EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Thakur	**v**	**Hallmark Connections Ltd**

Heard at: Reading Employment Tribunal
On: 17 to 20 June 2024
Before: Employment Judge George
Members: Mrs D Ballard
Ms HT Edwards

Appearances
For the Claimant: Mr A Thakur, claimant's son
For the Respondent: Mr R Beaton, counsel

Tribunal appointed Interpreter: Mr R Butt, Punjabi

RESERVED JUDGMENT

1. The claimant was not unfairly dismissed by the respondent.

2. The claimant was not subjected to an unlawful detriment on trade union grounds, contrary to s.146 Trade Union and Labour Relations (Consolidation) Act 1992.

3. The claimant was not subjected to an unlawful detriment on health and safety grounds, contrary to s.44 Employment Rights Act 1996.

4. The respondent was not in breach of their duty to make reasonable adjustments in relation to the claimant.

5. The respondent discriminated against the claimant by treating him unfavourably for a reason arising in consequence of his disability by the decision to dismiss him. This unfavourable act was not a proportionate means of achieving a legitimate aim.

6. Otherwise the claim of discrimination arising from disability, contrary to s.15 Equality Act 2010 is dismissed. In particular, the decision to reject the claimant's appeal against dismissal was a proportionate means of achieving a legitimate aim.

7. The claim for notice pay is dismissed on withdrawal.

8. The remaining issues as to remedy will be considered a separate remedy hearing.

REASONS

1. Following a period of early conciliation, which lasted between 30 September 2021 and 10 November 2021, the claimant presented a claim form on 10 December 2021. By that, he originally complained of unfair dismissal (including alleged automatic unfair dismissal on grounds of trade union activities and health and safety concerns), disability discrimination, failure to pay notice pay, disability related harassment, unauthorised deduction from wages and "other payments". The claim was case managed by Employment Judge Anstis at a preliminary hearing on 30 August 2022, following which the claims of harassment and for arrears of pay were dismissed on withdrawal (see page 62). Judge Anstis made an unless order directing the claimant to particularise the claim of "other payments" and, when that was not complied with, that claim was struck out (page 62). It was confirmed by Mr Thacker Jr., on behalf of his father, at the hearing before us that the claimant accepts that he was paid in respect of a 12 week notice pay and therefore he was content to withdraw any notice pay claim. That claim is dismissed on withdrawal.

2. The claims arises out of the claimant's employment as a PSV driver (also referred to as a PCV driver) by the respondent, a limited company operating a passenger transport business as part of the Rotala plc group of companies.

3. One of the matters that we had to make a decision about was the date of the effective date of termination. The claimant's employment was terminated following a capability review meeting by a decision of Mr Rob Newman, Operations Manager, which was communicated in a letter that is dated 25 June 2021 (page 286). It contains the following paragraphs:

   "It is therefore my decision that I will be terminating your employment on the grounds of capability (medical discharge) and this is with notice, which will be paid in lieu. The date of this decision will be recorded as 30 June 2021. Your employment commenced approximately June 2004 and therefore you are entitled to 12 weeks' notice based on your basic contractual hours of 42 hours per week.

   Please be advised I incorrectly detailed in your invite letter that you had accrued 15 days annual leave and taken 0 days. After further calculations based on your termination date of 29/06/2021 you have accrued 8.25 days annual leave up to your termination date and have been paid 2 days of annual leave. Therefore, you have taken accrued annual leave of 6.25 days, rounded up to 6.5 days, based on your termination date of 29/06/2021. This will be paid to you in the next available pay period."

4. The common position of the parties is that that document was attached to an email sent to the claimant on 30 June 2021 timed at 19:11. Therefore, although it bears the date 25 June 2021, the earliest date on which it could

have come to the claimant's attention is 30 June 2021, and then only sometime in the evening. The claimant's oral evidence was that he saw that email for the first time on 2 July 2021, after he had received in the post a hard copy of the same communication. He produced an envelope bearing a date stamp of 1 July 2021, which he said was the envelope in which the original letter had arrived. His oral evidence was that the first he knew that his employment had been terminated was on opening a hardcopy letter on 2 July 2022, whereupon he checked his emails and found an email dated 30 June 2021 with page 286 attached to it.

5. Neither party had included evidence in their witness statements about the date on which the decision to dismiss the claimant had been communicated to him and the above information emerged during the course of the hearing.

6. We had the benefit of a joint hearing file of documents that ran to 437 pages and page numbers in these reasons refer to that hearing file. The envelope and a photograph of the envelope taken together with the original hardcopy letter, were added as two pages to the hearing file. They became pages 438 and 439. The witness statements were in a separate file and page numbers in that file are referred to as WB page 1 to 58 as the case may be.

7. The tribunal heard oral evidence from the claimant who was cross examined with reference to a witness statement prepared on his behalf by his son as a result of information provided orally by the claimant. The claimant confirmed that he had sufficiently strong English language skills to be able to understand that the statement, which was written in English, represented evidence with which he agreed, and he was able to affirm that it was true to the best of his knowledge and belief.

8. The claimant and the Tribunal appointed interpreter, Mr Butt, had a conversation to assure themselves that they were able to understand each other. The claimant has relatively fluent English skills, but he was concerned that he might miss some detail of some questions asked if they were particularly long or used particular words that he did not understand. He therefore used the interpreter service as and when it was needed during his oral evidence. Mr Butt remained throughout the hearing to assist if needed but, given Mr Thakur Jr.'s assistance, the claimant only drew on the interpreter's assistance rarely, after his evidence was concluded.

9. There were a few preliminary matters which we had to deal with before starting to hear oral evidence. The respondent had made an application on 14 June 2024 to rely upon late disclosed witness evidence. The claimant consented to that; we heard oral evidence from three witnesses called by the respondent, all of whom were cross examined upon witness statements which they adopted in evidence: Andrew Creba - the managing director of the respondent; Darren Hammond - then operations manager; and Rakesh Chand - the allocations controller with the respondent.

10. The claimant had sent to the respondent witness statements of the evidence proposed to be given by a total of 13 witnesses. Mr Thacker Jr confirmed that four of them (his own statement, and those of his mother (Mrs C. S.

Thacker), Mr S Birdi and Mr K. S. Ghrial were only relied on in relation to remedy issues. It was decided that judgement would be given in relation to liability issues in the first instance and therefore those witnesses were not called or cross-examined about their witness statement at this stage.

11. Mr Thacker Jr also confirmed that Mr D Luckett, Mr D. Watson, Mr P. Jackson and Mr R Mehmi would not attend the tribunal in order to be cross-examined upon their witness statements. We were invited to give those statements as much weight as we thought possible, taking into account the fact that they had not been cross-examined upon them. That meant that the claimant called two supporting witnesses at the liability stage: Mr F Fernandes - a bus driver who had been the claimant's colleague for a number of years and Mr H Ladva, who had also been employed by the respondent following a relevant transfer of an undertaken from National Express to them in 2017.

12. That relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (hereafter referred to as TUPE) took effect on 25 November 2017. We find that all of the drivers whose employment was transferred to the respondent from National Express by that transfer were PCV drivers who drove on the Hotel Hoppa route. That is a route which connects some terminals at Heathrow airport and also connects a central point to hotels which service the airport.

Issues to be determined at the liability hearing

13. The claim was case managed at a preliminary hearing on 30 August 2022 (page 56 is the record of hearing). It was originally listed for final hearing to take place between 30 October 2023 and 2 November 2023, but was postponed (see the case management orders at page 65) with day three of the listing being converted to a preliminary hearing in public to consider the issue of disability. Ultimately that was conceded by the respondent with their position on disability being reflected in paragraph 58 of the Case Summary of Employment Judge Shastri-Hurst, sent to the parties on 1 December 2023. Although the claims and issues had been clarified by Judge Anstis, they were set out in bullet point form only (see pages 56 and 57).

14. At the start of the final hearing before us, I circulated a draft list of issues incorporating the legal tests for the particular complaints with the factual allegations to attempt to clarify a decision-making template for the tribunal. This was provided to the parties at the outset of Day 1 and they were invited to comment upon it. There was some subsequent amendments to the draft. The final agreed list of issues which was circulated to the parties on Day 4 is appended to this reserved judgment.

15. It was agreed that in the first instance, the tribunal would consider issues relevant to liability and therefore the issues in List of Issues 6, so far as they remain relevant, will be determined at a remedy hearing.

Time Limits

16. As identified in the list of issues. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 1 July 2021 may not have been brought in time. The prospect that some or all of the complaints may have been presented out of time, was raised by the employment tribunal since it is a jurisdictional matter and not one that the parties are able to agree between themselves. It had not been identified prior to Day 1 of the final hearing as an issue in the case. It is this which led to a chain of enquiry which ultimately provided the explanation set out in paragraph 4 above. The tribunal therefore needed to consider when was the effective date of termination. Ultimately, this matter was not contentious as we now explain.

17. Section 97 Employment Rights Act 1996 (hereafter the ERA) provides as follows:

> **" 97 Effective date of termination**
>
> (1) Subject to the following provisions of this section, in this Part. "the effective date of termination" –
>
> (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer, or by the employee, means the date on which the notice expires,
>
> (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect,"

18. It is well established that the period beginning with the effective date of termination includes that date as part of the period. In other words, if the effective date of termination is 1 June, then the end of a period of three months beginning with the effective date of termination is 31 August. To find the date at the end of that period of three months you find the effective date of termination (or the date of the act complained of) go back 1 day and forward three months. If the claimant has made contact to ACAS, in accordance with the early conciliation requirements, no later than the last day of the three month period that will stop the clock.

19. The respondent drew to the tribunal's attention the case of Wang v University of Keele, [2011] ICR 1251 EAT. Their position appears to be, relying upon Wang, that whether the plain and obvious meaning of the outcome letter was to give the claimant 12 weeks' notice or whether it was to give him notice to terminate his employment on a particular date, that notice only takes effect on the day following the day in which the notice is given.

20. However, Wang was a case in which the letter terminating employment, said, "the decision has been taken to dismiss you from your post. You are entitled to 3 months' notice". The letter did not say anything about when it was to take effect. (Para 39 Wang). It had been proved that the claimant had read the letter on 3 November 2008. His Honour Judge Hand QC, was bound by authority and accepted that the law does not take account of part of the day, so the start of a notice period was the day following the day on

which notice was given. Since the letter giving three months' notice had come to Mr Wang's attention on 3 November 2008 that three months started on 4 November 2008. It is also well established that if the meaning and effect of the letter of dismissal is ambiguous. It should be construed to the advantage of the employee (para 38 (C) Wang)

21. Furthermore, notice starts to run when the employee has the knowledge that he has been given notice of termination or when he has at least had a reasonable opportunity of discovering that he has been dismissed: Gisda Cyf v Barrett [2010] ICR 1475 U KSC. In deciding whether or not the employee has had a reasonable opportunity of discovering that they have been dismissed, we are entitled to take into account the reasonableness of their behaviour.

22. In the present case, the respondent does not argue that the claimant was in fact aware of the communication informing him that his employment had been terminated before 2 July 2021. Neither is it argued by the respondent that the claimant behaved unreasonably in not checking his email daily. There was an opportunity for the email to come to his attention on 30 June or 1 July before the hardcopy arrived. However, given the lateness of the hour at which the outcome was emailed and the short period of time before the hardcopy arrived, together with the fact the claimant had been informed at the capability review on 23 June 2021 that the decision would be communicated on either 24 or 25 June, the respondent realistically did not argue that the claimant behaved unreasonably by not checking his emails daily. Had there been grounds to infer that the claimant deliberately avoided looking for the outcome or went away so as not to receive it, then that might be different. Therefore, it is both parties' position that the claimant only found out about the termination on 2 July 2021 and did not behave unreasonably in not putting himself in a position where he could have found out sooner.

23. Nevertheless, our reading of the letter of dismissal, even construing any ambiguity in favour of the claimant is that, by it, the respondent intended the last date of employment to be 29 June 2021 and intended to pay compensation for lack of proper notice rather than to give notice to expire at a later date. We have quoted the relevant paragraphs from the outcome letter in para.3 above. We consider that that is the only sensible reading of the letter when taken together with the date of calculation of the holiday pay entitlement and how both parties behaved afterwards. The claimant's original grounds of claim stated that his employment had terminated on 30 June 2021 (para.4 on page 19) and the holiday play claim was withdrawn suggesting that it was accepted that holiday pay had been calculated to the correct date.

24. Given that interpretation of the letter of dismissal, Wang is not relevant to the decision. Wang sets out the default position if no other date has been specified either in the dismissal meeting or in the dismissal letter or, potentially, in the contract. However, that letter by which the respondent intended to communicate termination as from 29 June 2021, did not come to

the attention of the claimant until 2 July 2021. Therefore, employment was terminated immediately on that date. A pre-estimate of the damages for lack of proper notice was paid by the respondent.

25. We conclude that the effective date of termination was 2 July 2021. The claimant contacted ACAS on 30 September 2021, which was before three months had expired and therefore the unfair dismissal claim and all claims based on the decision to dismiss are in time.

26. All of the alleged detriments said to be discrimination arising in consequence of disability under s.15 EQA are to do with the capability process and unarguably connected to the dismissal so as to amount to a continuing act. The dismissal occurred less than three months before presentation of the claim and the appeal outcome - which is relied on as a separate act of detriment - was determined by letter dated 17 September 2021 (page 358). All of the EQA claims are clearly in time.

27. Depending upon our conclusions on the claim under s.48 ERA for unlawful detriment, it was possible that some otherwise meritorious claims would be out of time. We decided to consider those claims on their merits and then, if necessary, to consider time points. In light of our decision that none of those complaints are well founded, we do not need to reach a conclusion on whether there were presented in time or not.

Findings of Fact

28. We make findings of fact on the balance of probabilities, taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard, but only our principal findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgement about the credibility or otherwise of the witnesses we have heard, based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

<u>What trade union activities did the claimant undertake?</u>

29. The claimant alleges that various acts by the respondent, by which they removed him from the Hotel Hoppa bus route on three occasions and then subjecting him to a capability procedure, were done on grounds that he had taken part or propose to take part in the activities of an independent trade union. That is also said to be the reason or principal reason for his dismissal. We make the following findings about the extent of the trade union activities relevant for the purposes of this claim, in which the claimant was engaged.

30. He started as a trade union representative on 10 December 2019 (page 133), when he was elected a shop steward. The outcome of that election

was notified by the regional secretary of Unite to the respondent and he was formally acknowledged on that date.

31. As is well known, this country went into a national lockdown on 23 March, 2020 and the airline industry was particularly hard-hit by the prohibitions on people travelling except in very limited circumstances. This impacted upon the respondent's business of providing passenger service vehicles, including on the Heathrow routes. It also impacted the need for drivers on what are called “service routes” for Surrey County Council. The respondent notified the workforce on 6 April 2020 that there would be a change in rotas. Where relevant, this will be explained in more detail below, but it is likely that there were some discussions between the respondent's managers and the claimant in his role as shop steward before the collective grievance, which was presented on 28 April 2020 (page 147). On that date, Mr Thacker Snr submitted the collective grievance in relation to new working conditions to Mr Creba.

32. It is clear that Mr Thacker Snr was allocated particular days for union duties, including 14 May 2021. Mr Chand made a statement dated 28 May 2021 (page 377), in which he recounted discussions with Mr Thacker Snr on that date about rotating Hoppa drivers onto the Surrey Council service routes. We find that, separate to his own personal circumstances, Mr Thacker represented the drivers as a whole in discussions with Mr Chand about the fairness of shift and route allocation. Indeed, by common accord, discussion with Mr Chand and Mr Creba on 26 May 2021 concerned the position of the drivers generally as well as the claimant's personal circumstances.

33. It is also on that date, 26 May 2021, that the claimant represented a colleague who successfully overturned their capability dismissal on appeal.

34. The claimant may have carried out some other representation including of Mr Mehmi, but the above activities were the main occasions on which the claimant acted in his capacity as shop steward and carried out trade union activities. It is those which he argues caused the respondent to take action against him about which he complains within these proceedings.

35. There are however a number of factors or features of this case, which appear inconsistent with a finding that the respondent or its individual managers were motivated by the claimant's trade union activities in the decisions and action that they took from time to time in relation to him. We make findings of fact about their reasons for the actions complained of in detail below but we take into account the following features which point against there being a hidden unlawful motivation for the acts complained of.

    35.1 The fact that the claimant had allocated stand down time for trade union activities, such as on the 14 May 2021, tends to suggest that the company saw the benefit of, and was supportive of individuals being available in their capacity as trade union reps to support their colleagues. True, there is a statutory obligation to do so, but there is nothing to suggest permission was grudgingly given.

35.2 Contrary to the claimant's allegations, there is credible evidence that of the three trade union representatives apart from the claimant who left the respondent's employment during the relevant period at least two exited for reasons clearly unrelated to trade union activities. One was made redundant and Mr Creba volunteered information about an apparently serious incident in which the driving of one of the trade union representatives appeared to involve serious safety issues. The claimant's allegation that there was evidence of an attitude of general hostility, which was consistent with high turnover of those who were acting as trade union representatives was based on mere assertion and the evidence of Mr Creba effectively countered that, certainly in relation to 2 of the individuals.

35.3 The claimant and his supporting witnesses gave evidence of an undercurrent of alleged hostility towards former National Express drivers, which is an alternative explanation for alleged oral hostility or suspicion.

35.4 The relationship between management and the trade union appears to be generally productive from the evidence we have seen. As an example, we look at page 275, an email from the claimant to Mr Creba from June 2021, explaining that he had come to an arrangement with Mr Chand about how much notice there should be of rotas.

Did the claimant raise circumstances connected with his work which he reasonably believed were harmful or potentially harmful to the health and safety of the drivers or of himself?

36. Two particular matters were identified by the claimant. He said that on a number of occasions he had complained to the respondent about ill-fitting and worn seats on the buses which he had to drive and about the condition of those buses generally. The second matter that he relied on was complaints made about short notice of changes to rotas or shifts, which meant that drivers might attend with the expectation that they would finish a shift at a particular time and discover on arrival at work that they in fact were scheduled on a different route or shift, which would finish at different time. This latter point apparently caused inconvenience to drivers who had made plans about how to fit personal commitments around their driving duties and there was the risk that these might be disrupted at short notice.

37. At WB pages 2 to 3 the claimant sets out the communications that he made in relation to the condition of the buses. He alleges that he told the respondent that some of the seats were worn to the point that the metal edge or frame was pressing upon the legs of the driver as they operated the bus, which resulted in stopping the circulation to the legs and resulted in numb and at times painful legs.

38. His supporting witnesses did not give evidence that the seats were defective to the extent alleged by the claimant. Mr Ladva did not mention the seats at

all in his evidence. Mr Fernandes said that the seats were not in “good conditions” but his description we would not characterise as meeting the definition of potentially harmful to health and safety, which is the definition in the ERA.

39. According to Mr Thacker Snr, his complaints were made on at least 18 occasions between January 2018 and June 2021.

40. The respondent has countered this specific evidence of the claimant and the non-specific and less serious description by his supporting witnesses with reference to a routine involving regular inspections and repairs. We find that the drivers were expected to carry out a 10 minute inspection of the vehicle allocated to them every day and to mark the results on a VCR card. Any defects would be reported to an engineer who would either come and rectify the defect then and there or if the problem could not be resolved, quickly remove the bus from service.

41. We see evidence that the claimant mentioned his perspective that the seat conditions were contributing to backache when he was interviewed by Occupational Health in June 2019. Following that, the respondent bought him a cushion and backrest, which the claimant found did not suit him and which he chose not to use. As it was described to Occupational Health in 2019 (page 121), the description appears to be limited to the seats being all worn out and Mr Thacker finding it uncomfortable to drive after one and half hours.

42. Mr Creba was not aware of specific complaints about the seats which postdated the provision of the cushion and lumbar support.

43. Although the claimant told us that he made a large number of complaints between January 2018 and June 2021, there is very little reference to the problem of uncomfortable seats in the documentation. There is certainly less than one would expect had the claimant's account of these 18 meetings and communications been correct. We consider that the evidence provided by the claimant in WB pages 2 to 3 is an exaggeration of the degree to which he emphasised that the seats were harmful to him and his colleagues. We think that the reality was that the seats may have been worn, but not in a way that means the reasonable person could have considered that there was a risk of potential harm to the health and safety of the drivers. Mr Creba was not aware of specific complaints about the seats after the provision of the cushion and lumbar support to the claimant.

44. Furthermore, even if the claimant described the problem in the same terms that he used to us when saying how the seat affected him, that does not fall within the definition in s.44(1)(c) or s.100(1)(c) ERA. There is no clear and reliable evidence that concerns were raised by the claimant after June 2019 in a way that would lead to the conclusion that he reasonably believed they were harmful or potentially harmful to health and safety of the drivers. Our conclusion on this is that the claimant did not make them any such communications after June 2019.

45. The connection between the last-minute rota changes and health and safety is tenuous. Some drivers might find this situation unsettling or even annoying, but if a driver is scheduled on SB or spare then that driver could be allocated to any route which needed a driver unrelated to changes in the rota.

46. Mr Chand described a 94 line rota and said this led to a lot of complaints. It was a difficult period of time during the Covid-19 pandemic following the introduction of new rota in April 2020. Mr Chand, as he was directed to do, and the respondent's managers were managing competing aims in generally stressful times. We accept that Mr Creba was attempting to take steps to preserve employment and to preserve the business as a whole, when the work carried out by the business had been significantly reduced. This meant that the driving duties available had reduced considerably. An example is that the Hotel Hoppa buses apparently reduced from 23 shifts for all routes during the course of the day to 4 to 5, such was the fall in footfall of passengers around the terminals and in the hotels.

47. When the claimant raised concerns about the rotas being changed at short or late notice, taking the circumstances as a whole, we do not think that it was reasonable for him to think that he was raising something that concerned the health and safety of individuals.

    Were there formal arrangements for reasonable adjustments that the claimant should drive Hotel Hoppa buses during his employment with National Express?

48. The assessment by occupational health In June 2019 had followed an accident at work. However, it was not the first occasion on which the claimant had experienced a bad back.

49. The claimant’s history of back pain appears to go back to 2006 (see the summary of medical interventions at page 78 and 79). On 31 July 2013 the claimant was driving a coach to Gatwick and had to stack luggage particularly high. He explained in the record of a return to work meeting on 14 August 2013 that he had started to feel pain in his back on the return journey. Part of the way of helping the claimant to manage that pain appears to have been that the claimant was assigned to the Hotel Hoppa buses.

50. We understand that National Express were organised into more than one division with the claimant previously having driven coaches in one division. Within the National Express organisation, the position of Hotel Hoppa driver was in a different division to which PSV Drivers were allocated. One relevant question is whether the claimant had the benefit of a formal adjustment of his working arrangements in 2019 to 2020.

51. The evidence was that all of the drivers who transferred from National Express to the respondent were allocated to drive Hoppa buses prior to transfer.

52. The evidence that the claimant drove Hoppa buses for a long time prior to the events with which we are concerned does not lead to an inference that that was because of any specific arrangement. We find that he was part of that section or division of the National Express business which was subject to the transfer. We found the evidence Mr Hammond about the arrangements of the TUPE transfer to be particularly strong. He gave clear evidence that information was provided as part of due diligence where any employee had flexibility or reasonable adjustments for some recognised reason. He also stated, and we accept, that the drivers who had specific arrangements had a counterpart letter to confirm it which could be compared with information received by the respondent direct from National Express.

53. The claimant has not produced any documentary evidence of a formal arrangement either to us or during the course of his employment. Mr Hammond's evidence about the counterpart letter means that the apparent loss of part of the claimant's personnel file in a fire and of part in a malicious act by which data was destroyed is not a complete answer to a lack of such documentary evidence. The drivers themselves were apparently provided with such a document. Mr Chand confirmed that the drivers who had arrangements came to him with a letter explaining what the flexibility or adjustment was and the opportunity to do so had been within four weeks of the transfer back in 2017. That process as described and the timescales accords with our industrial experience of standard arrangements in a TUPE transfer situation.

54. We note the summary of the medical history between 2006 and 2013, page 78 and shows that, off and on over that period, the claimant had sickness and absences because of back pain and sciatica.

55. Mr Thakur Snr's evidence about the return to work meeting at page 86 to 88, is noted. He states (the bottom of WB bundle page 5) that the Hotel Hoppa to which he was assigned would consist of a five minute journey and a stop to collect passengers from a hotel during which time (approximately 2 minutes) he was able to benefit from a short break out of the driver's seat, stretching his legs and helping passengers with where to place the luggage.

56. His evidence about how the transfer had come about was that the notes of the meeting on 14 August 2013 (page 86) followed the incident when he had lifted two cases up high on the Gatwick run as a coach driver. He stated that he asked for a transfer to Hotel Hoppa until he felt 100%. That is what is in the contemporaneous documentation at the bottom of page 87 where it is recorded that the claimant has asked to go onto Hoppas until he feels 100%.

57. National Express were apparently able to accommodate this and that led to a change in terms and conditions, namely a reduction in his hours. Once he was moved to a division where he drove Hoppas only, that is a possible reason for the lack of paperwork associated with adjustments in his case. The respondent did not need to make any further adjustments because of the change of location in which the work to be done. It is reasonable to

assume that the claimant transferred to drive Hoppas in approximately mid-August 2013.

58. Part of the relevance of the documents from the claimant's personnel file about the management of back pain is that they were before Mr Creba when he had to consider the reliability of medical evidence obtained by this respondent at the time he made his decision to dismiss. They are worth analysing in some detail as a consequence.

59. The claimant started a period of sickness absence on 26 October 2013, which ended up continuing until a return to work interview on 13 December 2013. We can see from page 95 that he self-certified initially with the reason for absence being "continuity of previous lower backache". He also described the backache as leading down the right side of his leg. The GP certified him not fit for work for two weeks because of right side sciatica on 28 October 2013.

60. An assessment form is at page 99 - 100. It appears that in September 2013 he was assessed and advice given that he should have restricted work duties as described on page 100, but those are only to refrain from heavy lifting and take rest on regular intervals.

61. There was an assessment done on 4 November 2013 and a subsequent GP note certifying him unfit for the period 6 to 27 November 2013. This assessment advised that the claimant be fully restricted from heavy lifting. There were a number of partial restrictions recommending that the claimant avoid sitting for prolonged periods, avoid bending beyond the knee (at the moment), avoid pushing or pulling heavy objects and avoid twisting his back. Some of the recommendations are a little difficult to read, but that appears to be the gist of the assessment. Page 1 of the assessment at page 98 of the hearing file records a diagnosis of "Right lumbar muscle spasm, decreased spinal mobility at L 2 to 5" and raises the question about whether there is disk pathology. The history apparently described by the claimant was sudden onset of pain over the period 26 to 28 October 2013.

62. An MRI scan of the lumbar and sacral area was carried out on 21 December 2013. It seems a reasonable inference that this was in response to the question raised by the practitioner in the November 2013 assessment. In the report dictated on 8 January 2014 (page 104), the practitioner has interpreted the scan as showing

> "some small broad-based discs on the L3/L4, L4/L5 and L5/S1. The S1 disc is slightly more prominent on the right abutting the right transiting S1 nerve root."
>
> I have now your clinical details, but it seems that there is a little bit of pressure on one of the nerves in the spine, causing pain in the right leg."

63. At a meeting on 3 November 2014, still during his employment with National Express, the claimant's absence was reviewed and the reason for going sick contains the following explanation (page 110) "Ranjan had an appointment for an epidural in Westminster and Chelsea Hospital for an ongoing back problem

and could not drive for 48 hours," he was only on paracetamol and had been absent on the day he was due to return to work because he had diarrhoea. That evidence indicates that he had had an absence for treatment to his back in October 2018. The comments are that the claimant "suffers with pain from his back on a daily basis and has a disc which is damaged at the moment he can only try and control the pain."

64. Another relevant document is an accident report from December 2014 (page 112) which indicates that the driver, Mr Thacker Snr, reported a problem with the Hoppa bus he had been driving, which jerked heavily when he changed gear and that affected his back, which started aching. There is no documentation in the hearing file that indicates absence or problems with the back between that report and June 2019.

65. Indeed, at page 120, we have the occupational health report from 19 June 2019, where Dr Patel records the claimant saying his only concern was "uncomfortable driver's seats" and records Mr Thacker Snr saying it was uncomfortable to drive after 1 ½ hours. Dr Patel carried out a physical examination, and recorded that the neck and spinal movements were fairly full and recorded the claimant saying that he does not experience any back pain when driving his own motor vehicle as well as saying that the symptoms were relieved by taking a swim or paracetamol. Dr Patel certified the claimant medically fit to drive a bus, recommended that the claimant be provided with the seat cushion and lumbar support attached details of suitable products, and he recorded the following

"Mr Thacker informed me that he has not suffered from any previous musculoskeletal condition relating to his back, neck, or pelvic area, which may have been a pre-existing condition."

66. The claimant readily accepted that this was not accurate and said that he thought this was a misunderstanding on Dr Patel's part because his recollection was that he had told the occupational health physician that he had been put on the Hoppa buses because of the injury and would not have told the doctor that he had no pre-existing condition. By the point of the examination by Dr Patel, the claimant had had an MRI scan which indicated some pressure on one of the nerves in the spine as a potential cause of the right leg pain and had had a spinal injection. For whatever reason, Dr Patel does not appear to have been aware of this history. The claimant accepted that he had been sent the report and he had not corrected that apparent misunderstanding.

67. We give weight to the statement in the notes of the meeting, at page 87 that the claimant had asked to go on to the Hoppa buses temporarily. There is nothing in writing to suggest that this was a formal adjustment that the National Express considered *needed* to be made or that was supported by medical evidence. There were other elements of the job role which were restricted from time to time, notably lifting heavy luggage. Potentially, the move to the Hotel Hoppa meant that, as driver, he was less likely to have to lift luggage than on a coach to Gatwick Airport. Certainly none of the

documentation suggests that the move was done because of the need for rest breaks, which is the case the claimant has advanced before us.

68. What does appear to have happened is that because of the way National Express was structured, he was never taken off the Hoppa route. However, we are not satisfied that there was a formal adjustment made because the claimant needed regular breaks. There is no mention of that requirement in meetings at which the transfer to Hoppus is discussed. There is a partial restriction in November 2013, saying that he should avoid sitting for prolonged periods, but that was during a period of sickness absence that ended on 13 December 2013 and in October 2014 he had an epidural.

69. Given all that happens in the claimant's medical history, we do not think we can infer that National Express transferred the claimant to the Hotel Hoppa route because an adjustment was needed for regular breaks on a permanent basis.

The claimant's sickness absence

70. As we record above, the occupational health report dated 19 June 2019 (page 120) recorded that the claimant was fit to drive. The claimant's representative at the time analysed the weeks worked from June 2019, versus the weeks during which he was absent and the reason for those absences in a table at page 336. This provides some assistance with the length of particular absences. Where it states the claimant was absent due to sickness it does not say what the specific cause of the sickness was.

71. The claimant had seven days' absence between 1 and 7 July 2019. On page 132, there is a MED3 certificate stating that he may be fit for work, taking account of advice that he may benefit from altered hours specifically a maximum 8-hour shift and a maximum 3-hours of continuous driving. This is said to be the case for six months from 19 November 2019 to 18 May 2020. It appears that the claimant was at work until 5 January 2020 when he started an absence that continued to 23 January 2020. Page 134 is a certificate dated 8 January 2020, which certifies that for the following two weeks he will be unfit for work due to back pain.

72. There is no suggestion that the claimant had been removed from the Hotel Hoppa route prior to this and that fortnight precedes the national lockdown. He returned to work until 24 March 2020. Although page 336 says that he was sick between that date and 12 April 2020, there is no sick note in the hearing file or explanation of the reason and we note that it coincides with the national lockdown. We therefore disregard this period.

73. He was then furloughed between 13 April and 14 June 2020.

74. Rakesh Chand was a little unclear about whether specific conversations about the suitability of the duty had taken place at the time the claimant had been trained to work on the 555 service route in about June 2020 or the following year. However, he was clear and categoric that, to his recollection, the claimant had not worked for two weeks on the service route. He

explained that three or four days' training on the route was normal. We find that the claimant probably had four days' training on the 555 in about June 2020. It is unclear how many shifts he drove on that service route at that time before he stated that his back was badly affected and took sick leave, visiting his GP to complain of stress about being asked to do different duties and a flareup of back pain.

75. At that consultation, on 11 June 2020, the claimant's GP certified that he may be fit for work, taking into account restrictions to a maximum 8-hour shift, and "encourage regular breaks to allow for stretching, short walk". This is said to cover the period from 11 June till 10 December 2020. This certificate appears to have been signed during the consultation referred to in the extract from the claimant's medical records at page 295. There are a limited number of extracts from the claimant's medical records in the hearing file; they are those produced during the course of the capability proceedings. The claimant's GP sent a letter of 20 July 2021 (page 293) to the respondent addressing two particular matters that the claimant had asked him to focus on. He also appended two pages taken from the claimant's medical records showing consultations between 11 June 2020 and 7 September 2020. In the consultation on 30 June 2020 the GP prescribed pregabalin 50 mg capsules twice daily, and co-dydramol 10 mg tablet to take 1 or 2 tablets, 4 times daily. The GP advised the claimant not to drive until he is stable on his medication and DVLA signs off is okay to drive. The claimant apparently told his GP that he would speak to his manager about that.

76. The claimant had attended this consultation by telephone and talked to his GP about stress at work due to "doing duties that I normally don't do" as well as describing ongoing back pain and a flareup due to different duties. His daughter had apparently recommended pregabalin. He is described as feeling stressed and reporting that he had been advised to start training for what must be the 555 route, but that he felt nervous about it and he was prescribed a short course of sleeping tablets. This appears to be when the fit note was issued with the recommended restricted duties for six months.

77. The claimant remained unfit to work and a further certificate was issued on 6 July 2020, covering from that date to 3 August 2020. The reasons provided were lower back pain and stress at work. The fit note itself is at page 211 and the record of that consultation is at page 295 to 296. It states "back pain has worsened, and also feel stressed by the changes imposed by the employer." We conclude from this that from the claimant's perspective, the stress he is experiencing is caused by being asked to do something which he considers will exacerbate his condition. But what the GP has noted, is nervousness about doing something new or unaccustomed.

78. On 14 July 2020 the claimant had a welfare meeting with one of the operations managers, Mr Harry. We should explain that we heard from Mr Hammond, who was one of two operation managers. He and Mr Harry sometimes covered for each other in managing procedures of this kind. It was Mr Harry who was directly responsible for managing the claimant's

procedure at the relevant time. Following the welfare meeting on 14 July 2020 the claimant emailed the operations manager (page 212), and asserted that forcing him to work on the 555 service route did not have the correct conditions that he needed. He asserted that in 2019, he had submitted a doctor's note that he needed short routes with frequent breaks, and says that he was called back from furlough on 5 June to be trained on the service routes. In fact the medical evidence does not support the assertion that breaks were part of the reason why he was driving Hoppa buses. He asserted that the 555 service route "does not have the correct conditions for me to take regular breaks, my shifts regularly exceed eight hours".

79. There is a dispute between the respondent's witness, Mr Chand and the claimant about whether that is accurate. Mr Chand explained that, while the 555 was not the shortest route, it was the route which was most likely to allow the driver to step down from their seat during the route, particularly during that period when there was limited passenger transport need. That was, he said, because the bus was most likely to be running ahead of schedule compared with the other service routes. He also said that he was mindful that the claimant had restrictions on lifting, and lifting of luggage could not be avoided completely when driving the Hoppa buses.

80. On 3 August 2020 the claimant was certified not fit for work due to low back pain and the consultation note (page 296) records that his back is "little better but still not able to cope with work." The pregabalin was increased in dose, and the prescription for co-dydramol repeated. The reasons for being unfit for work did not, at this point, include stress.

81. When reviewed on 1 September 2020, the claimant remained unfit for work and on this occasion the reasons were stated to be low back pain and stress. This certificate covers the period 1 September 2020 to 28 September 2020. (Page 219). On 7 September 2020 the claimant consulted with his GP about shoulder pain (see page 296) and was diagnosed with a frozen shoulder. He was then certified unfit to work from the expiry of the previous certificate to the 27 October 2020 because of back pain and a frozen shoulder (page 220). This was repeated at a consultation on 28 October 2020, when he was certified unfit to work for those reasons until 25 November 2020.

82. Mr Hammond conducted a welfare meeting on behalf of Mr Harry on 11 November 2020 (page 240). It is clear from those minutes that Mr Hammond was discussing options that he considered should meet the restrictions recommended by the GP in the June 2020 fit note, namely a maximum 8-hour shift and regular breaks to allow for stretching and a short walk. Some options were discussed and the prospect of involving an amendment to the contracted hours was flagged. In the end, Mr Hammond decided to refer the claimant for an occupational health report in order that the respondent could understand what the professional advice was about what they could allocate to the claimant.

83. We set out above the chronology of sick notes and other evidence about the reasons for sickness absence over that period of time, ending with a return to work meeting on 20 January 2020 with Mr Harry page 256). Among the things this evidence shows is that the claimant was absent from work for 19 days in January 2020 when he was driving the Hotel Hoppa and the reasons for that absence appear to be unrelated to a request for him to drive the service route. The claimant was absent from 1 July 2020 until 20 January 2021, after he had undergone the training and done a limited number of shifts on the 555 service route. The reasons for his absence over that period consistently mentioned back pain. The sick notes over that period all cite back pain or low back pain as contributing to the unfitness, although some additionally say a contributory condition was shoulder pain or stress. It appears that the claimant was back at work from 20 January 2021 until he was put on flexi furlough on 26 May 2021.

The request for the claimant to drive the service route

84. There are three particular matters that the claimant complains about in relation to being allocated to the service route:

    84.1 the decision that he should train for the 555 service route and then drive it on a rotational rota from approximately mid-June 2020,

    84.2 the decision that he should drive the 555 service route from March 2021 onwards and

    84.3 apparent rostering for him to drive that service route and which led to the conversation on the 26 May 2021.

85. The claimant had been on furlough until 14 June 2020 and the respondent's intention was to bring him (and, no doubt, a number of other drivers) back to work from furlough and train them to drive service routes. In particular, the claimant was to be trained on route 555 for Surrey Council. The respondent gave all employees driving the Hotel Hoppa route 28 days' notice of a change in the rotas (page 184). That notification, dated 6 April 2020, explains that, in the exceptional circumstances in which they are working during the Covid-19 pandemic, they consider it to be necessary to make a permanent change to new rotas, which will be effective from 5 May 2020. The notification talks about the requirement to cut services and reduce frequency for the foreseeable future.

86. We accept that the exceptional circumstances of the pandemic would have required the company to take steps to protect the business and seek to keep as many drivers employed as possible. A later email to trade union representatives, including the claimant, from Mr Creba on 10 June 2020 (page 200) sets out the financial impact of the loss of particular revenue strands. This part of the business is very dependent upon leisure and business air travel, which was negligible during this period. The communication talks about contracts with minimum number of hours and states that it may be that employees are required to work their normal contractual number of days, but that due to reduced demand for services,

they are not required to work the same amount of hours per day as a measure to prevent lay-offs. It also states

"Hoppa services have reduced from a 23 PVR down to a 5 PVR with no sign of recovery, we are in the process of training the Hoppa Drivers to Drive on Surrey routes and from Monday 15th June they will be Driving on the 555 and 458 Services on reduced hours."

87. We accept unreservedly that the reasons that the respondent directed that all Hoppa drivers would be retrained so that they were capable of driving alternative routes was exactly as they say in that letter. It is clear that as there has been a reduction from 23 buses a day servicing the airport hotels to 5 buses a day that would have led to a considerable reduction of the number of drivers needed to drive those buses.

88. We consider what the situation was in January 2021, when the respondent was planning for the claimant's return to work from sickness absence. At that date, the respondent was still operating a flexible rota with 93 lines and all drivers were rotated through the duties on that rota. They were sometimes on furlough, sometimes on a service route (and there was more than one service route available), they were allocated to the Hotel Hoppa or allocated SB or spare, which meant that they could be allocated to whichever route needed a driver on that date. Rakesh Chand had a desktop, showing him where individual drivers had restrictions on duties. There were clearly a number of reasons why individual drivers might have restrictions on the time of day that they could work or the number of hours that they could work. We accept that there were several different reasons why individuals might be limited in what they could do. This was still during the Covid-19 pandemic; during the second national lockdown some workers would have individual vulnerabilities - either of themselves or of family members - which meant that particular services were unsuitable for them. Mr Chand said, and we accept that he took account of medical evidence and family situations covered the categories where particular accommodations had to be given.

89. Mr Hammond had decided in November 2020 that an occupational health report that was needed to advise on what it was possible to ask the claimant to do. It is a great pity that one was not obtained before bringing the claimant back to work. However, they did have some restrictions advised by the GP in the June 2020 fit note. Other information available was set out in the claimant's description of his present condition in the return to work meeting on 20 January 2021 carried out by Mr Harry.

90. The minutes of that return to work interview are at page 256. It is recorded that the claimant still has back pain which will never go away, but is no longer on medication of any kind. He apparently informed the operations manager that the injury was only aggravated by sitting for a long time, which he stated was more than 30 to 45 minutes, depending upon the type of vehicle. We comment that it is difficult to see how the claimant knew that when he had just had six months off work and had improved to the point

where he was not taking any medication but, nevertheless, that was what he told Mr Harry.

91. The available work was discussed and the operations manager informed the claimant that there were no school duties available at present. Those would apparently have potentially been suitable because they were short spells of driving either in the morning or the afternoon and therefore fitted with the claimant's request for short routes. At that time, the respondent was not organising any short working shifts or part-time rotas. It was decided that he would be returned to rotated duties, but that the rota showed that he would be on the Hoppa duties until approximately the end of February and then revert to SB (spare body), which meant that he could be allocated any route that he had been trained on. The claimant's response was "I think service work may aggravate my back, but I will not know until I try, I am not refusing, it is just driving for long spells."

92. It is clear that the claimant, in being allocated to a rotating rota was being treated the same as everyone else who did not have a specific adjustment. The respondents were satisfied, and we accept the rationale, that at least the 555 service route would potentially meet such adjusted duties as they were aware of because there would be no lifting, there would be the opportunity for the claimant at scheduled stops to get out of the cab and stand up to stretch his back before resuming the journey and because the 8-hour maximum driving shift could be accommodated. As a matter of practicality, he would be on the Hotel Hoppa until about the end of February but that was to do with where he fitted into the rota and not because it had been agreed that he should only drive those buses.

93. It is absolutely clear, and we find, that the only reason the claimant was allocated to SB or spare body, and was therefore available to drive the service route, from about the end of February 2021 or the beginning of March 2021, was that the respondent did not accept, on the basis of the then available medical evidence, that it was necessary to make a reasonable adjustment to put him on the Hotel Hoppa permanently and had devised a system which rotated all of the drivers through the available work.

94. As we have already explained there were not very many passengers at that time and we accept that the drivers could probably have got off the bus to walk around for a minute or two and stretch their backs, provided they kept to the schedule and left the bus secure when they did so. On that basis, a trial of the 555 service route was quite reasonable and the claimant does say in the return to work meeting that he will try it. There is nothing to indicate that the claimant is being targeted by this treatment because of carrying out trade union duties or to prevent him or deter him from taking part in trade union activities. He was being treated exactly the same as everybody else, given that the respondent did not accept that there was an obligation to keep the claimant on the Hotel Hoppa. Indeed, the respondent reasonably did not think that the Hotel Hoppa was the most suitable route to fit the needs of which they were aware.

95. We are also mindful of the claimant's evidence that he was brought back from furlough to do trade union duties. His representation for Mr Makwana was at approximately this time. It seems inconsistent with the alleged hostility to the claimant's trade union activities that the respondent should have done that.

96. The claimant does remark in the return to work meeting on 20 January 2021, that the types of vehicle can affect whether his injury is aggravated. He describes the new Hoppas as okay, but the service vehicles as not that good. The operations manager records that the dimensions of the cabin seats are to be evaluated as to whether there was a difference and also the older Hoppa buses are to be checked. We accept the common evidence that drivers checked each of their vehicles every day and were required to mark any defects on a form following that 10 minute walk around. If there had been any defect an engineer would inspect the bus and if the defect could not be remedied, the vehicle was taken out of service.

97. In about January 2021 onwards, there were many spare vehicles because of the reduction of services. This communication in the return to work meeting, even if regarded as a communication of something which is potentially harmful to health and safety is said in response to the claimant being told that he had been allocated onto the rota and it is clearly not the reason why he was allocated onto the rota.

98. We accept Mr Creba's evidence that the Hoppa vehicles were old but serviceable. The DVLA audits encouraged the rigorous inspection routines that he outlined. The claimant could not reasonably have thought that the condition of the vehicles as a whole was potentially harmful to health and safety. Because the claimant had an underlying back condition, specific vehicles might cause him particular difficulties but it appears that this problem was being looked into. Furthermore, the rota allocating the claimant to rotate into SB had been drawn up before the meeting at which the claimant makes this comment.

99. The respondent did not accept that there was medical evidence to support a decision to put the claimant on the Hotel Hoppas exclusively. To do so would have caused tension with the other drivers when there were only four or five Hoppa buses in service.

100. We accept that the medical evidence does not support a requirement that the claimant drive on the Hotel Hoppas exclusively – at best it requires that he have a maximum eight hour shift and the opportunity to take regular breaks. A previous requirement had restricted lifting and that had been described as a permanent alteration of duties - at least in relation to heavy lifting.

101. The record of the return to work meeting in January 2021 (page 256) shows that when the claimant put forward concerns, they were listened to. That and the fact that the claimant was told of the proposed rota before the comment about the seats negates any suggestion that he was targeted for raising concerns about the condition of the Buses and the impact on him of

that or of allocation of the rotating rosters in respect of the drivers as a whole.

102. The claimant gave evidence (see the top of page 8 of his witness statement) about when he was asked to drive the longer route – when that became his turn under the rotating rota. He stated that he attempted to complete a shift but halfway through the day felt a severe pain in his back, spoke to Mr Harry and was told he was not required to complete the route. He stated that, from that point, he was returned to the Hotel Hoppa. We have not heard evidence from Mr Harry, but see that the claimant signed the Occupational Health consent form in April 2021 (page 260 which is a referral to Pegasus Occupational Health). It is a little uncertain what happened but it appears that the operations manager may have informally decided not to require the claimant to drive the Surrey service route from March 2021 but made an Occupational Health referral.

103. The other point of contemporaneous documentary evidence is the record of the conversation between the claimant and Rakesh Chand on 14 May 2021 when the claimant seems to have been allocated as SB or spare body on the rota. Mr Chand dealt with this at paragraph 8 of his witness statement (WB page 57). He described the claimant approaching him during a stand down day for union duties; on Mr Chand's account, he explained to the claimant how the allocations were done. This evidence, which we accept, suggests that nobody told Mr Chand that the claimant could not be on the Surrey service route although he may have been allocated to the Hotel Hoppa where possible. Mr Chand wrote a file note about this conversation (at page 377).

104. A second conversation is recorded in that file note as taking place on 25 May 2021 (referred to in Mr Chand's paragraph 12). The claimant apparently spoke to Mr Chand during the night shift on 25 May and, according to Mr Chand, said that he could not drive the 555 because his back gets sore when he sits and he cannot drive too long and "If I put him on there he will go sick the day after due to the back pain". We accept that Mr Chand probably told the claimant that he could be allocated to the 555 because he was on spare and we find that this was done by reason of rotation of the rota.

105. It is unclear, in the absence of evidence from Mr Harry, why the claimant did not drive the 555 service route after the attempted shift in March 2021. Mr Chand was never told that an adjustment had been agreed to by management and that would have been inconsistent with Mr Harry's letter of November 2020 (page 250). This letter was sent by that operations manager following the welfare meeting with Mr Hammond and in it he recommended an Occupational Health report which had not yet been obtained by the following March.

106. Mr Chand clearly had been told something about the restrictions that the claimant was working under. We infer that he was told about the restrictions on the last MED3 certificate in terms of the maximum eight hours shifts and regular breaks. He independently volunteered that the claimant could not

drive for more than eight hours and needed constant rest during his oral evidence and that appeared to come from his recollections. We infer that one of the managers had instructed Mr Chand about those restrictions on the then expired - but most recent - fit note as the best attempt to accommodate the claimant's need pending an Occupational Health report. It is a pity that it took so long to get the Occupational Health report but, in principle, that was a sensible thing to do.

107. It appears that the claimant was told that all the drivers on the Hotel Hoppa had threatened that they would go on sick leave if allocated a service route and on 28 May 2023 the claimant emailed Mr Creba (page 267). Among other things, he informed Mr Creba that he has chronic lower back pain and was placed on Hoppa duties to prevent further injury to his back. He asked Mr Creba to be kept on the Hoppas until the Occupational Health report was completed.

108. There was then a meeting on 26 May 2021. Coincidentally the claimant had represented Mr Makwana on the same date. It appears from page 432 that the claimant had attempted to clarify that it was only he himself who would become unfit if required to drive the Surrey service route. Be that as it may, it appears that the claimant and Mr Chand met at a meeting that Mr Creba was present at to discuss both group complaints about whether it was fair to allocate non-Hoppa drivers to the Hoppa routes and also to discuss the claimant's personal circumstances.

109. In the hearing involving Mr Makwana the claimant successfully argued that he should be reinstated following a termination due to capability. We understand that to have been a decision of Mr Creba on appeal.

110. The claimant's account of the meeting with Mr Creba and Mr Chand on 26 May starts at the penultimate paragraph on page 8 of his witness statement. He states that he was advocating that rotas should be provided with more notice and as we referred to in paragraph 35.4 above an agreement seems to have been reached between him and Mr Chand in relation to that. The three witnesses present at this meeting all agreed that, when the three of them were in conversation, Mr Creba received and took a phone call and returned to inform the claimant that he could be on flexi-furlough. There is no specific complaint within these proceedings about that decision. The explanation given by Mr Creba is that he had taken a phone call which had been to talk to HR about something and during the course of it they explained to him about the flexi-furlough scheme which was being introduced. He saw it as a solution for what needed to be done in relation to the claimant when they were waiting for the Occupational Health report.

111. This seems to have been as an alternative to remaining on the rotating rota.

<u>Referral to Occupational Health</u>

112. In the meantime Dr Farrand had been instructed by the respondent. There is some contrasting evidence about the reasons for the instruction going to Dr Farrand because it appears that, in addition to a specific referral in

respect of the claimant, Dr Farrand was carrying out a paper review of long term sickness in respect of a large number of employees and also of their restrictions where those were impacted by vulnerabilities in a time of Covid.

113. It is not necessary for us to identify precisely how the claimant's case first came to the attention of Dr Farrand. We accept that Dr Farrand was an appropriately qualified Occupational Health professional for the respondent to consult. The claimant challenges this saying that they had not found reference to him online or online CV but we accept that he was instructed by the respondent to carry out a substantial body of work for them. Dr Farrand's first letter to Occupational Health concerning the claimant's case is dated 19 April 2021 (page 262). He detailed the documentation the HR Department had forwarded to him, namely the medical certificates, two welfare meetings and a description of the roles filled. This is clearly a paper review of someone who has had a long period of sickness absence albeit someone who is back at work at the time of the paper review.

114. The claimant criticises the respondent for making available a limited number documents when his personnel folder had originally been said to be unavailable. The explanation given was that Mr Harry had abstracted from the claimant's personnel file a section of the folder that concerned medical evidence and sickness absence over the preceding employment with National Express and had it in his office. There was a fire in the part of the building where the personnel records as a whole were kept and the paper copies of documents, such as the contract of employment which dated from prior to the TUPE transfer, were destroyed. It also appears that online records were destroyed in a malicious act at some other time.

115. We accept that the respondent has disclosed all documents that are available to it although it is apparent that they are incomplete. For example, the document at page 105 appears to be the second page of a letter from a consultant neurologist but the first page is apparently missing. In the light of the explanations given, we do not think any adverse inference can be drawn that the respondent has retained medical evidence that supports the claimant's case. The summary at page 78 was itself on file and all of the documents that are referred to in that spreadsheet are listed appear in the hearing file so there is nothing to indicate that a reasonable adjustment was agreed in writing and that document has been omitted. The claimant has not produced such a document.

116. The claimant consented to be examined by Dr Farrand and for his medical records to be disclosed (page 263 and 264). The letter that Dr Farrand then wrote to the claimant's GP (page 265) asked for a full history of the low back pain and the history of work related stress and medication prescribed for that problem and details of the frozen shoulder. The GP, sometime later, provided a letter (page 293) stating that the claimant wished him to address two aspects of the opinion that had by that time been given by Dr Farrand. For whatever reason, the GP's letter does not provide the answers to the questions that he had been asked by the Occupational Health Physician.

117. We find that the reasons why Dr Farrand was instructed are the extended sickness absence of the claimant up to 20 January 2020 and the assessment of the managers in the welfare meetings of November 2020 and return to work meeting of January 2021 that information about his back condition and its impact on his ability to carry out the full role of PCV Driver with the respondent was necessary to decide how to manage this issue.

118. The initial paper review is dated 19 April 2021 (page 262). Dr Farrand gave the opinion that six months' absence from work due to a mechanical back dysfunction was unusual and four to six weeks would be more normal for an uncomplicated back problem which caused him to consider that there was something more serious present. He inferred that the reason for the prescription of pregabalin was pain from inflamed nerves but notes no such condition being mentioned in the medical certificates. We note that this was not a matter that the claimant asked his GP to comment on; the claimant does not appear to have asked his GP to explain why pregabalin was prescribed in the light of Dr Farrand's suspicion that it was prescribed not for stress but for neuropathic pain. Dr Farrand points to comments by the claimant about how long he expects his shoulder and back problems to last which he thinks leads to an inference that there is a degenerative condition and is suggestive that, "His continuing safety and ability to drive PSVs is permanently impaired."

119. The interaction between Mr Creba, Mr Chand and the claimant on 26 May 2021 is clearly after the date on which Dr Farrand was instructed and therefore Dr Farrand cannot have been instructed because of anything that happened on 26 May, such as the claimant's communications about his concerns about the vehicles or about the impact on the drivers on the rotas, or indeed, his representation of Mr Makwana. The email to the claimant dated 29 May 2021 (page 269), by which Dr Farrand invites him to say when it could be convenient for them to meet, is a coincidence. The claimant was assessed by Dr Farrand on 3 June 2021 in a Facetime call (page 271).

120. That page is where we find the report in which Dr Farrand mades clear that he gave his opinion to the claimant on 5 June and the claimant commented on it. The comments and Dr Farrand's answers are incorporated into his report of 6 June. A summary of it is as follows:

    120.1 He considers the claimant to have a degenerative condition affecting his lumber spine and, in all probability, a similar condition affecting his neck.

    120.2 He considers stress to have probably been insufficient to have prevented the claimant from working between July and September 2020 and attributes the absence between those dates to spinal problems.

    120.3 The claimant apparently told him that he continues to experience back pain to date and has altered sensation in both his lower limbs.

He apparently told Dr Farrand about an MRI scan which had identified a pinched nerve.

120.4 He concludes from the six plus months absence in the recent past that the back problem has deteriorated over the last 12 months.

120.5 He concludes that Pregabalin was probably prescribed to manage neuropathic pain.

120.6 He concludes that the length of time since the lifting incident took place at National Express suggests that it was a chronic injury rather than something that should have settled within a reasonable time (this is the reference to the length of time it took for the back pain to resolve itself in 2013 to 2014).

121. He does not conclude that the claimant is unable to work at all. In the final paragraph on page 272 he states the following:

121.1 There is an obvious need for ongoing management.

121.2 "In relation to Mr Thakur's fitness to work as the bus driver I am of the opinion that this is unwise at this or any future time if my hypothesis is borne out by specialist assessment." (Our emphasis).

121.3 Hoppa or general duties are both likely to exacerbate the spinal conditions from which the claimant suffers and accelerate deterioration.

121.4 The claimant requires work that he can undertake in different postures with the ability to change position and move as often as he feels necessary.

121.5 Dr Farrand put restrictions on lifting to handling loads of 7kg or less.

121.6 "Driving company small vans or cars is a suitable activity because of the different suspensions/eating/vibrations characteristics that they possess. With these restrictions Mr Thakur might well be able to remain in full time employment until normal retirement age"

122. The claimant's challenges at the time included that he asserted that the Hoppa route was well suited to the recommendations that Dr Farrand made but Dr Farrand repeated (see page 273) that what he had said had been that the claimant is no longer fit to drive any form of bus service.

123. This report states that the risk is to the claimant; the risk to the respondent is that they would be potentially opened up to a personal injury claim if they let him continue to drive and his condition exacerbated.

124. The claimant was invited to a capability meeting and the letter of invitation dated 18 June 2021 is at page 278. In it he is warned of the possible outcome. He is told that he can be accompanied. He is given the Occupational Health assessment dated 6 June 2021 although as we have

seen he was sent the draft report for comment and the comments were incorporated in the final report. We are satisfied that all of the issues were aired at that meeting. Consideration was given to the recommendations by Dr Farrand for driving in alternative vehicles and the claimant was told that there are, at present, no non-PCV driving vacancies; there are no small company vans or vacancies for driving cars.

125. One of the criticisms by the claimant of the process followed by the respondent is that they did not first administer a warning upon him to improve his sickness absence before moving to dismissal. It is true that many capability processes explain that a person's sickness absence should be managed and suggest a system of escalating warnings. However, in the present case the respondent says that the reason for dismissal was that the claimant was, based on the medical advice that they accepted, unfit to carry out the only duties that they had available to him. Furthermore, that was not a situation which was going to change because, according to the available medical evidence, it was due to a degenerative condition. It can be within the range of reasonable responses for an employer to decide to dismiss an employee for capability if they reasonably conclude, after proper investigation, that they are unfit to carry out the only available duties and that is not going to improve. There are other requirements of a fair process such as consultation and consideration of alternatives but, contrary to what the claimant argues, it is not the case that every decision to move straight to dismissal is inevitably outside the range of reasonable responses. It would be a different situation had the respondent been dismissing because of frequent absences - particularly since the claimant was at work shortly before the capability process was convened - because then one might expect that action short of dismissal such as a warning should be considered in order to try to improve attendance. If we accept that the reason for dismissal was as the respondent says then it is not inevitably a breach of a fair process to move straight for dismissal.

126. The capability review took place on 23 June 2021. The report was read out together with the claimant's comments and they were discussed as we see from the minutes. Points made by the claimant include that he had been working since the middle of January and had not been absent through sickness. He argued that, if the reason for the absence had not been stress linked with doing the 555 route, then why was it that he had been able to drive for the four months since his return to work. He argued that he was being forced to do the 555 service route and that the Hoppa route suited him because he was able to get up and walk around regularly.

127. We do note that at page 283 of the minutes his union representative argued that the occupational health report was not thorough enough and that they would have expected a physical assessment. They also argued that it was important that the report had been from someone who had reviewed all of the documents from the claimant's treating physician because otherwise it was a report made only on "a smidgeon of the information".

128. Dr Farrand had apparently attempted to get information from the claimant's GP and there had been some problem in communication possibly due to a

misunderstanding on the part of the GP about the process for obtaining payment for a report. Nevertheless, it is a valid point that Dr Farrand has made recommendations and given an opinion in the absence of any detailed medical history.

129. At the bottom of page 284, it is recorded that Mr Thakur Snr asks for MRI scans to be done and referred to a comment on page 2 of the report by Dr Farrand that an assessment of both areas was necessary and an MRI scan would identify cause and effect. At the end of the meeting, Mr Newman said that he would adjourn overnight and give the claimant his decision in the morning. In fact we know it was given in writing by a letter dated 25 June that emailed on 30 June and was posted on 1 July.

130. As the claimant argues, it was a very significant decision to decide to dismiss someone after 17 years' employment. We agree that making further efforts to obtain the GP records or information about the history and an up to date MRI scan were obvious further investigations that were urged upon the decision maker by the claimant or his representative.

131. When we consider our findings on why Mr Newman decided to dismiss, on what the factual reason was, what the set of circumstances in his mind was that caused him to dismiss, we give weight to the outcome letter at page 286. We have heard no oral evidence from Mr Newman. The respondent's oral evidence came from Mr Creba who made a decision on the appeal. We do consider whether we should give any weight at all to the letter written by Mr Newman in his absence. Bearing in mind the way that questions were asked of Mr Creba and the fact that the claimant did not allege his reasons were not genuinely expressed, together with the supporting documentation available to Mr Newman, we think it is right to give qualified weight to that outcome letter as a statement of Mr Newman's reasons. In summary he said that,

    131.1 The claimant had been unable to give regular and reliable service and there was nothing to suggest that that situation would improve.

    131.2 Whether he drove a Hotel Hoppa or another service, continuing to drive PCV vehicles was likely to exacerbate the spinal conditions and accelerate deterioration of them.

    131.3 It was unwise for the claimant to continue to work as a bus driver as it was likely to accelerate deterioration of those conditions.

    131.4 Mr Newman was therefore terminating the claimant's employment on grounds of being medically unfit.

    131.5 He decided there were no reasonable adjustments which could be made because of the medical opinion that the claimant was not fit to drive any form of PCV bus.

132. We take great care when trying to look in the mind of a decision maker from whom we have not heard. There is a reference in the outcome letter to

sickness absence in his reasoning and we cannot ignore that. However, taking the outcome letter as a whole, we conclude that it must have been at least part of the reasons for the decision that the claimant could not give reliable service in the PCV role without carrying out tasks which risked exacerbating his condition and that he had been unable to drive for long periods of time and when allocated longer routes he would go off sick. This is not least because that factual matter was part of the reason that Dr Farrand concluded that the condition was as serious as he thought it.

133. We do not know who initiated the instructions to Dr Farrand. Mr Newman signed the letter of dismissal and it stands as his reasons for his decision. There is no reference in it to vehicle or passenger safety, as was pointed out by Mr Thakur Jnr,. That issue is not mentioned in Dr Farrand's report or in the minutes of any of the welfare meetings so there is no documentary evidence that whoever started the capability process (whether that is the operations manager, Mr Newman himself or HR) was motivated by vehicle or passenger safety when commencing the process. It is clear that the claimant had been absent for a long period and that needed addressing, as did whether he was fit to drive the roles available hence the operation manager's decision to refer him for Occupational Health report. We also can understand that the respondent appears to have thought that they needed to comply with a duty of care towards the individual employee.

134. When we consider whether Mr Newman took account of passenger safety and vehicle safety when deciding whether to dismiss we need to take account of the fact that there is no reference in his outcome letter to that at all. There is no suggestion in Dr Farrand's report that was the basis of Mr Newman's decision that the claimant was a risk to passengers, but only to himself.

135. We are quite satisfied that Mr Newman should have made further enquiries, that he could have made those enquiries, and that no reasonable employer would have failed to make enquiries of that kind before deciding that there were no duties that this claimant could carry out when the claimant had given continuous service of 17 years. There was no urgency to make the decision at the time it was made. The respondent had decided to refer the claimant to Occupational Health in November 2020 but the referral did not take place until the earliest April 2021. This does not demonstrate any urgency that these important decisions should be taken sooner rather than later. Dr Farrand's own opinion evidence is qualified by his phrase "If my hypothesis is correct" and we are of the view that no reasonable employer would have relied on an opinion that the author of the opinion considered should be qualified in that way. The claimant suggested in the capability review that MRI scans were necessary and we think that any reasonable employer acting reasonably would have checked whether this hypothesis was correct. Dr Farrand did assess the amount of the claimant's absence incorrectly; it was not as high as 50% over the relevant period although it was significant. At the time the decision was made we do not think that the decision to dismiss was necessary and certainly not that it was reasonably necessary given the further investigation that was needed.

136. The claimant appealed the decision on 7 July 2021 and the grounds of appeal are at page 290. There are 10 grounds of appeal including the following: he challenges the diagnosis that he was suffering from a degenerative condition; he alleges that the stated level of sickness absence was incorrect; he points out that he had been in regular attendance over the previous six months; he argues that the sickness while working the Hotel Hoppa service was related to the condition of the fleet; and that Dr Farrand's report was not to be relied on including because of inability to take into account details from the GP. He also argued that his period of sickness absence was driven primarily by being forced to do a job that did not suit his medical conditions despite the previously agreed accommodations.

137. By the time of the appeal, the GP had provided the letter that is at page 293. He stated that the claimant wishes him to address two aspects of the opinion of Dr Farrand: first, that the condition of stress was of insufficient severity to prevent him from working between July and September 2020 whereas the spinal problems did; and secondly, that if his hypothesis is borne out by specialist assessment driving both Hoppas or general route service are likely to exacerbate the spinal conditions and accelerate deterioration. The opinion answer given by the GP produces the reports of consultations between June and September 2020 to which we have already referred. It recounted what Mr Thakur Snr had told the GP about the stress he felt by reason of the imposition of alternative duties. This paragraph does not, in fact, provide the GP's own opinion as to whether it was the stress or the back pain which meant that Mr Thakur Snr was unfit to work and at the time he had certified that both contributed to unfitness. The GP dealt with the second point pointing out that it is based on "only a hypothesis and needs a consultant spinal surgeon opinion". He continued that, as he understands it, the evidence was that the claimant was coping well on the Hoppa service and that it was the imposition of the change to his duties and route that aggravated the known back pain. He recommended a second opinion from a consultant and pointed out that he is not an expert in occupational medicine.

138. The appeal hearing took place on 23 July 2021 and the claimant was again represented by his union. Mr Creba talked through all of the points raised in the appeal and asked the claimant to explain the entire history of his back condition, referring to the documentation - now available in the hearing file - which pre-dated the claimant's employment by this respondent and which appears not to have been available to Mr Newman. It does appear that those older records were only presented to the claimant during the meeting but they were apparently sent to him after it and no point was taken on this during the hearing. Indeed, the minutes relate that the claimant and his representative were given half an hour during the course of the meeting to consider them. Mr Creba explored with the claimant the factual matter of whether all of the sickness absence had been when he was asked to drive the service route. Therefore the passage in his witness statement (paragraph 55.a.) where he sets out his conclusions on the point of appeal that related to this he does so having carefully explored with the claimant the evidence that he was relying on.

139. Dr Farrand was asked to comment on the GP's report and his response to that dated 7 August 2021 is at page 337. He held to his view that the back condition was probably the predominant cause of sickness absence during the latter half of 2020. He also stated that the GP's conclusion that the evidence was that the claimant was coping well on the Hoppa service was contradicted by the claimant's analysis of his sickness absence which included sickness absence prior to being removed from the Hoppa Service. This is factually true in particular of the 19 day absence in January 2020. It was during a period covered by the recommendation for altered duties (page 132) but page 134 shows that he was not fit for work during that period because of back pain. By the time of the 7 August report by Dr Farrand he had also been sent the pre 2014 documents as can be seen from the penultimate paragraph where he refers to the diagnosis in the MRI scan from 2014. Dr Farrand considers that that is objective evidence that supports his hypothesis.

140. Further MRI scans were carried out on 2 September 2021 and an analysis of the scans is at page 355. It refers to "Cervical degenerative change most pronounced at C5 to 6 and C7 to T1 with bilateral C6 and C8 neural foraminal stenosis and impingement of these nerve routes." It is clear that this was forwarded to Dr Farrand for his further comment because the appeal outcome letter of 17 September at page 358 refers to the report from the MRI scan and a report from Dr Farrand dated 14 September 2021. Regrettably this had not been included as a separate document in the hearing file but the claimant accepted that, as the outcome letter says, it was forwarded to him at that time. It was located during the hearing before us but given the circumstances in which it had arisen at the last moment, it was not inserted into the bundle but neither party took the point that there had been any inaccuracy in the way that it was referred to in Mr Creba's outcome letter.

141. At the bottom of page 360, Mr Creba quoted two paragraphs from that 14 September 2021 report and it appears that Dr Farrand considered that the recent September 2021 MRI scan confirmed the diagnosis of degenerative lumbar disc disease and gave the opinion that the nerve impingement was consistent with the pain that Mr Thakur experienced in his right leg. It also appears at the bottom of page 363 that Dr Farrand's report sets out the opinion that the MRI scan confirmed his hypothesis that the shoulder pain was connected to the cervical disc disease. He stated:

> "It is not beyond the bounds of possibility that the changes in Mr Thakur's cervical spine could result in a sudden onset of severe neck pain that could interfere with his ability to control a vehicle that he was then driving and result in serious consequences for himself, any passengers he was carrying and other road users. On that basis and on the potential for bus driving duties having the potential to aggravate his condition and accelerate its deterioration, I remain of the firm opinion that this individual is no longer fit to undertake Group II driving duties for this or any other employer. Unfortunately the condition from which he suffers is not amenable to surgical intervention and its natural history is for continuing deterioration."

He recommends termination of employment on grounds of medical incapacity for Group II driving.

142. Although the claimant is understandably critical of the length of time it took for the appeal outcome to be produced, in fact when one considers the amount of investigation that was carried out during that period, it fully explains why it was not until 17 September that the outcome was produced. We consider that the outcome fully, carefully and thoroughly considers the points raised by the claimant and each of them were rejected by Mr Creba for sound evidence based reasons.

143. Mr Creba had the following further information available that was not available to Mr Newman.

    143.1 The GP's letter at page 293: we consider that what the GP does not provide compared with what he had originally been asked for is almost as relevant as what he does because the medical reports show a very limited snapshot of the history of a condition that went back to 2006.

    143.2 The point about the GP saying that he was not an Occupational Health Physician is that it seems to us that Mr Creba rightly gave weight to the expertise of someone who has analysed the impact of the claimant's condition in the workplace.

    143.3 A considerable amount of the claimant's argument focusses on whether he was working well on the Hoppa service and the evidence before Mr Creba did not support the claimant's points on that issue.

144. The report from Dr Farrand at page 337, after having receive the GP's letter and the 2014 MRI scan, was done at a time when Dr Farrand had objective evidence to support his hypothesis. He was also aware - as he had not previously been - that the claimant had been administered a spinal analgesic in 2020.

145. There was also the more recent MRI scan and Dr Farrand's comments on those. The claimant criticised the use of Dr Farrand to look again when more evidence was produced. We accept that Dr Farrand's manner of expression is direct and uncompromising but that is insufficient reason to infer that he was incompetent or not expert in analysing the results of the scan.

146. Mr Creba also had the medical evidence from the National Express file.

147. The claimant denied before Mr Creba that he had a degenerative condition. At the hearing before us we have seen a subsequent report by Dr C Ulbricht (page 370). The claimant accepted that he sought the opinion from that consultant spinal surgeon after he had received the appeal outcome and had not during that appeal urged Mr Creba to take an opinion from such an expert. We do not think that Mr Creba can be criticised therefore for not

taking an opinion from a consultant neurological and spinal surgeon. Mr Ulbricht's opinion is that:

> "Neither clinically nor radiologically there are any problems with his spine and in particular the lumbar spine that would prevent his driving any vehicle including coaches, Buses and HGVs and I would regard the degenerative changes seen as fairly average and age related.

148. He appears to have had both MRI scans available. Given that this report was not before Mr Creba and there was no reason why he should have waited for it, it has not been the subject of close analysis in the hearing before us so we merely note that we do not think that the opinions in it can be taken entirely at face value because it is unclear what information was available to the consultant and he does not analyse the impact on the claimant's condition of driving large Group II vehicles. The claimant sought this second opinion because he was worried that he was no longer able to do his job.

149. Mr Creba reasonably rejected the claimant's argument that he had been working well on the Hoppa service. Although there appears to have been no back-related sickness absence between 2014 and 2019, the Occupational health referral in 2019 had suggested that the situation could be solved by provision of a cushion which the claimant did not use. There was then an absence in January 2020 when the claimant was driving a Hoppa. Mr Creba said, and we accept, that he thought that the claimant was using the additional lumbar support that had been provided to him. The claimant had then had a long period of absence from June 2020 onwards and this was objectively evidence from which it was reasonable to conclude that the condition had worsened. Furthermore, the respondent's expectation of what the driver should do during the Hotel Hoppa involved the occasional lifting which the claimant could not do and that meant that they were potentially not providing a full service to the passengers including the service of ensuring that luggage was stacked safety. These reasons were valid ones to conclude by early 2021 that the claimant's service as a Hoppa Driver was not one that was working well for the claimant or the company.

150. The 2021 MRI scan and Dr Farrand's comments on it removed any doubt about whether the Occupational Health Physician had made an unjustified hypothesis; his hypothesis was confirmed by the further investigation as Mr Creba reasonably concluded in his analysis of point 2 of the appeal (page 360). In Mr Creba's analysis at point 5 he rejects the claimant's reliance upon his GP letter on a reasonable basis (see page 362).

151. We have already referred to the opinion of Dr Farrand about the possibility of the sudden onset of severe neck pain. This suggests to us that when Mr Creba explained that he had passenger safety in mind this was a reasonable concern to have based on the evidence in front of him. Indeed he refers to passenger safety in relation to correctly stowed luggage at the top of page 364. He also in his oral evidence vividly described to us the concerns that he held about the possibility of a very serious incident if that

were to come to pass and his own personal responsibility for it. It is true that, for the most part, the analysis in the appeal outcome letter concerns the claimant's own safety and wellbeing. That would have been a perfectly reasonable indeed laudable consideration for Mr Creba. Nevertheless, there is some evidence in the appeal outcome letter that passenger safety was a consideration, it may not have been the only consideration, but we accept that it was something that Mr Creba genuinely had in mind. His role as Managing Director meant that while employee safety was important he had personal responsibility for passenger safety.

152. Overall we consider this to be a very good letter that carefully analysed all of the issues. We accept that Mr Creba balanced the impact on the claimant of the loss of his long employment against the evidence that he was unfit to drive Group II vehicles. It is clear that the finding that the claimant lacks the ability to give regular and reliable service to the company was part of his reasoning but he had medical evidence that it was right for him to give weight to that the adjustment sought by the claimant of driving the Hotel Hoppa service would not have been a reasonable one and there were no alternative duties available. We can see from page 368 that Mr Creba considered in detail what the role involved in terms of lifting luggage but also of deploying the wheelchair ramp to assist passengers who were wheelchair users. The claimant did not agree with Dr Farrand's conclusion about the limitations on bending and lifting and these also were matters that were required of a driver either of those two services.

153. Our view of the appropriateness of Mr Creba's actions given the investigations that were carried out at the appeal stage provide weighty evidence about what would have happened had Mr Newman made the same investigations.

Law applicable to the issues

Detriment and Automatic dismissal for raising health & safety concerns and/or trade union activities

154. Key provisions of TULR(C)A are:

146.— Detriment on grounds related to union membership or activities.

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

(a) …,

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, [...]

(2) In subsection (1) "an appropriate time" means —

(a) a time outside the worker's working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;

and for this purpose "working hours" , in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work."

148.— Consideration of complaint.

(1) On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act .

…

152.— Dismissal of employee on grounds related to union membership or activities.

(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

(a) [...]

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, ..."

155. So far as is relevant, s.44 ERA provides as follows:

44.— Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) …

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

[…]

(4) This section does not apply where the worker is an employee and the detriment in question amounts to dismissal within the meaning of Part X.

156. So far as relevant, s.100 ERA provides as follows:

100.— Health and safety cases.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

> (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
>
> (b) being a representative of workers on matters of health and safety at work or member of a safety committee—[…]the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,
>
> (ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),
>
> (c) being an employee at a place where—
>
> > (i) there was no such representative or safety committee, or
> >
> > (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
>
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
>
> (d) …."

157. The claimant relies on s.100(1)(c), which applies if the employee works at a place where there is no official safety representative or there is one and it is not reasonably practicable to raise the relevant health and safety issue through them.

158. Causation for complaints of alleged health & safety detriment/dismissal or trade union activities detriment/dismissal involves consideration of the same principles to those applying in protected disclosure detriment/dismissal complaints.

159. Deciding on the reason for dismissal involves a subjective inquiry into the mental processes of the person or persons who took the decision to

dismiss. The classic formulation is that of Cairns LJ in Abernethy v Mott Hay and Anderson [1974] ICR 323 at p. 330 B-C:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee."

160. The reason for the dismissal is thus not necessarily the same as something which starts in motion a chain of events which leads to dismissal.

161. The legal burden of proving the principle reason for the dismissal in automatic unfair dismissal complaints where the employee has more than 2 years' continuous service is on the employer, although the claimant may bear an evidential burden: See Kuzel v Roche Products Ltd [2008] IRLR 534 CA at paragraphs 56 to 59

"… There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. …

57

I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

58

Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59

The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET *must* find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."

Capability dismissals

162. The starting point in an unfair dismissal claim is s.98 of the Employment Rights Act and in particular s.98(4). In the case of capability dismissals it is

relevant to consider the decision of East Lindsey District Council v Daubney [1977] ICR 566 EAT. Mr Justice Phillips, as he then was, amongst other things, said the following:

"Unless there are wholly exceptional circumstances before an employee is dismissed on the ground of ill health, it is necessary that he should be consulted and the matter discussed with him and that in one way or other steps should be taken by the employer to discover the true medical position."

163. The following are therefore relevant matters for us to consider when looking at the respondent's decision to dismiss and whether it was reasonable in all the circumstances.

    163.1 Did the respondent take sensible steps to consult the claimant and to discuss with him his condition and his continued employment?

    163.2 Did the respondent inform themselves of the true medical position?

    163.3 Did the respondent keep abreast of changes in the claimant's diagnosis and prognosis and seek up to date medical information if none was available?

    163.4 Did the respondent consider what could be done to get the claimant back to work?

    163.5 Did the respondent consider alternative employment and whether that was available?

164. In general, there is a balance to be struck between the employee's need for time to recover from his illness and the employer's need for work to be carried out.

Discrimination arising from disability

165. Section 15 EqA provides as follows:

"15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

166. Discrimination arising from disability is where the reason for the unfavourable treatment is something arising in consequence of disability. The example given in the EHRC Code of Practice on Employment (2011) (hereafter the EHRC Employment Code), is dismissal for disability related sickness. Another might be a requirement that an employee take annual leave to attend medical appointments for a disabling condition; they need regular absences for medical treatment in consequence of their disability and they are required to take annual leave to do that. It should not be forgotten that the treatment must be unfavourable nor that the defence of justification is available in claims of s.15 discrimination.

> "In considering whether the example of the disabled worker dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it."
>
> *EHRC Employment Code paragraph 5.6.*

167. The importance of breaking down the different elements of this cause of action was emphasised by Mrs Justice Simler, as she then was, in Pnaiser v NHS England [2016] I.R.L.R. 160 EAT at paragraph 31,

> "the proper approach can be summarised as follows:
>
> (a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant […].
>
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the

consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g)[…].

(h) Moreover, the statutory language of s.15(2) makes clear […] that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. […]

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

168. The Court of Appeal considered s.15 EQA in City of York Council v Grosset [2018] ICR 1492 CA and held as follows:

    168.1 On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability?

    168.2 The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something".

    168.3 The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something".

    168.4 Section 15(1)(a) does not require that A must be shown to have been aware when choosing to subject B to the unfavourable

treatment in question that the relevant "something" arose in consequence of B's disability.

168.5 The test of justification is an objective one, according to which the employment tribunal must make its own assessment: see Hardy & Hansons plc v Lax *[2005] ICR 1565* , paras 31–32, and Chief Constable of West Yorkshire Police v Homer *[2012] ICR 704* , paras 20, 24–26 per Baroness Hale of Richmond JSC, with whom the other members of the court agreed. What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. This is for the respondent to prove.

169. The other potential defence is lack of knowledge of disability. That is not relied on in the present case.

Breach of the duty to make reasonable adjustments

170. The obligation upon an employer to make reasonable adjustments in relation to disabled employees so far as it is relevant to this claim is found in ss. 20, 21, 39 and 136 and Schedule 8 EqA 2010.

170.1 By s.39(5) the duty to make reasonable adjustments is applied to employers;

170.2 By s.20(3) and Sch.8 paras.2 & 5 that duty includes the requirement where a PCP applied by or on behalf of the employer puts a disabled person, such as the claimant, at a substantial disadvantage in relation to his employment in comparison to persons who are not disabled to take such steps as are reasonable to have to take to avoid the disadvantage.

170.3 When considering whether the duty to make reasonable adjustments has arisen, the Tribunal must separately identify the following: the PCP (or, if applicable the physical feature of the premises or auxiliary aid); the identity of non-disabled comparators and the nature and extent of the substantial disadvantage: Environment Agency v Rowan [2008] ICR 218 EAT.

170.4 By s.21 a failure to comply with the above requirement is a failure to comply with a duty to make reasonable adjustments. The employer discriminates against their disabled employee if they fail to comply with the duty to make reasonable adjustments.

170.5 By s.136 if there are facts from which the tribunal could decide, in absence of any other explanation, that the employer contravened the Act then the tribunal must hold that the contravention occurred unless the employer shows that it did not do so. The equivalent provision of the Disability Discrimination Act 1995 (DDA 1995), which was repealed with effect from 1 October 2010 upon the coming into force of the EqA 2010, was interpreted in Project

Management Institute v Latif [2007] IRLR 579 EAT in relation to an allegation of a breach of the duty to make reasonable adjustments to mean that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. This requires evidence of some apparently reasonable adjustment which could be made.

170.6 Sch 8 para. 20 provides that the employer is not subject to a duty to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage in question.

171. It is clear from paragraph 4.5 of the Equality and Human Rights Commission (EHRC) Code of Practice Employment (2011) that the term PCP should interpreted widely so as to include "any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions."

Conclusions on the issues

Automatic unfair dismissal

172. The claimant had taken part in the activities of an independent trade union as set out in paragraph 30 - 34 above.

173. The claimant was dismissed but we are persuaded by the respondent that the reason for dismissal was in no part the trade union activities that the claimant had taken part in or a desire to inhibit the claimant's participation in them. The reason was entirely the conclusion of Mr Newman and Mr Creba that the claimant was not fit to carry out his duties as a PCV driver. As we explain in para.35 above, there is evidence from which we infer there was a generally positive approach towards the trade union and its activities on the part of the respondent. We also remind ourselves of our conclusions on Mr Newman's reasons (paras.131 to 132) and Mr Creba's reasons (para.149 to 151).

174. Within these proceedings it has been accepted that at the relevant time if there was a health and safety representative at the depot where the claimant was working it was not reasonably practicable for him to raise the health and safety concerns to them. The evidence about who that was and whether there was one either reemployed directly by the company or connected with the union has been vague and during the period of the Covid pandemic the parties are understandably uncertain about who was present at any particular time.

175. The next question that we have to consider is whether the claimant brought to his employer's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. We refer to our findings in paragraphs 36 to 47 above. For the most part the concerns raised by the claimant (and to some

extent supported by one of his supporting witnesses) do not seem to us to be sufficiently serious to be able to say that they could be described as harmful or potentially harmful to health and safety. This is particularly true of the comment raised by the claimant during the welfare meeting in January 2021.

176. To the extent that earlier expressions of concern by the claimant about the condition of the Buses and the impact of that upon drivers health and safety could be described as circumstances he reasonably believed were harmful or potentially harmful to health and safety, they were made many months before the decision to convene a capability review. We have found that the concerns about the impact of late changes of rotas on the driver's health and safety were communicating information that only very tenuously is connected with health and safety and cannot be said to fall within s.100(1)(c) ERA.

177. Setting all that aside, as we have explained in relation to the allegation that the principal reason was trade union activities, the respondent has shown that the sole reason for the decision to dismiss was that the claimant was medically unfit to drive the vehicles that they had available to be driven by a PCV driver.

Unfair dismissal

178. Turning to the so called "ordinary" unfair dismissal claim. The respondent has shown that the reason for dismissal was capability in the sense that the claimant was medically not capable to carry out the role of PCV driver.

179. List of issues 2(g) set out the various considerations that the law says should be borne in mind when deciding whether the dismissal was fair or unfair in all of the circumstances.

180. We find that both Mr Newman and Mr Creba genuinely believed that the claimant was no longer capable of performing his duties. Both at the first stage and at the appeal stage there was adequate consultation with the claimant at a time when it was still possible for him to influence the decision. Mr Newman conducted a capability review meeting on 23 June 2021 at which all of the issues that were in his mind were aired with the claimant and the claimant had also been consulted upon the Occupational Health report at a draft stage so that he could made comments upon it. The appeal meeting on 23 July 2021 was particularly thorough in considering all of the points raised by the claimant in his written grounds.

181. We turn to the question about whether the respondent carried out a reasonable investigation including finding out about the up to date medical position. For reasons that we explain at paragraph 135 above, no reasonable employer would have made their decision to terminate such a long-standing employee's employment without making further efforts for the GP's medical information to be available, for Dr Farrand to have the opportunity to comment on it and for Dr Farrand's hypothesis to be tested by means of an MRI scan. The impact on the claimant of the prospect of losing

his career as a coach and bus driver that he had enjoyed for 17 years was significant. At the point of Mr Newman's decision, there was no sufficient urgency about the situation that he could not have waited until those investigations were carried out.

182. However, in an unfair dismissal claim we are considering the whole of the dismissal process and whether, taken as a whole, including the investigations done between dismissal and appeal the process was fair in all the circumstances. We have set out at paragraph 137 – 143 above the further information that Mr Creba had following investigations carried out at the appeal stage. Had we been considering the decision of Mr Newman on its own, then we would have found that the respondent did not carry out a reasonable investigation and that no reasonable employer would have taken a decision at that point based on the evidence they had given that there was no urgency. However, taking the procedure as a whole including the appeal we find that the decision to dismissal this employee for capability was fair in all the circumstances; taken as a whole, including the appeal, the decision was within the range of reasonable responses.

Unlawful detriment under ERA or TULR(C)A

183. We accept that the claimant has shown that he was removed from driving the Hotel Hoppa services exclusively – the date on which he was to move onto the rotating rota may have been 15 June 2020 although he may have been told sooner than that that it was to happen and undergone training on the service route. The precise date is immaterial. It does appear that the introduction of these new rotas was announced to all of the drivers without consultation by issuing a notice on 6 April 2020 (page 184 see para 85 above). The claimant, and all the other Hoppa drivers were told that they were being brought back from furlough onto a rotating rota which would include some days driving the Hoppa route and some days driving other, potentially longer, routes.

184. The claimant returned to work from a period of sickness absence in January 2020 and was told at that time that the rota meant that he would be rotated off the Hoppa services to the 555 service route at about the end of February 2021. Therefore he has shown that he was removed from driving a Hoppa service although that happened by operation of the rotation of the rota.

185. In terms of the complaint about being allocated to do a longer route on 28 May 2021, strictly speaking this allegation has not been made out in full. It appears that what happened was that the claimant was told that he would be rotated into SB or Spare Body and could then be asked to drive the 555 service route. He was scheduled to drive that route imminently, possibly the next day, but was put on flexi-furlough instead as a solution because of his complaint that he would become unfit due to back pain if required to drive a service that he considered did not meet his medical needs. Mr Creba therefore put the claimant on flexi-furlough in order that he should not drive routes that the claimant considered to be unsuitable pending receipt of the Occupation Health report. The allegations of alleged detriment are therefore not made out in full. However, it is absolutely clear that the reason

why the claimant was removed from the Hotel Hoppa route or rotated from that route to the service route is that all drivers had been put on a rotating rota and the claimant was not targeted in any way. Therefore the allegation that the grounds for these actions by the respondent were the trade union activities of the claimant or any expression of health and safety concerns is rejected and these claims fail.

Discrimination arising from disability

186. The claimant's disability is the physical impairment of chronic back pain and sciatica which he has had since 2006 and knowledge of that condition is not disputed.

187. It is common ground that the respondent subjected the claimant to a capability procedure during the course of which he dismissed the claimant and ultimately the claimant's appeal against dismissal was rejected. The capability procedure itself in the present case did not involve anything other than the calling of the capability review meeting at which the claimant was dismissed. The operations manager and Mr Hammond had both considered that the length of absence of the claimant between June 2020 and January 2021 meant that an Occupational Health report should be ordered particularly given the claimant's self-declaration about which duties was suited to his back condition. However, referring him for Occupational Health in those circumstances was a supportive measure and does not amount to a detriment. There is therefore little involved in the capability procedure beyond the invitation to the capability review meeting itself.

188. The claimant argues that in consequence of his chronic back pain and sciatica he was unable to drive for long periods of time so that when allocated longer routes he would have to go off sick. His GP's fit notes said that there was a maximum shift length of eight hours as a condition of him being fit to work and he needed to take regular breaks. However, the medical evidence available at the dismissal stage, in the various reports of Dr Farrand, stated that the claimant was unfit to drive Group II vehicles because all vehicles in that category were likely to lead to a deterioration of his condition.

189. The claimant has shown through supporting medical evidence that in consequence of his disability, he was unable to drive for long periods of time; in fact the medical evidence goes beyond the alleged "something" that he would have to go off sick when allocated longer routes. The medical evidence suggests that he was liable to go off sick even without being allocated longer routes because it was advised that he should have regular breaks and a maximum shift length rather than a limit on the length of the route.

190. We asked then whether the claimant was put through the capability procedure including dismissal and rejection of his appeal because of his inability to drive for long periods of time.

191. The respondent argues that the true reason for the respondent's actions was that the claimant was medically unfit to drive the vehicles that the respondent had available to be driven by a PCV driver and unfit in such a way that no adjustment could be made that would enable him to drive those vehicles; furthermore, that the medical condition was not susceptible to treatment or one from which he was likely to recover. The respondent, through Mr Beaton, argues that if that is the true reason for the decision to dismiss then the tribunal does not need to consider the s.15 claim any further because it is not the reason relied on by the claimant.

192. In a s.15 EQA claim the reason relied on by the claimant does not have to be the whole or even the principal reason for the respondent's actions. The reason relied on by the claimant merely has to contribute something of substance to the reasoning of the respondent. Put that way we reject the ingenious argument of Mr Beaton that the so-called true reason excludes the possibility of the reason relied on by the claimant because the latter seems to us to fall within the reason as articulated by the respondent. If one returns to the evidence, the outcome letters - both at dismissal and appeal stage - refer to the history of the claimant becoming unfit and it seems to us to be semantics to argue that an inability to drive for long periods of time is not part and parcel of an inability "to give regular and reliable service" (see page 286). Mr Newman on page 287 refers to the medical opinion that continuing to drive a bus is likely to accelerate deterioration of the claimant's spinal conditions. We accept that Dr Farrand took a far more pessimistic view of the degree of risk the claimant faced than did the claimant himself but again it seems semantics to say that that is qualitatively different to a statement that when allocated longer routes the claimant would have to go off sick. The claimant has shown that the unfavourable treatment was because of the thing arising in consequence of his disability.

193. Knowledge of disability is accepted and we therefore move on to consider whether the respondent has shown that the treatment was a proportionate means of achieving a legitimate aim. This was clarified during the course of the hearing because there was no detailed list of issues in the case management orders. The respondent explained that its aims were "ensuring vehicle and passenger safety by only allowing drivers who were physically fit to drive PSVs to do so".

194. We need to carry out a critical evaluation of whether the employer's reason demonstrate a real need to take the action in question and carry out an objective balancing exercise between he needs of the employer and the effect on the claimant. It is possible for an employer to seek to justify action with reference to an aim that they did not have in mind at the time. There is no evidence that vehicle safety was a contemporaneous consideration of either Mr Newman or Mr Creba or indeed of whoever decided to convene the capability proceedings. There is ample evidence that driver safety and the aim that drivers should be fit to drive were considerations for all concerned. There is no reference - as Mr Thakur Jnr pointed out when the aim was clarified in this way - to passenger safety in the dismissal outcome letter, although there is reference to passenger safety in connection with the

need for luggage to be properly stowed in Mr Creba's appeal outcome letter (see paragraph 150 above).

195. However we were impressed by the evidence of Mr Creba that passenger safety concerns can have a wide ranging and extremely detrimental affect on the company's fortunes and reputation as well as potentially involving management liability. We heard evidence about an incident involving a collision by a bus driven by one of the other trade union representatives, and the extent of the damage there illustrates the potential for significant injury in such cases.

196. Overall we accept that the aims of a capability review process (including dismissal and the appeal stage) were to provide a way in which drivers who are not physically fit to drive PSVs can be assessed, redeployed if possible and dismissed if not, because there is always the potential for passenger safety to be impacted if the driver is unfit to drive. We accept that it was a legitimate aim of all stages and the respondent has shown that in the hearing, despite passenger safety not being expressly articulated until the appeal stage.

197. We are satisfied that the capability process itself was a proportionate step to take. The claimant was returning to work after a lengthy period of sickness absence where the reason for absence included back pain and he was clearly anxious about the prospects of being asked to drive routes that he considered exacerbated his back. Quite properly, Mr Harry and Mr Hammond decided to make an Occupational Health referral to investigate that as a supportive measure. When a report such as Dr Farrand's dated 6 June 2021 was received stating categorically that the spinal conditions from which the claimant suffers were likely to be exacerbated by driving either of the two types of duties that the claimant had been allocated to and there was no activity available in the category that the occupational physician said was suitable then convening a capability review was a proportionate act.

198. Mr Newman decided to dismiss the claimant. Even accepting, as we do, that an aim of dismissal in those circumstances is vehicle and passenger safety it is absolutely clear that doing so at that time with the information available to Mr Newman was not reasonably necessary. He did not have sufficient information to conclude that the claimant was medically unfit for all available duties when Dr Farrand himself referred to it himself as a hypothesis that needed further investigation and when the claimant urged him to carry out that investigation and to obtain further information from the GP. There was no urgency for action and the impact on the claimant was extremely serious. The respondent has not shown that the decision by Mr Newman to dismiss by the letter dated 25 June 2021 was a proportionate means of achieving their aim whether that was driver safety or whether it also included passenger safety or might reasonably be taken to have done so.

199. We have made findings that passenger safety was part of Mr Creba's reasoning and we accept that it was an important thing that he sought to guard against. We set out in paragraph 137 - 143 above the further

investigations Mr Creba carried out. He reasonably relied upon Dr Farrand's expertise as an Occupational Physician with knowledge of the impact of vibration on musculoskeletal injuries and it was reasonable for him to consider that that medical evidence about the impact on the claimant of those working conditions was sufficiently robust that he did not need a consultant spinal surgeon's opinion. The concern that there was a prospect of sudden onset of pain was a consideration that had sufficiently serious consequences that it could not be ignored and, as he explained in his outcome letter, passenger safety could be impacted in another way by the claimant's inability to lift luggage when stowing it. The claimant stated that in reality he rarely had to lift luggage on the Hotel Hoppa service, but the respondent has to take a conservative view of safety needs for the benefit of the passengers and of their drivers. Given all of those further investigations and the great care that Mr Creba took when considering his decision we are satisfied by the respondent that his rejection of the appeal was a proportionate means of achieving a legitimate aim.

200. In doing so we remember that it is for us to step back and consider objectively how the needs of the claimant and the respondent should be balanced. The claimant was losing his employment and that as we have already said is a very serious matter for him. The respondent had a driver who was certified unfit to drive the only vehicles they had available. They were rightly concerned about the impact on passengers. They were also concerned about the impact on the claimant's health as they had a duty of care towards him. The claimant had not been consistently driving the Hotel Hoppa services without incident or without impact upon his health. The constraints of the pandemic meant that there were very many fewer Hoppa services in operation and others with specific restrictions to consider so that was why the rotating rota for most drivers was introduced. We accept that, as a matter of fact, the Hoppa route was not as suitable for the claimant's back condition as he claims because it would and should have involved some lifting. The January 2020 absence indicates that there was objective reason to think that the claimant's condition was deteriorating. There were no services available at that time that were within the category of vehicles that the medical evidence approved the claimant to drive. In all of those circumstances the decision to reject the appeal was a proportionate one.

Reasonable adjustments

201. We find that the respondent did have the PCP of a requirement that drivers drive both longer and shorter routes because they were operating a rotating 93 line rota from April 2020 to which all drivers were allocated.

202. We then ask whether the requirement to put the claimant at a substantial disadvantage in that he was unable to drive for long periods of time so that when allocated longer routes he would have to go off sick. As that PCP was applied to the claimant it did not have that substantial disadvantage because the respondent intended that, as an adjustment, the claimant would only drive the Hotel Hoppa and the 555 service route. The 555, although longer than the Hotel Hoppa, had opportunities for breaks as recommended by the claimant's GP. Conversely, there were other duties

on the Hotel Hoppa which would have had adverse effects on the claimant's condition. As applied to the claimant therefore we do not accept that when allocated the 555 he would have to go off sick because he would have the opportunities to get down from the cab to stretch his spine from time to time as he did on the Hotel Hoppa.

203. Alternatively, if we are wrong and the claimant was put to the substantial disadvantage alleged, the respondent made some adjustments namely those to fit the medical evidence that they had which was that he should drive for no more than an 8-hour shift and have regular opportunities for breaks. The service route 555 met those requirements as did the Hotel Hoppa. The adjustment contended for by the claimant is that the respondent should put the claimant exclusively on the Hotel Hoppa and we do not think it was reasonable for the respondent to have to take that step. The Hotel Hoppa had duties which did not meet the restrictions on lifting, albeit not very often. At the time in question there were only five Hoppa Buses in operation and other drivers whose restriction and flexibility arrangement shad to be accommodated. This was something that had to be balanced into the consideration when deciding if restricting the claimant to one of those was a step that it was reasonable for the respondent to have to take. We accept that the 555 service route provided a suitable alternative based on the medical evidence available to the respondent prior to the Dr Farrand report. We therefore do not accept that there was a breach of the duty to make reasonable adjustments by failing to put the claimant exclusively on the Hotel Hoppa route.

204. Once the respondent had evidence that it was detrimental to the claimant to drive the Hotel Hoppa they were right to restrict him from doing so because of their duty to him.

205. As a result of the above the claimant succeeds on one claim of s.15 discrimination for a reason arising in consequence of disability and compensation for that will be assessed at a remedy hearing.

_____

Employment Judge George

Date: …15 September 2024……..

Sent to the parties on:
16 September 2024

…….....
For the Tribunal Office

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Case No: 3323505/2021 Thakur v Hallmark Connections Ltd

1. **Time limits**
    a. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 1 July 2021 may not have been brought in time.
    b. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
        i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
        ii. If not, was there conduct extending over a period?
        iii. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
        iv. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
            1. Why were the complaints not made to the Tribunal in time?
            2. In any event, is it just and equitable in all the circumstances to extend time?

    c. Was the unfair dismissal complaint made within the time limit in section 111 of the Employment Rights Act 1996? The Tribunal will decide:
        i. When was the effective date of termination?
        ii. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?
        iii. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
        iv. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

    d. Was the detriment claim made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:
        i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?
        ii. If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
        iii. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
        iv. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. **Unfair dismissal**

a. Was the claimant dismissed?

Automatic Unfair Dismissal

b. Had the claimant taken part, or did he propose to take part, in the activities of an independent trade union at an appropriate time?

c. Was the reason or principal reason for dismissal that the claimant had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time (s.152(1)(b) TULR(C)A)?

If so, the claimant will be regarded as unfairly dismissed.

d. Was the claimant an employee at a place where
   i. There was no health & safety representative or safety committee;
   ii. Or there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

   And did he bring to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety? The claimant relies upon paras 15 & 16 of his particulars of claim.

e. Was the reason or principal reason for dismissal that the claimant had brought such circumstances to his employer's attention (s.100(1)(c) ERA)?

Unfair Dismissal

f. What was the reason or principal reason for dismissal? The respondent says the reason was capability.

g. If the reason was capability, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It Tribunal will usually decide, in particular, whether:

   i. The respondent genuinely believed the claimant was no longer capable of performing their duties;
   ii. The respondent adequately consulted the claimant;

iii. The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
iv. Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
v. Dismissal was within the range of reasonable responses.

3. Detriment (Employment Rights Act 1996 section 48)

a. Did the respondent do the following things:

i. Remove the claimant from the Hoppa services on 15 June 2020 without consultation with him;
ii. Remove the claimant from the Hoppa services in March 2021;
iii. Allocate the claimant to a longer route on 28 May 2021;
iv. Subject the claimant to a capability procedure because of either his inability to do longer routes and/or his sickness absence.

b. By doing so, did it subject the claimant to detriment?

c. If so, was it done on the ground that

i. (s.146(1)(b) TULR(C)A) The claimant had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time; or
ii. (S.44(1)(c) ERA) The claimant was an employee at a place where
    1. There was no health & safety representative or safety committee;
    2. Or there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

    and he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety? The claimant relies upon paras 15 & 16 of his particulars of claim.

4. Discrimination arising from disability (Equality Act 2010 section 15)

a. Did the respondent treat the claimant unfavourably by:

i. Subject the claimant to a capability procedure.
ii. Dismiss the claimant;
iii. Reject the claimant's appeal against dismissal.

b. The claimant's disability is the impairment of chronic back pain and sciatica since 2006. Did the following things arise in consequence of the claimant's disability:

    i. He was unable to drive for long periods of time, so that when allocated longer routes he would have to go off sick?

c. Was the unfavourable treatment because of any of those things?

d. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

    i. Ensuring vehicle and passenger safety by only allowing drivers who were physically fit to drive PSVs to do so.

e. The Tribunal will decide in particular:

    i. was the treatment an appropriate and reasonably necessary way to achieve those aims;

    ii. could something less discriminatory have been done instead;

    iii. how should the needs of the claimant and the respondent be balanced?

f. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date? The respondent admits that they had knowledge from 19 June 2019.

5. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

a. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date? The respondent admits that they had knowledge of disability from 19 June 2019.

b. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

    i. A requirement that drivers drive both longer and shorter routes.

c. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he was unable to drive for long periods of time, so that when allocated longer routes he would have to go off sick?

d. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

e. What steps could have been taken to avoid the disadvantage? The claimant suggests:

    i. Retain the claimant on the shorter Hoppa route.

f. Was it reasonable for the respondent to have to take those steps [and when]?

g. Did the respondent fail to take those steps?

6. Remedy for unfair dismissal and discrimination

a. If there is a compensatory award, how much should it be? The Tribunal will decide:

    i. What financial losses has the dismissal caused the claimant?
    ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    iii. If not, for what period of loss should the claimant be compensated?
    iv. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
    v. If so, should the claimant's compensation be reduced? By how much?
    vi. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
    vii. Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
    viii. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
    ix. If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
    x. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
    xi. Does the statutory cap of fifty-two weeks' pay or [£105,707] apply?

b. What basic award is payable to the claimant, if any?

c. What compensation for injury to feelings is payable to the claimant?

d. Is interest payable on any compensation for injury to feelings?

e. Should there be a deduction to reflect the chance that the claimant would have been dismissed lawfully in any event?

f. Should any award be increased or decreased for an unreasonable failure to comply with an applicable ACAS disciplinary or grievance Code?