirement. The Tribunal notes that use of the term "causation" is to be deprecated. In <u>Warburton</u> the EAT at paragraphs 61 – 75 set out the relevant case law and restate the correct test. It is one of "significant influence". **"The question was whether the protected act had a significant influence on the outcome**. <u>Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947 HL, Nagarajan v London Regional Transport [2000] 1 AC 502,</u>

Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425 and Page v Lord Chancellor [2021] ICR 912 CA were considered and applied.

122. The Tribunal asked did the protected act have a significant influence on the detrimental treatment. The only protected act is 7 December 2021. The only detriments that could possibly have happened because a protected act had a significant influence on them are those that post date the protected act and are therefore at (f) and (g).

Det F and G

123. If the Tribunal is wrong about that and some of the other complaints amounted to protected acts so that any or all of them preceded detriments then the following detriments fail for the following reasons:

Detriment A: *On 17 August 2021, the Claimant suddenly being asked by Stuart that he provide a doctor's letter to see what medication he was on and to have an understanding of what his mental health condition was. The Claimant was surprised by this and immediately said that he was not on medication and did not understand why Stuart was assuming he was.*

124. This does not amount to a detriment in law. The claimant had an unjustified sense of grievance about this. The respondent was entitled, and indeed obliged, following Guidance to the Equality Act which states that a duty arises when an employer knew or ought reasonably to have known of a disability to act on that information. The respondent knew the claimant was saying he had mental health problems. It was obliged under the Guidance to find out more about the condition and any impact it may have on his ability to drive.

125. If the Tribunal is wrong about that, then protected act had no significant influence on Mr Harland asking for medical information. Mr Harland asked for the medical note, not because the claimant had shown Mr Carter a grievance (which the Tribunal found did not happen) but because the claimant was telling Mr Harland he had a mental health issue.

Detriment B: *On 7 October 2021, the Claimant was informed by Brian Carter that his grievance had been dismissed before he had even attended a grievance meeting.*

126. This detriment pre-dates the only protected act that the Tribunal has found to have taken place so fails because the protected act cannot have a significant influence on the detriment when it has not happened yet. The Tribunal finds as a fact that Brian Carter did not tell the claimant on or about 7 October 2021 that his grievance would be dismissed, before it had been heard. The Tribunal had directly contradictory evidence on this point. The claimant said it happened, Mr Carter said it did not. Mr Flood cross-examined the claimant on this point and asked why the claimant had not included it in his appeal. The claimant had no credible reason for it not being in his written appeal letter. However, the claimant did raise it at appeal.

The notes from the hearing on 14 December 2021 record that the claimant raised this issue. The transcript notes also record this issue. The Tribunal had regard to the chronology of events. The claimant said this happened on 7 October 2021. On 10 October 2021 the claimant sent two grievances to the respondent and did not mention this point. This was a claimant who made many, wide ranging and repeated complaints. If Brian Carter had told him that his grievance would be dismissed the Tribunal finds that the claimant would have put that in writing and added it his grievances promptly and certainly by 10 October 2021. The Tribunal finds that the absence of any written complaint about this, in the context of this claimant who put lots of complaints in writing at that time, means that on the balance of probabilities this did not happen in the way the claimant later recalled it. The Tribunal finds that if there was some discussion about a lawyer having been engaged and grievance outcomes between Mr Carter and the claimant, then that conversation made no material difference to the fairness of the process because Mr Carter was not the decision maker on the grievance or appeal.

Detriment C: *On or around 21 - 27 October 2021, the Claimant received a disciplinary letter to say that the Claimant was being investigated for gross misconduct on the basis of a loss of trust and confidence, as it was alleged the Claimant had been 'medically disqualified from driving' without informing the Respondent.*

127. The respondent accepted that this amounted to a detriment. Being subjected to disciplinary proceedings is a detriment. If this detriment had not preceded the protected acts the Tribunal would have gone on to consider whether the fact of the complaints had a significant influence on this decision. The Tribunal would have found that the reason for the disciplinary investigation, accepted by the claimant in cross-examination, was because it was not clear (i) if the claimant had a licence to drive HGV and (ii) if there were any medical conditions attaching to any licence or not and (iii) whether the Traffic Commissioner was allowing the claimant to have a licence and (iv) whether the claimant had been driving lawfully or unlawfully during the long gap. The claimant accepted in response to the question, "you were disciplined as you hadn't informed the employer that your licence had expired and that from January 2021 you were only driving under the provisions of Section 88 ?" that that was the reason for the disciplinary process. This was a key admission in cross-examination which meant the complaint at detriment C could not have succeeded. As it transpired the licence was granted and shared with the respondent and the disciplinary proceedings did not go ahead. The detriment complaint would have failed, even if there had been an earlier protected act, because the protected act had no significant influence on the decision to undertake a disciplinary investigation.

Detriment D: *On 18 November 2021, the Claimant received an email from the Respondent to say that they had received 'constant grievances' from him over the past few weeks;*

128. The email from Mr Carter was not a detriment. The claimant had an unjustified sense of grievance about this email. Mr Carter was showing justifiable irritation at the frequency with which the claimant raised grievances and the overlapping content of those grievances. The Tribunal identified 7 grievances from

26 August to 7 December 2021. Some of the grievances repeated content from earlier grievances, some related to altercations with colleagues and some to complaints about the business. The grievances were hostile in tone and increasingly over the period the claimant said that his trust and confidence in the employer was broken and that he was seeking legal advice and wanting a solution. It seemed to the Tribunal that by the letter of 24 November 2021 in which the claimant said:

> *"I take it from your email that because Brian has stated that I allegedly said I won't be back and I'm going to sue you that there is no longer a position at M and S Transport for me"*

that the claimant had decided not to return to work and was pushing the employer to dismiss him.

129. There were, in addition to the 7 grievances the Tribunal identified, letters of complaint that would not in law amount to a grievance so that the Tribunal finds that the respondent was bombarded with correspondences from the claimant during August to November 2021. Mr Towers intervened on 24 November 2021 and told the claimant to stop sending grievances to Mr Carter but to send them to him instead. On 25 November 2021 Mr Towers said that he had appointed an external person to deal with the grievances.

Detriment E: *From 1 December 2021 onwards, the Respondent insisting that the Claimant drive an 18 tonne vehicle, and sending the Claimant home unpaid without being able to do so.*

130. There was no detriment here. The respondent was entitled to require the claimant to do that which he was engaged to do and was paid to do. The claimant was engaged as an HGV driver. He was paid to drive vehicles as reasonably allocated to him by his employer. That included 7.5 tonne and 18 tonne vehicles. The fact that the respondent tried to accommodate his preference for 7.5 tonne so that most of the time, even as much as 80% of the time, the claimant had his preference met, did not erode the respondent's contractual right to allocate him an 18 tonne vehicle. This finding is at the heart of this case. The claimant has failed to persuade the Tribunal that he had a legal verbal arrangement that he would drive only 7.5 tonne vehicles. It prefers the evidence of the respondent on that point.

131. The respondent was remarkably tolerant of the claimant's refusal to drive an 18 tonne vehicle in December 2021 in that it allowed this to become a period of unpaid leave. The Tribunal accepts that this was because of the difficult climate of recruitment and retention for HGV drivers. The respondent could have taken a different approach and disciplined and dismissed the claimant for refusing to do his work in December 2021.

132. Even this had been a detriment, the claimant could not establish that a protected act had a significant influence on the instruction. The claimant in cross-examination accepted that he did not know the driving needs of the business in December 2021 and could not say that the instruction was not because there was a genuine need for an 18tonne driver at that time.

Detriment F: *The Claimant not receiving an outcome to his grievance of 7 December 2021.*

133. This detriment came after the protected act of the grievance of 7 December 2021. Not receiving an outcome to a grievance has the potential to be a detriment. The Tribunal looked closely at the factual chronology. The claimant was invited to attend a grievance meeting with Mr O Donohue and attended by Teams on 14 December 2021. The claimant wanted to record the meeting and was allowed to do so and then to produce his own transcript of the recording. Christmas intervened and then for understandable domestic reasons the claimant needed time to get the transcript ready. He said he would produce it within days of 4 January 2022. In the event he got it to Mr O Donohue by 18 January 2022. Mr O Donohue then needed to check content with Mr Carter who was away. Mr Carter appears to have returned by 24 January 2022. The claimant was chasing an outcome to his appeal and had not had it when on 13 February 2022 he resigned. The Tribunal finds that this delay in response was, in the context of the seven grievances and lengthy transcript of the meeting, not an unreasonable amount of time to take to look in to matters and reach a decision. The outcome was then, post resignation, produced on 8 March 2022. The delay was wholly explained by the evidence of Mr O Donohue which the Tribunal accepts. The protected act was not a significant influence on the delay. Putting it simply, Mr O Donohue didn't delay because the claimant had complained. On the contrary Mr O Donohue was engaged specifically to respond to the grievances and he took time to allow the claimant to produce his version of the notes and to talk to Mr Carter. The detriment complaint fails.

Detriment G: *The Claimant not receiving a grievance appeal.*

134. Being denied an appeal could amount to a detriment but on the facts of this case the claimant had an appeal against his GR1. He lodged GR1 on 26 August, had an investigatory interview on 31 August, had an outcome on 21 October, appealed that outcome (after his disciplinary investigation meeting) on 16 November 2021 and had an appeal meeting on 14 December 2021. The claimant did receive an appeal to the only first instance grievance that was decided. This complaint fails on its facts.

Constructive Dismissal

<u>Was the Respondent in repudiatory breach of contract? The Claimant relies on the implied term of trust and confidence and alleges the last straw was:</u>

<u>On 7 February 2022 the respondent 'offered' to discuss the claimant returning to work and 'his proposal of moving to a 7.5 tonne driver' despite the claimant already having this in place previously, therefore leaving the claimant feeling that this was disingenuous; and</u>

<u>The claimant still not receiving the outcome to his grievance outcome appeal.</u>

135. The Tribunal considered whether individually or cumulatively the respondent's failure to deal with the claimant's grievances amounted to a breach of the implied term of mutual trust and confidence.

136. Between 26 August and 7 December 2021 the claimant's submitted seven grievances. The first grievance went to an investigation into 31 August 202. The outcome of that grievance provided in writing on 21 October 2021. The claimant appealed that outcome on 16 November 2021 but by that time had lodged further grievances. On 24 November 2021 Mr Towers intervened and told the claimant to stop sending grievances to Brian Carter and to send them to him instead. On 25 November 2021 Mr Towers typed the claimant in writing:

> *"In the interests of fairness I have appointed a solicitor who specialises in employment law to go over all the reports and investigations carried out and your grievances to ensure we have dealt with each one professionally and in a fair manner."*

137. Mr O Donohue was appointed and contacted the claimant to arrange a meeting for the 14 December 2021. In reliance on Mr Towers letter the claimant could reasonably expect that Mr O Donohue was going to look at everything; an appeal against grievance one and all of the outstanding grievance issues that had been raised.

138. The Tribunal is concerned that that is not what happened. Mr O'Donoghue's terms of reference were not provided to the Tribunal. The respondents notes of the 14 December 2021 investigator meeting are short. Mr O'Donoghue says:

> *"I have seen your appeal email regarding a grievance you lodged and they will go through each point one by one."*

139. Mr O'Donoghue appears to believe that he is dealing with a, singular, grievance appeal against grievance one and not the broad remit that Mr Towers had led the claimant to believe would be the case.

140. In January 2022 the claimant produced his transcript notes of the investigatory meeting of 14 December 2021. On 11 January 2022 and again on 24 January 2022, 7 February 2022 and, 8 February 2022 Mr Carter writes to the claimant trying to get him to return to work and have a discussion about his ongoing concerns. It is not clear what Mr O Donoghue was looking at and what in terms of grievance resolution was meant by an offer of discussion of ongoing concerns. Mr Carter offers a meeting to discuss the return to work and offers that the claimant can return on the basis that he will only be asked to driver 7.5 tonne vehicle.

141. The Tribunal considered the claimant's case that either the delay in the grievance appeal outcome and / or the letter of 7 February 2022 offering the claimant the 7.5 tonne work amounted to a last straw act, taken either individually or together with each of the other complaints about the grievance handling, entitling the claimant to resign.

142. The Tribunal finds that there has been no fundamental breach of contract by the respondent. There has been nothing that crosses the Malik line. The respondent has not acted in a way, without reasonable and proper cause, that was likely to seriously damage or destroy the relationship of trust between the employer and employee.

143. Quite the contrary, the tribunal notes the tolerance shown by the respondent to an employee who was threatening litigation, seeking to pre-empt his own dismissal on 24 November 2022, refusing to do the work he was contracted to do in December 2021 and January 2022 and who had from February 2020, failed to tell his employer that his licence had expired and that he was granted an extension because of COVID, and then failed to tell his employer that he was driving under the provisions of section 88, and then failed to provide his employer with a letter from his GP, so that is employer could be sure that the provisions of section 88 applied to him.

144. The Tribunal finds that the letter of invitation 7 February 2022 was not disingenuous. The Tribunal accepts the evidence of Mr Carter and Mr Towers as to how difficult it was to recruit and retain HGV drivers and this is why the respondent showed such tolerance not only of altercations between drivers, and the way it allowed a cooling off period with unauthorised absence and then their return to work, but specifically tolerance of the claimant's unreasonable refusal to do the work he was contracted to do in December 2021 January 2022. The letter of 7 February 2022 was a genuine offer to try and bring the claimant back in to drive 7.5 tonne vehicles on 7.5 tonne pay. It was entirely consistent with the respondent's position that he had been on 18 tonne pay before and therefore required to drive 18 tonnne " as and when". The letter did not amount to a breach of contract nor an innocuous last straw act upon which the claimant could rely to treat himself as dismissed.

Did the claimant resign as a direct result of the alleged breach?

145. The dismissal complaint, if it had succeed this far, would have failed at this point because the Tribunal finds that the claimant had had an agenda to leave the respondent since 24 November 2022 and that he resigned when he did, not because of the delay in getting his grievances addressed or the outcome of his grievance appeal, but because he was being pushed to return to work and was being offered exactly what he had asked for.

146. The claimant had on numerous occasions threatened litigation, had tried to pre-empt his own dismissal on 24 November 2022, had gone to ACAS on 30 November 2021, applied for benefits in January 2022 and refused to attend the meeting to discuss a return to work on the terms he had been seeking in late January and early February 2022. The Tribunal finds that if there had been a breach or breaches upon which he was entitled to rely to treat himself as dismissed, he did not resign because of them.

Unauthorised deduction from wages

<u>Has the claimant been subjected to unauthorised deductions on 16 August 2021 and from 1 December 2021 onwards? (Claimant to clarify in his schedule of loss the payments alleges were deducted)</u>

147. The Tribunal finds that the terms of the claimant's contract were that if he refused to perform work that was allocated to him then he was treated as being on unpaid leave. Having refused to drive an 18 tonne vehicle in December and January, the claimant's contract subsisted during that period, and he was, as soon as his employer had advised in writing, unpaid because he was on unauthorised absence from work. Applying section 13 there were no wages properly payable to the claimant during December and January because he was refusing to do any work during that period and the established term of his contract was (for example during colling off periods) that if you don't work you don't get paid.

148. On 16 August 2021 the claimant attended work ready, willing and able to perform his duties. He was not paid for that day. Wages were properly payable to him for 16 August 2021. He had been off sick on 13 August 2021. He had not notified the employer of sickness absence on 16 August 2021 so it could assume he would attend work.

149. The respondent asked its employees, as a courtesy, to let it know if they were to return to work after sickness absence by 3 PM on the day before their return. This was so that it could avoid incurring the cost of an agency driver to cover their absence. The claimant received a phone call at 14:05 on 13 August 2021 from the work mobile phone. He couldn't take the call but replied, through his wife, within two minutes by text to say that he would be in work on the 16th.

150. In order to deduct pay from the claimant on 16 August 2021 the respondent would have to show a legal entitlement to do so. It has not produced a contract of employment with the signed deductions clause allowing it to deduct pay where an employee has failed to provide notice of return to work by telephone on the preceding working day before 3pm. Even if it had, in this case on the facts the Tribunal finds in the claimant's favour that he had signalled his intention to return to work at 14:07 to the same phone that had contacted him.

151. Accordingly, a day's pay is due to the claimant for 16 August 2021.

Section 1 Employment Rights Act

152. Section 1 Employment Rights Act 1996 imposes a duty on an employer to give a statement of key terms and conditions. If on commencement of Tribunal proceedings, in this case for unauthorised deductions from pay, the employer cannot show that it has provided that statement, then the Tribunal may, if the unauthorised deductions complaint has succeeded, make an award of two weeks' pay to the employee for the employer's failure to provide the section 1 statement.

153. The respondent's witnesses gave oral evidence that a contract had been provided to the claimant when he started work but that it is common for drivers to take those contracts away and not sign them. The Tribunal accepts that to be the case and that despite chasing up those employees the respondent often does not

hold a signed contract for its staff. Further, the Tribunal accepts the oral evidence of the respondent's witnesses, that the claimant was provided with the contract to sign in late November 2021 and that again he took it away and did not sign it. The claimant corroborates this position. He says he was provided with the contract but did not sign it. Neither party has produced a copy of either the first contract or the November 2021 contract. In those circumstances the respondent has not discharged its burden of proof to show us that the information that is required to give under section 1 Employment Rights Act 1996 had been given. The Tribunal has no way of knowing whether or not either of those contracts which were provided met the requirements of section 1. The Tribunal notes the respondent is a small privately owned business and that it is often the case that documentation in small businesses is not exactly as an employment lawyer would want it to be. However, it is surprising in this case that the respondent has not been able to produce copies of the contracts that it says, and he agrees, it provided to the claimant even though he did not sign and return them.

154. Accordingly, this part of the claimant's complaint succeeds.

Conclusion

155. The claimant's complaint for victimisation fails.

156. The claimant's complaint of constructive unfair dismissal fails.

157. The claimant's claim for unauthorised deduction succeeds in part in relation to his pay for 16 August 2021 and that complaint having succeeded the claimant's complaint that he has not been provided with a statement of terms and conditions under section 1 ERA 1996 succeeds.

158. An award of £ 990 was made on 26 January 2024 and judgment sent to the parties on 1 February 2024.

Employment Judge Aspinall

Date: 28 March 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

28 March 2024

FOR EMPLOYMENT TRIBUNALS

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/