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EMPLOYMENT TRIBUNALS

Claimant: Mr M Provatas

Respondent: DHL Services Limited

Heard: in Sheffield on 13th, 14th, 15th, 16th and 17th January 2025

Before: Employment Judge Ayre
Mrs J L Hiser
Mr K Smith

Representation

Claimant: In person
Respondent: Ms Martin, counsel

Greek Interpreter: Erta Zace

RESERVED JUDGMENT

1. The respondent made an unauthorised deduction from the claimant's wages in the sum of £235. By consent, the respondent is ordered to pay the sum of £235 to the claimant.

2. The claim for indirect race discrimination fails and is dismissed.

3. The claim that the respondent failed to make reasonable adjustments fails and is dismissed.

4. The claim for harassment related to race and disability fails and is dismissed.

5. The claim for victimisation fails and is dismissed.

6. The claim for constructive dismissal fails and is dismissed.

REASONS

Background

1. The claimant was employed by the respondent as an HGV driver from 1 July 2013 until his resignation on 5 January 2023. On 17 November 2022 the claimant issued this claim in the Employment Tribunal following a period of ACAS early conciliation that started on 6 October 2022 and ended on 17 November 2022.

2. The claimant is bringing claims for:

    1. Indirect race discrimination;
    2. Failure to make reasonable adjustments;
    3. Harassment;
    4. Victimisation;
    5. Unfair constructive dismissal; and
    6. Unauthorised deduction from wages.

3. A Preliminary Hearing took place on 3 April 2023 at which:

    1. The claimant's application to amend his claim was partially allowed;
    2. The claimant was ordered to pay a deposit as a condition of being permitted to continue to pursue certain complaints of indirect discrimination and victimisation;
    3. The claimant was ordered to provide further information about his claim;
    4. The case was listed for a further Preliminary Hearing.

4. The claimant subsequently withdrew the allegations that were the subject of the Deposit Order and those claims were dismissed in a Judgment sent to the parties on 17 May 2024.

5. A Second Preliminary Hearing was listed for 13 June 2023. That hearing was postponed due to the unavailability of a Greek interpreter and because the Tribunal was unable to achieve audio contact with the claimant.

6. The Preliminary Hearing was relisted for 15 August 2023 and at that hearing:

    1. The case was listed for final hearing in January 2024;
    2. Case Management Orders were made to prepare the case for hearing; and
    3. There was a discussion of the claims that the claimant is bringing and of the issues that will fall to be decided in the case.

7. The final hearing that was due to take place in January 2024 was postponed by the Regional Employment Judge because it was extremely likely that the case could have been heard due to the number of cases in the list.

8. By letter dated 19 March 2024 the final hearing was re-listed for 4 to 9 August 2024.

9. On 1 August 2024 the claimant's solicitors informed the Tribunal that they were no longer acting for him. On 4 August 2024 a full panel of the Tribunal, chaired by Employment Judge Brain, postponed the final hearing. The reasons for that decision are set out in an Order sent to the parties on 28 August 2024 and I do not propose to repeat them here.

10. The respondent indicated that it wished to apply for a costs order in relation to the postponement of the final hearing in August 2024. The case was listed for a costs hearing to take place on 25 October 2024 and Case Management Orders were made to prepare the case for that hearing. The costs hearing was subsequently postponed on the application of the respondent and, by letter dated 25 September 2024 Employment Judge Brain directed that the respondent's costs application would be heard at the final hearing.

The hearing

Witness Evidence

11. The Tribunal heard evidence from the claimant who produced two versions of his witness statement, one in English and one in Greek. The Tribunal has considered the English version only. The interpreter was asked to read both versions, and subsequently confirmed to the Tribunal that the English version was an accurate translation of the Greek version.

12. The claimant also produced a witness statement for a Velichka Vazheva, a friend of the claimant who attended several meetings with him. Ms Vazheva was not willing to attend the hearing voluntarily. The claimant applied for a Witness Order for Ms Vazheva who had, the claimant said, indicated that she was not willing to attend the hearing on a voluntary basis. It was the unanimous decision of the Tribunal that a Witness Order should be issued for Ms Vazheva because her evidence appeared relevant to the issues that we had to determine. Ms Vazheva attended the hearing on 15 January and gave her evidence pursuant to the Witness Order.

13. For the respondent we heard evidence from:

    1. Neil Davidson, Transport Manager;
    2. Katie Dean, HR Business Partner; and
    3. Laura Pickard, Transport Controller.

14. The respondent also produced witness statements for Mark Leach-Gerrard, former agency HGV driver for the respondent and Kelly Hodges, HR Business Partner. Mr Leach-Gerrard was not able to attend the hearing as he had become a full time carer for his father. Ms Hodges' statement explained that. Enquiries were made as to whether Mr Leach-Gerrard would be able to attend the hearing via video link, but Ms Martin told the Tribunal that he was unable to do so due to a bereavement. The respondent asked that his statement be taken into account.

15. Ms Hodges was present during the hearing and willing to give evidence. Her

evidence however related only to the reasons why Mr Leach-Gerrard was not present and was not relevant to any of the issues that the Tribunal had to determine. The Tribunal accepted that Mr Leach-Gerrard had good reason not to be present, based upon the information provided to the Tribunal by Ms Martin who, as counsel, owes professional duties to the Tribunal.

16. The Tribunal has read the witness statements of Mr Leach-Gerrard and Ms Hodges.

Documents

17. There was an agreed bundle of documents running to 586 pages, an Ancillary Bundle running to 12 pages, and a Supplementary Bundle running to 79 pages.

18. The Tribunal was also provided with CCTV footage of an alleged incident involving the claimant and his line manager on 10 July 2022 and watched that footage.

19. Both parties produced written submissions on behalf of the respondent, for which the Tribunal is grateful. The claimant was given time, on the morning of the 16th January, to go through the respondent's written submissions with the interpreter so that she could translate them for him. The hearing started at 11 am that day to accommodate this.

Application to amend the response

20. On the afternoon of the third day of the hearing the respondent applied to amend its response to add the following legitimate aims in support of a justification defence to the indirect discrimination claim:

    1. The need to have important conversations without notice on occasion and the impracticability of having a translator present on site at all times; and
    2. The need to have conversations without notice in circumstances where there would be a negative effect from delaying conversations.

21. The claimant objected to the amendment being granted. He pointed out that he was a litigant in person and, as the respondent had objected to any changes to the list of issues at the start of the hearing, it would not be appropriate for the amendment to be granted at the last minute.

22. It was the unanimous decision of the Tribunal that the application to amend the response should be refused for the following reasons:

    1. It is made at a very late stage in the proceedings, after the claimant has given his evidence and with just one witness for the respondent remaining. Whilst delay in making an application to amend is not a bar to such an application succeeding, the timing of the application is a relevant factor that the Tribunal can take into account;

2. The application was made in response to the Employment Judge pointing out to the respondent's representative that justification had not been pleaded by the respondent or included as an issue in the List of Issues identified at the Preliminary Hearing on 15 August 2023. The respondent was represented by counsel at the hearing. The Record of that Preliminary Hearing sets out the issues to be decided in the indirect discrimination claim and there is no mention of any legitimate aims or justification defence. Paragraph 12 of the Record states that: "*The claims and issues, as discussed at this preliminary hearing, are listed in the Case Summary below. If you thin the list is wrong or incomplete, you must write to the Tribunal and the other side by **29th August 2023**. If you do not, the list will be treated as final unless the Tribunal decides otherwise*";

3. The nature of the amendment that the respondent seeks to make is to introduce new factual matters, namely what the respondent says its legitimate aims were and whether what the respondent did was reasonably necessary to achieve those aims. This would require new areas of factual enquiry and evidence, as well as new and complex legal arguments;

4. There is no evidence whatsoever in the respondent's witness statements in support of any justification defence, and it is surprising that the respondent suggests it can rely on the unchallenged evidence of the claimant;

5. Justification is a notoriously difficult and legally complex area of the law. The respondent has been legally represented throughout these proceedings. The claimant is not represented in this hearing.

6. The justification defence is not pleaded in either the original Response or the amended Grounds of Response. The respondent's primary defence to the indirect discrimination claim is that it did not apply the PCP relied upon, and/or that the PCP did not put the claimant at a particular disadvantage. Refusing the amendment does not prevent the respondent from relying on this defence.

7. There would be significant prejudice, injustice and hardship to the claimant, as a litigant in person, of having to face, unrepresented and at very short notice, a new and legally complex issue. This outweighs the prejudice to the respondent of not being able to run a justification defence, but still being able to rely on its other defences to the indirect discrimination claim.

8. At the start of this hearing the respondent objected to being required to deal with any issues that it had not prepared to deal with. The Tribunal was sympathetic to that position. We extend the same sympathy to the claimant.

9. For the above reasons the balance of injustice and hardship favours refusing the amendment.

Final day of the hearing

23. Evidence and submissions concluded on the fourth day of the hearing. The Tribunal then deliberated and made its decision. The parties were asked to attend at 11.30 on the fifth day of the hearing to receive the Judgment.

24. The claimant did not attend the hearing on 17 January. His friend, who had been present throughout the hearing, handed in a letter informing the Tribunal that the claimant had been taken into police custody at approximately 4.15 am. He did not know the reason for this, or how long the claimant would remain in police custody.

25. In the circumstances the Tribunal decided to adjourn the hearing and reserve its judgment. It was not appropriate, in the Tribunal's view, to continue with the hearing in the absence of the claimant.

26. Ms Martin indicated that the respondent wished to pursue an application for costs in relation to the adjournment of the hearing in August 2024 and asked the Tribunal to make case management orders in relation to such an application. The Tribunal declined to do so. It would not, in the Tribunal's view, have been fair to the claimant to make case management orders without giving him the opportunity to comment on them. The respondent was informed that any application for costs, and for case management orders in connection with such an application, should be set out in writing and copied to the claimant.

The issues

27. At the start of the hearing we discussed the issues that need to be decided in this case. A list of issues was originally set out in the Record of the Preliminary Hearing on 15 August 2023. However, following that hearing an agreed list of issues was agreed between the parties, including the solicitors who were, at the time, representing the claimant. There was some difference between the lists and, having heard representations from both parties as to which list to use, it was the unanimous decision of the Tribunal that the agreed list of issues should be used. That list was more accurate (for example, the previous one contained an allegation that had been dismissed) and the respondent indicated that it had not prepared to meet the original list, but rather the more recently agreed list.

28. Ms Martin told the Tribunal that the respondent admitted owing the claimant £235 in respect of unpaid wages. The claimant confirmed that the value of his claim for unauthorised deduction from wages is for the sum of £235. That claim therefore succeeds.

29. During the course of submissions, Ms Martin accepted that the remaining claims were made in time and that the respondent had knowledge of the claimant's disability. The Tribunal has not had to consider those matters.

30. In light of the respondent's concessions, the issues that fell to be decided by the Tribunal were the following:

1. **Indirect race discrimination (Equality Act 2010 section 19)**

1.1 Did the respondent have the following provision, criterion or practice ("PCP"):

1.1.1 Holding meetings and important conversations in English without a suitable interpreter?

1.2 Did the respondent apply the PCP to the claimant on the following occasions:

1.2.1 8 July 2022 during the disciplinary hearing;
1.2.2 10 July 2022 when the claimant was suspended and told to leave site; and/or
1.2.3 20 July 2022 when the claimant was escorted off site?

1.3 Did the respondent apply the PCP to employees who are not of Greek national origin or would it have done so?

1.4 Did or would the PCP put employees who shared the claimant's protected characteristic of race based on language (being of Greek national origin with English not being the claimant's first language) at a particular disadvantage when compared with those who do not share that protected characteristic, i.e. those who were not of Greek national origin with English not being their first language?

The disadvantage relied upon by the claimant is that he could not properly participate and/or understand what was discussed in the meetings?

1.5 Did the PCP put the claimant at that disadvantage?

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

2.1 The respondent admits that the claimant was, at all material times, disabled due to type 2 diabetes and osteoarthritis. The respondent also admits that it had knowledge of the claimant's disability.

2.2 Did the respondent have the following PCP:

2.2.1 Requiring HGV drivers to drive for more than 10 hours a shift?

The claimant says that he was asked to drive to Swindon, a trip of at least 10 hours and 45 minutes in ideal conditions without delays.

2.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that it caused him pain and had a detrimental effect on his diabetes?

The claimant says that a driver who did not share the claimant's disability and who was asked to drive for more than 10 hours during a single shift would not have been put at that disadvantage.

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

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

2.5.1 Reducing the hours that HGV drivers were required to drive to less than 10 hours per shift;
2.5.2 Planning for the claimant to drive short trips locally; and/or
2.5.3 Using the claimant as a spare.

2.6 Was it reasonable for the respondent to have to take those steps and when?

2.7 Did the respondent fail to take those steps?

3. **Harassment related to disability and/or race (Equality Act 2010 section 26)**

3.1 Did the respondent do the following things:

3.1.1 On 10 July 2022 did the claimant's manager, Laura Pickford, tell the claimant to "*fuck off*" and "*leave the yard now, now, now*" whilst making an offensive hand gesture at him, namely sticking up two fingers?
3.1.2 On 20 July 2022 did Laura Pickard ask what the claimant was doing on site given that he was suspended? When the claimant tried to explain that he was off sick and not suspended and was asking security for the CCTV footage from 10 July 2022, did Laura Pickard request security to security escort the claimant off site?

3.2 If so, was that unwanted conduct?

3.3 Did the conduct on 10 July relate to disability? The claimant says he was experiencing difficulty walking because of the swelling of his knee due to osteoarthritis and needed to take a break walking to leave the yard and to sit down at the security point before being able to walk further due to pain in his knee.

3.4 Did the conduct on 20 July relate to race? The claimant says Laura Pickford ignored the claimant's comments due to English not being the claimant's first language.

3.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.6 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. **Victimisation (Equality Act 2010 section 27)**

4.1 The respondent admits that the claimant's grievance dated 23 July 2022 was a protected act.

4.2 Did the respondent do the following thing:

4.2.1 Refuse permission for the claimant to bring his own friend to the grievance meeting on 10 August 2022?

The respondent says that it had already sourced and paid for an external interpreter after the claimant had confirmed he did not wish to bring a family member or friend to the disciplinary hearing and before the claimant said he wanted to bring his friend, and that the claimant was provided with a Greek interpreter so suffered no detriment.

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

4.4 If so, was it because the claimant did a protected act?

5. **Constructive Unfair Dismissal**

5.1 Did the respondent do the following things:

5.1.1 discriminate against, harass and/or victimise the claimant as set out above;
5.1.2 Call the claimant on 14 April 2022 and ask him to work on 15 April 2022 then, after the claimant worked as requested between 15 and 19 April 2022, tell him he should not be working as he was suspended, and subsequently pay him holiday pay rather than wages without his agreement;
5.1.3 Ignore the claimant's request for a Greek translator to attend the disciplinary hearing on 8 July 2022 and instead use a Bulgarian woman who could not understand English very well as an interpreter; and/or
5.1.4 Tell the claimant to drive to Swindon on 10 July 2022, a trip of at least 10 hours and 45 minutes in ideal conditions, despite the claimant explaining that this would have a negative impact on his osteoarthritis and diabetes and that he was unable to do a trip this long. Did the claimant apologise and did Laura Pickard

shout at him to leave the yard immediately and gesture at him sticking two fingers up at him and tell him to "fuck off" until he left? Did the respondent fail to provide a translator so that the claimant was unable to understand what was happening? Did the respondent suspend the claimant?

The claimant alleges that his mental health deteriorated due to the way in which he was treated by the respondent.

5.2 Did that breach the implied term of trust and confidence? The Tribunal will decide:

5.2.1 Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

5.2.2 Whether it had reasonable and proper cause for doing so.

5.3 Did the claimant resign in response to the breach?

5.4 Did the claimant affirm the contract before resigning? Did the claimant's words or actions show that he chose to keep the contract alive even after the breach?

5.5 If the claimant was dismissed, what was the reason or principal reason for dismissal? The respondent asserts that it was capability, misconduct and/or some other substantial reason.

5.6 Was the reason for dismissal a potentially fair one?

5.7 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason for dismissal?

5.8 Did the respondent follow a fair procedure?

6. **Remedy**

6.1 In light of our findings on the substantive issues above, it has not been necessary for us to deal with questions of remedy.

Findings of fact

31. We make the following findings of fact on a unanimous basis.

32. The claimant was employed by the respondent as a Class 1 HGV Driver based at the M&S Site in Chapeltown, Sheffield. His employment started on 1 July 2013 and ended with his resignation on 5 January 2023.

33. The claimant is a Greek national who moved to England in 2005 at the age of 40. Greek is the claimant's first language and prior to moving to the UK he spoke hardly

any English. At the time of the events that this claim is about the claimant had lived in England for approximately 17 years and was able to speak, read and write some English. He had worked for the respondent for 9 years and, throughout that time, used English to communicate at work. There was no evidence before us to suggest that, at any time prior to the events that this claim is about, the claimant had ever requested an interpreter for normal work interactions. He communicated in English with his managers and used English in his every day work.

34. The claimant has Type 2 Diabetes and Osteoarthritis. On 12 October 2018 the claimant's GP provided the claimant with a letter stating that the claimant had gout and joint pains, and that as a result the claimant had asked to limit his work shifts to no more than 8 hours. The GP supported this request. The claimant gave this letter to the respondent.

35. On 1 February 2019 the claimant was assessed by the respondent's occupational health team. There was no evidence before us to suggest that there was an interpreter present during that assessment. In the report produced following that assessment, the occupational health doctor wrote that the claimant had intermittent swelling of joints, which gave him some difficulty with walking, and that he had diabetes which was controlled. In response to the question "Does the condition have any implications for work performance/attendance" the doctor replied ""*He tries to work when he has the pain but it does affect his ability to left, carry and walk when the inflammation is there*". The doctor also commented that the claimant was not sure what to do "*because he has limited English*" and that he had advised him to see his GP.

36. On 30 July 2019 the claimant's GP assessed him and provided a fit note stating that the claimant was fit for work but with amended duties due to his diabetes. The GP wrote that the claimant had asked for a change of rota to the day shift from the night shift.

37. On 19 August 2019 the claimant was assessed at Barnsley Hospital, who subsequently provided a letter stating that the claimant had been diagnosed with gout, osteoarthritis, hypertension, CKD and Type 2 diabetes.

38. The claimant's evidence to the Tribunal, which we accept, is that he gave all of the letters and fit notes provided by his doctors to the respondent. He was open about his health and did not seek to hide any of his conditions.

39. On 20 August 2019 the claimant's GP provided a letter in which he wrote that "*I support his request to have his shifts at the same or near to the same time each day in order to allow him to keep himself well.*"

40. During 2019 the claimant had a period of extended sickness absence. On 9 October 2019 the claimant's GP provided a fit note certifying the claimant as unfit for work until 23 October 2019 due to work related stress and diabetes. A further fit note was provided extending the period of certified sickness absence to 5 November 2019.

41. The claimant had a further period of sickness absence in 2020, this time due to shoulder pain. He was certified as unfit to work due to shoulder pain from 24 November 2020 to 25 January 2021. Between 25 January and 24 March 2021 his GP assessed him as fit for light duties. In a fit note dated 24 February 2021 the GP suggested that the claimant should avoid driving for more than 8 hours a day and avoid heavy lifting.

42. The claimant was referred again to the respondent's occupational health providers who assessed him by telephone on 24 March 2021 without an interpreter. The physician who assessed the claimant that day wrote in the report "*Although we did not have an interpreter he was able to understand my questions and this was consistently checked and questions rephrased when needed. I was also able to understand his answers and felt that there was sufficiently good communication to allow us to continue with the appointment. Where there was difficulty in answering specific questions it was more to do with his recollection of timelines rather than a language barrier.*"

43. The doctor reported that the claimant "*feels he can drive for a unlimited time without experiencing pain*", and that the claimant's underlying medical condition was likely to be rotator cuff syndrome linked to diabetes. The doctor was asked to advise as to what adjustments were necessary to assist the claimant to return to work and commented that the claimant was unlikely to be able to manage the manual handling aspects of the role but may be fit for a driving role that did not involve manual handling. He also suggested a regular day shift, starting in the morning, to assist with diabetic control, and that adjustments may be required for the foreseeable future.

44. The claimant returned to work on 26 March 2021 after approximately 3 months' absence due to shoulder pain. On 31 March 2021 the claimant's GP provided a fit note recommending that the claimant work shorter shifts of 8 hours or less for a 2 month period.

45. On 5 April 2021 the claimant attended a meeting which lasted almost 1.5 hours, with Sarah Johnson, the respondent's Transport Manager. He was accompanied at the meeting by a colleague, Chris Saxon. The respondent produced notes of that meeting running to more than 10 pages. The notes were signed by everybody else present at the meeting, but not by the claimant. The reason the claimant did not sign the notes was because he was not confident that he fully understood them as they were written in English.

46. There was no interpreter present during the meeting, and no evidence to suggest that the claimant asked for one. There was a detailed discussion about the claimant's health and his ability to work and the notes suggest that the claimant was able to answer all of the questions put to him and to discuss his health. The claimant did however on one occasion ask what the word 'flex' meant, and this was explained to him (in English) by his colleague. On another occasion during the meeting he referred to having visited a hospital in Athens, "*because of the language barrier*". Chris Saxon said that the claimant would like a start time no later than 9 am and for 'trunking' duties only.

47. Trunking duties do not involve any loading or unloading of goods from a vehicle. Instead the driver drives a lorry to a particular destination where s/he then picks up either another lorry, or exchanges trailers (so that a new trailer is attached to the cab that the driver is using) and then drives back to base with the new trailer or lorry.

48. The claimant subsequently had a further period of sickness absence due to shoulder pain. On 25 May 2021 his GP certified him as unfit to work due to shoulder pain for a four week period. On 23 June 2021 his GP certified him as fit to work on light duties and 8 hour shifts for four weeks. On 19 July 2021 the GP certified him as fit to work 8 hours a day starting at 8 am until 13 September 2021.

49. On 13 August 2021 a health review meeting took place. The claimant attended accompanied by a work colleague. There was no interpreter present and no record in the minutes of the claimant having asked for one. The minutes do however record that the claimant said, when asked whether he had asked his GP what the long term situation was, "*my English is not good and sometimes I don't understand"* and that he had not asked his GP because "*my English is not great*".

50. The Transport Manager, Sarah Johnson, commented during the meeting that the restrictions sought by the claimant could be difficult to accommodate. She stated that:

"*there is no driver who has the same restrictions as you. If you said you can do 8 hours and store delivery, we can have a look for you or if you can do trunking and longer hours than we can offer you work also. If any of those can be restricted, we can look at that for you. It is less than 8 hours and no store delivers which leaves us with very limited options. We trunk to Scotland and Wellhelm green which are going to be longer than 8 hours if we gave you those jobs."*

51. These comments are consistent with the evidence given by Laura Pickard to this Tribunal, that because of the number and type of restrictions that the claimant wanted the respondent to put in place, there was very little work that he could actually do. Much of the work available for HGV drivers involved loading and unloading and/or working in the evenings and overnight.

52. In February 2022 the claimant had a further period of sickness absence due to gout. He was then on holiday in March 2022, and was due to return to work on 1 April 2022.

53. On 31 March 2022 Ben Eaton the Shift Controller sent a text to the claimant informing him that he had been allocated a run to Penrith on the following day, starting at 8 am. The claimant replied that the shift would involve working over 8 hours. Mr Eaton texted back "*You have no limitations unless you can provide us with an up to date fit note*". The respondent believed that the recommendations that had previously been made for shorter shifts were temporary rather than permanent, whereas the claimant clearly believed that the adjustments he had asked for should be permanent.

54. The claimant attended work on 1 April and Tyrone Fox, the Transport Manager,

spoke to him. Mr Fox asked the claimant why he was not able to do the Penrith run and explained it would not involve any loading or unloading, and that he would remove a stop at Bradford to make it easier for him. The claimant said he had a doctor's note stating he should start at 8 am, work no more than 8 hours, and not deliver to stores or outlets. Mr Fox told the claimant that was too restrictive, and he needed to be more flexible around his start time. The claimant refused.

55. Mr Fox told the claimant that there was nothing on file to corroborate his story. This was in fact incorrect, as by that time the claimant had supplied plenty of medical evidence relating to his health conditions.

56. Mr Fox suggested that the claimant work without restrictions until he got a letter from his doctor confirming that the restrictions were required. The claimant refused, and the claimant then left the office saying he was going to his doctor's to get a note. The claimant subsequently sent in an SSP form covering the period 1 to 5 April 2022.

57. Mr Fox refused to accept what the claimant was saying about his health. In a statement that he wrote on 6th April 2022 he referred to the claimant "*using the same rhetoric regarding his restrictions but with no proof…. Phew!*

58. It is clear from this statement that Mr Fox showed no sympathy whatsoever towards the claimant and was not willing to believe what he said. Describing the claimant's genuine concerns about his health as 'rhetoric' is, in the Tribunal's view, inappropriate.

59. On 6 April 2022 the claimant was suspended. The reason given for the suspension was that the claimant "*refused to carry out a reasonable management instruction, whereupon you then left site explaining you would not return the following day. You then failed to report for duty for a further three days or make contact in accordance with DHL absence Policy*". The claimant was informed that the allegations were considered to be potential gross misconduct which could result in dismissal without notice.

60. There was no evidence before us to suggest that either Ben Eaton or Tyrone Fox took the time to check the claimant's medical history or what evidence the respondent had as to the claimant's fitness to work. They did not properly consider the claimant's explanation for not wanting to do the shift on 1 April.

61. On 7 April 2022 the claimant's GP provided a letter asking the respondent to consider a shorter shift pattern of 8 hours because the claimant was having difficulty sitting down for prolonged periods.

62. On the same day the respondent wrote to the claimant inviting him to an investigation meeting on 12 April.

63. The investigation meeting took place before Wayne Pritchard, Transport Manager. The claimant attended the meeting with a trade union representative, Mick Martin. A friend, Velichka Vazheva, also attended to support the claimant

64. Ms Vazheva speaks fluent Greek. Although Bulgarian is her first language, her mother is Greek and she lived in Greece for many years, from the age of 7. She was not employed by the respondent, but worked for another company, GXO Logistics, on the same site as the claimant.

65. We were provided with partial notes of the investigation meeting, which had been signed by all of those present, including the claimant and his union representative, but excluding Ms Vazheva.

66. Although Ms Vazheva is not a professional interpreter and did not provide the claimant with a full translation service during the investigation meeting, she was able to help the claimant with any language issues. There was no evidence before us to suggest that the claimant or his trade union representative raised any concerns during the meeting about the language used or the lack of a professional interpreter, or that they suggested that the claimant was having difficulty understanding.

67. The claimant told the Tribunal that he had asked for a professional interpreter to be present at the meeting. We find this evidence on this issue not credible and do not accept it. He was unable to recall when he asked for an interpreter, who he asked, or how he asked. Moreover, when the claimant did subsequently ask for a professional interpreter (in relation to his grievance hearing in August 2022) the respondent provided one. There was no reason why, if the claimant had asked for a professional interpreter for meetings before the grievance hearing, one would not have been provided.

68. It is clear from the evidence before us that the respondent believed that Ms Vazheva's presence at the meeting was, at least in part, as an interpreter. The respondent's disciplinary and grievance policy states that employees are entitled to be accompanied at disciplinary and grievance hearings by an employee representative or a trade union representative. The claimant had a trade union representative there. He was therefore not entitled to have another representative or a friend present.

69. The respondent does not normally allow friends of employees to attend meetings unless there are exceptional circumstances. In this case, the respondent believed that Ms Vazheva's role at the investigation meeting was to act as an interpreter for the claimant.

70. After the investigation meeting in April, the claimant remained off work until July 2022, with the exception of a few days in April where, by mistake, he was scheduled to work from 15 to 19 April by a manager who was not aware that he was suspended. The claimant worked those days, at the respondent's request, but was subsequently told he should not have done so because he was suspended. The claimant was not paid properly for the days he worked in April, and the respondent admits owing him £235 in respect of those days worked. The respondent's concession that it owes the claimant £235 for the days worked in April 2022 was only made at the start of this hearing.

71. The claimant had surgery to remove a cyst on 22 March 2022 but suffered post-

surgery complications. Between 22 April 2022 and the end of June 2022 the claimant was certified by his GP as unfit to work due to the cyst and surgery.

72. In May 2022 the claimant was assessed by the respondent's occupational health providers. The report produced following the assessment records that the claimant had told occupational health that he had a cyst since 2013 which had grown in size and been surgically removed on 22 March 2022. The claimant told occupational health that the area operated on had not healed well and that, as a result he was unable to sit properly or for long periods.

73. The report records that the claimant had not disclosed any other underlying medical condition. The claimant's evidence to the Tribunal was that he had only been asked about the cyst during the occupational health assessment. We accept the claimant's evidence on this issue. The claimant was open with his employer about his medical conditions and there was no reason to believe that if occupational health had asked him about other health conditions he would not have told them about his diabetes and osteoarthritis. It was in his interests to do so.

74. The occupational health assessment in May took place by telephone without an interpreter present. There was no suggestion from the report produced following that assessment of any communication difficulties during the consultation.

75. Following the expiry of the claimant's fit notes, he was placed back on suspension on 1 July 2022.

76. On 29 June 2022 the respondent wrote to the clamant inviting him to a disciplinary hearing on 8 July 2022. Neil Davidson, another Transport Manager, was appointed as the disciplinary hearer. The allegations against the claimant were that he refused to carry out a reasonable management instruction on 1 April 2022 and left site and that he `then failed to report for duty for a further three days. The claimant was told that the allegations were being considered as potential gross misconduct for which he could be dismissed without notice.

77. Shortly before the disciplinary hearing the claimant consulted his GP again and the GP provided him with a letter dated 6 July in which he wrote that the claimant's osteoarthritis was "*causing him significant pain when having to move heavy objects. As a result, I would support his application to be exempt from loading/unloading his wagon.*" There was no mention of any other restrictions or adjustments in this particular letter.

78. On 8 July 2022 a disciplinary hearing took place, chaired by Neil Davidson. P220. The claimant was accompanied at that hearing by Mick Martin, a trade union representative, and Velichka Vazheva. The notes of that meeting, which are signed by the claimant and his trade union representative (but not by Ms Vazheva or Mr Davidson) state, on the front page, that Ms Vazheva was present as an interpreter.

79. There was no professional interpreter present, but Ms Vazheva did provide translation services during the meeting, and was given time to go through documents with the claimant to translate them for him.

80. There was no evidence before us to suggest that the claimant could not understand what was happening during the meeting, or that he or his union representative suggested that he needed a professional translator. The respondent believed that Ms Vazheva was acting as the interpreter, and that was the reason she was allowed to attend the hearing. Moreover, the respondent had agreed to pay her wages for two hours whilst she was supporting the claimant at the disciplinary hearing. There was no reason why the respondent would agree with GXO that they would pay Ms Vazheva's wages unless they believed she was acting as an interpreter.

81. The respondent's normal practice, where an employee needs an interpreter in a meeting, is to try and source an interpreter internally by using another employee who speaks the relevant language fluently. It was in line with this normal practice that Ms Vazheva was present at the meeting.

82. During the disciplinary hearing the claimant explained that he was unable to work more than 8 hours and had told Ben Eaton that, but he had been allocated a 12 hour shift. He said that he had tried to explain the situation to Tyrone Fox on 1 April but Mr Fox had told him he was going home with no pay, and that he had to get a doctor's letter.

83. The claimant was asked during the disciplinary hearing about his health and handed over the letter dated 6 July 2022 from his GP. The claimant said that he believed there were doctor's letters that had been brought in previously, but the respondent did not appear to be aware of them. Mr Martin, his trade union representative, commented that he could not understand why the doctor's letters weren't on file. Mr Davidson's response was to rely purely on the occupational health report which suggested that there was no underlying health condition to impair service.

84. The claimant was asked whether he had been working 8 hour shifts previously and said that he had been working shifts lasting around 10 hours. The claimant said that he was fine to work a 9 or 10 hour shift, and Mr Davidson indicated that the claimant would be allocated trunking duties but would be expected to do a reasonable amount of overtime when he returned to work.

85. Mr Davidson decided to issue the claimant with a 12 month final written warning for unauthorised absence and failing to comply with the respondent's absence policy on 1 April 2022. He wrote to the claimant on 20 July 2022 confirming the decision. The letter contained a section headed "Right to Appeal" informing the claimant of his right to appeal against the decision and the deadline for raising an appeal.

86. The claimant's suspension was lifted and he was able to return to work on 9 July 2022.

87. The claimant returned to work on 9 July 2022 and was allocated what is known as a 'spare' duty, which meant that he was not given a specific route but waited in the yard as a reserve or spare driver to cover any runs that could not be done by the allocated driver due to sickness, or for any other reason. He was called out to do a

short run to Bradford that day.

88. On the afternoon of 9 July the claimant was informed that he had been allocated a return trip to Swindon the following day. He was concerned that the run allocated to him was too long as the estimated length of the shift was 10 hours and 49 minutes and on the evening of 9 July sent emails to Laura Pickard and Tyrone Fox asking them to change the shift. Ms Pickard did not read the email before the following morning,

89. The shifts or runs that were available for the 10 July were limited. There was one trunking run to Swindon, which the respondent anticipated would involve approximately 8 hours driving time in total and which started at 07.45 am. There was another run which involved less driving, approximately 4.5 hours in total, but involved multiple stops to unload goods, which the claimant was unable to do. That run also started at 10.30, which was later than the claimant wanted to start work, and was due to last until approximately 9.30 pm.

90. The other five runs available on the 10th July all started in the afternoon or evening. Ms Pickard believed that the Swindon run was the best one for the claimant because it was a trunking run, which did not involve any loading or unloading, and it started at 7.45 am. All of the other shifts that were available that day involved loading or unloading or started much later in the day. The claimant would not have been able to do any of the other runs that were available on 10 July.

91. The claimant attended work on the morning of 10 July. He told Ms Pickard that he was not going to do the Swindon run but did not say why. Ms Pickard asked the claimant if he was refusing a manager's reasonable request and the claimant replied that he wasn't refusing to do it, he just wasn't doing it. Ms Pickard said that she couldn't see the difference. The claimant said that he was stressed out and hadn't slept. Ms Pickard then told the claimant to go home and he initially refused to do so unless Ms Pickard provided him with a letter stating that she had no run for him to do.

92. The claimant went to sit in a truck and Ms Pickard went to contact Tyrone Fox for advice. Mr Fox advised Ms Pickard to suspend the claimant and to ask security to escort him off site if he was refusing to leave. Ms Pickard then went to the truck where the claimant was waiting and told him he was being suspended. The two of them then walked to reception and the claimant subsequently left the premises.

93. There was a conflict of evidence about what happened on 10 July. Ms Pickard's version of events was corroborated by Mal Linton. She produced a statement the day after the incident which was consistent with the evidence she gave the tribunal. In contrast the claimant's evidence was confused. At times he suggested the discussion had taken place near a lorry, at others he suggested it was in the middle of the yard, and he also suggested it was in reception.

94. His version of events was not corroborated by the CCTV footage before us. In particular the claimant was insistent that he had sat down to rest in reception because of arthritis in his knee, but the CCTV footage showed the claimant standing up at all

times both in the yard and in the reception,

95. The claimant suggested that Laura Pickard had told him to “F off” three times, and to “leave now, now, now” and had made a hand gesture, sticking two fingers up at him. Ms Pickard strongly denied that behaviour. On balance we prefer the evidence of Ms Pickard on this issue. The CCTV footage did not show any such behaviour (albeit there was no recording of the conversation between the claimant and Ms Pickard) but rather showed Ms Pickard and the claimant appearing to converse normally in reception.

96. We find that the claimant did not tell Ms Pickard on 10 July that the reason he did not want to do the Swindon run was because of his health, but he, reasonably in our view, believed that would be obvious to Ms Pickard. This was because of the conversation in the disciplinary hearing just two days previously when he had said he could only do shifts of 9 to 10 hours. Not only was Ms Pickard present during the disciplinary hearing but she took the notes.

97. The claimant was again suspended and on 11 July his suspension was confirmed in writing. In the letter confirming the suspension the allegation against him was described as refusing a manager’s reasonable request. He was warned that the behaviour was being treated as potential gross misconduct which could result in dismissal.

98. On 11 July 2022 the claimant saw his GP and was signed off as unfit to work due to stress until 25 July 2022. The claimant sent his fit note to Tyrone Fox who replied on 12 July that he would lift the suspension whilst the claimant was off sick and send the claimant a letter confirming this. There was no evidence to suggest that this letter was actually sent. Mr Fox did not tell Laura Pickard that the claimant’s suspension had been lifted.

99. On 19 July Ms Vazheva spoke to Paul Williams, the Security Manager, about the incident on 10 July. Mr Williams told her that he knew what had happened and asked her to tell the claimant to get in touch with him so that he could help him.

100. On 20 July the claimant went into work because he wanted to speak to Mr Williams and try and get a copy of the CCTV footage of the incident on 10 July. Whilst he was in reception Laura Pickard was walking through reception with Katie Dean, accompanying her off site.

101. There was a conflict of evidence between the claimant and Ms Pickard as to what happened on 20 July. Katie Dean was also present during the conversation. Her evidence was that she was standing close to the claimant and Laura Pickard and heard the claimant say he was off on sick leave, but did not hear him mention CCTV footage. She described Ms Pickard as acting professionally. She also said that she could understand clearly everything that the claimant was saying and that, whilst he spoke with an accent, he was perfectly understandable. We find Ms Dean's account of the event to be the most credible, as she was an independent observer of the conversation, and we accept her evidence about the conversation.

102. Ms Pickard did not know that the claimant's suspension had been lifted and believed that the claimant should not be on site. She asked Katie Dean for advice as to what to do. Ms Dean advised her to tell the claimant that he should not be on site because he was suspended and to ask him to leave.

103. Ms Pickard went over to the claimant and asked him to leave because he was suspended. The claimant told her that he was on sick leave and not suspended. Ms Pickard then went to security and asked one of the security officers to escort the claimant off site. The claimant subsequently left the site accompanied by the Security Manager.

104. The next day the claimant sent in a letter stating that he had been legally advised to ask for the footage of the incident on 10 July.

105. On 21 July the claimant consulted his GP who issued a fit note certifying the claimant as unfit to work due to osteoarthritis until 27 August 2022.

106. On 23 July 2022 the claimant raised a grievance]. The grievance is hand written, in English. In the grievance the claimant complained about the incident on 10 July involving Laura Pickard and said that he felt discriminated against because he is Greek and cannot speak English very well. There was no evidence before us as to whether the claimant had help writing this letter.

107. On 24 July 2022 the claimant wrote to Neil Davidson stating that he wanted to appeal against the disciplinary warning. He sent a further email setting out the grounds of his appeal on 26 July.

108. Katie Dean wrote to the claimant asking whether he would be willing to attend a grievance hearing on site. The claimant replied by email on 1 August that he would be willing to come to meet on site and that he "*would require a professional translater that can speak and understand my language. Although I can speak English I find it very hard to absorb conversations and need them breaking down so I can fully understand. I have got help from a friend in replying to you over this matter*". This was the first time in approximately 9 years working for the respondent that the claimant had asked for a professional interpreter to be present in a meeting.

109. Katie replied asking the claimant to confirm what language he needed translating so that she could arrange for an interpreter to be present. The claimant replied by email, "*I would request a Greek translater, the person that thornclife provided in my last disciplinary was I think Bulgarian that worked in the warehouse. I felt she didn't fully understand me and felt I didn't fully understand her, her her Greek wasn't very fluant.*"

110. The claimant accepted in his evidence to the Tribunal that he was, in this email, referring to Ms Vazheva. This email suggests that Ms Vazheva had been present at the disciplinary hearing as an interpreter, provided by the respondent.

111. The claimant was initially invited to a grievance hearing on 10 August but the hearing had to be postponed because Katie Dean was struggling to find a

professional Greek interpreter. Greek is not a common language in the area and the respondent did not have a professional interpreter that it had used before. Katie Dean had to source one and then get the interpreter set up on the respondent's systems as a contractor.

112. On 8 August– Ms Dean wrote to the claimant explaining that she had been trying to find a Greek translator for the meeting and was struggling. She told the clamant that she was willing to allow him to be accompanied by someone else, and that he could bring someone he knew or a family member to help in the meeting and act as translator.

113. The claimant replied that he did not have any family members in the UK who could help, or any Greek friends locally. He said that he was willing to wait until the respondent could find an interpreter.

114. Ms Dean wrote to the claimant again on 11 August asking if the union was able to assist with providing a translator, as she was having difficulty finding one.

115. Ms Dean was however subsequently able to find a professional Greek interpreter and on 12 August she wrote to the claimant inviting him to a grievance hearing on 19 August at which a professional Greek interpreter would be present.

116. On 15 August, the claimant wrote by email to Devon Read, the grievance hearer, to ask if he could bring a friend with him to the grievance hearing for support Mr Read replied asking whether the friend was a work colleague and explaining that the respondent did not usually allow external colleagues to attend internal meetings. He said that he needed to understand whether the friend would be providing a translating service for the claimant, and that if not, the friend would not be authorised to attend.

117. The claimant replied to Mr Read that the friend was not a DHL employee but would be providing emotional support, as he was currently off work with stress. He also confirmed that he would still need the respondent to provide an interpreter for the meeting.

118. The claimant was not allowed to bring his friend Andrea Dishman to the grievance meeting. The reason for that was that the respondent's policy is that an employee can only be accompanied by a trade union or employee representative at disciplinary hearings. The claimant already had a trade union representative who was due to attend the hearing and Ms Dishman was neither an employee nor a union representative. The respondent would have allowed Ms Dishman to attend if she had been acting as an interpreter, in the same way that it had allowed Ms Vasheva to attend.

119. We find that the reasons why the claimant was not allowed to bring his friend to the grievance hearing was that she was not acting as an interpreter, he already had a union representative accompanying him and the respondent's policy does not allow for friends to attend.

120. The grievance hearing went ahead on 19 August 2022. The claimant was

accompanied at the hearing by a trade union representative. A professional Greek interpreter was also present, provided by the respondent.

121. Devon Read wrote to the claimant on 22 September 2022 to inform him of his decision in relation to the grievance. Mr Read partially upheld the claimant's grievance but did not uphold his complaint about Laura Pickard's alleged behaviour on 10th July 2022. Mr Read's findings on that issue were that "*there is no supporting evidence that Laura Pickard displayed unacceptable conduct towards you. CCTV has been obtained which I have viewed and does not evidence any unacceptable conduct.*" Mr Read concluded, in summary, that:

- "*I have upheld that a disciplinary appeal needs to be heard for the final written warning issued which started 8th July 2022.*
- *I have advised the site to cease all disciplinary action against you for the allegation 10th July 2022.*
- *I have advised the site to make an occupational health referral to assess your osteoarthritis and a subsequent health review be conducted to determine and agree clearly any reasonable adjustments that can be accommodated.*
- *No further action planned with Laura Pickard, mediation on return if both parties are in agreement*."

122. The claimant remained off work due to ill health and did not return at any point after 10 July 2022.

123. On 30 August the respondent wrote to the claimant inviting him to an appeal hearing on 2 September in relation to the final written warning. The claimant sent an email to the appeal hearer on 31 August stating that he did not feel well enough to attend the appeal hearing. Ms Dean responded to the claimant by email on 2nd September. In her email she suggested waiting until 11th September and wrote that "*we can provide a translator for meetings and also for emails if needed.*"

124. On 6 October 2022 the claimant wrote to the respondent stating that he wanted to formally appeal against the grievance decision because he disagreed with the way in which the grievance was handled and the outcome. The respondent wrote to the claimant on 11 October asking him to set out the grounds of his appeal. The claimant replied on 13 October stating that he had stated his grounds of appeal in his emails, and had new information. He asked whether his appeal was being refused. A response was sent to the claimant on 14 October stating that once an appeal manager had been allocated they would be in touch.

125. On 13 October 2022 the claimant attended a telephone occupational health assessment, at which a Greek translator was also present. The Occupational Health Advisor assessed the claimant as being medically fit to attend meetings with management but recommended that the claimant be accompanied by a suitable person or interpreter and be allowed breaks.

126. On or around 30 October 2022, the claimant provided a letter from his GP in which the GP stated that the claimant had been diagnosed with anxiety and depression related to work related stress and had told the GP that he was not well enough to attend meetings with his employer. The GP also issued a fit note on 27 October signing the claimant as unfit to work until 1 January 2023 due to osteoarthritis and depression.

127. On 31 October the respondent wrote to the claimant asking him to attend a health review meeting. On 4 November Ms Dean informed the claimant by email that she had organised for a translator to attend the health review meeting.

128. The health review meeting took place on 29 November and a Greek translator was present. The claimant attended the meeting. He was asked about a potential return to work and said that he would like to return when he felt better. He said that his diabetes was controlled, and that his osteoarthritis came and went, but he had medication for it and "it is ok". He said that he could only work 8 hours, and no longer, because of his health. He also said that he did not want to attend any more meetings about the grievance and disciplinary appeals.

129. On 5 January 2023 the claimant resigned by way of a resignation letter containing the following:

"*It is with great regret that I hereby give my notice of resignation of employment with DHL. Today 5th January 2023 will be the first day of my notice period. My mental health and wellbeing continue to deteriorate and be affected with ongoing work related issues. After a consultation with my GP and advice given I feel I have no alternative to resign as my mental health and wellbeing has to be a priority.*

I would like to take this opportunity to thank DHL for my employment over the many years that I have worked for them."

130. In his evidence to the Tribunal, when asked why he had resigned on 5 January 2023, given that the events about which he complains in his constructive dismissal claim took place several months before his resignation, he said that it was because his mental health had deteriorated and his doctor had advised him not to go back to the work place.

131. After leaving the respondent's employment the claimant obtained other work as a driver. His new work involved working shifts lasting up to 15 hours and which started at different times of the day and included night work.

132. The hours that drivers are allowed to work are strictly regulated. Drivers are not legally permitted to drive for more than 9 hours a day, except on no more than 2 days a week when they are allowed to drive for up to 10 hours. There are also strict rules on rest periods for drivers. They are however permitted to work for up to 15 hours a day, provided that their driving hours do not exceed the legal maximum and they take the necessary breaks and rest periods.

The Law

Indirect discrimination

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

"*(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply , it to persons with whom B does not share the characteristic.

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are –

….
disability;
….
Race….."

Reasonable adjustments

134. Section 20 of the Equality Act 2010 states as follows:-

"(1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A*

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…"

135. Section 21 of the Equality Act 2010 provides that:-

"*(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

(2) A discriminates against a disabled person if A fails to comply with a duty to make reasonable adjustments…"

136. The importance of a methodical approach to reasonable adjustments complaints was emphasised by the EAT in ***Environment Agency v Rowan*** **[2008] ICR 218** and in ***Royal Bank of Scotland v Ashton*** **[2011] ICR 632**, both approved by the Court of Appeal in ***Newham Sixth Form College v Sanders*** **[2014] EWCA Civ 734. 65**.

137. Assuming that the claimant is a disabled person, the following are the key components which must be considered in every case:

1. What is the provision, criterion or practice ("PCP") relied upon?

2. How does that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

3. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?

4. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

5. Is the claim brought within time?

138. Paragraph 6.28 of the Equality and Human Rights Commission's Code of Practice on Employment (2011) sets out factors which it is reasonable to take into account when considering the reasonableness of an adjustment. These include:-

1. The extent to which it is likely that the adjustment will be effective;

2. The financial and other costs of making the adjustment;

3. The extent of any disruption caused;

4. The extent of the employer's financial resources;

5. The availability of financial or other assistance such as Access to Work; and

6. The type and size of the employer.

<u>Harassment</u>

139. Harassment is defined in section 26 of the Equality Act as follows:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) The conduct has the purpose or effect of –
(i) Violating B's dignity, or
(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b),each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect…"

140. In deciding whether the claimant has been harassed contrary to section 26 of the Equality Act, the Tribunal must consider three questions:

b. Was the conduct complained of unwanted:
c. Was it related to the protected characteristic; and
d. Did it have the purpose or effect set out in section 26(1)(b).

Richmond Pharmacology v Dhaliwal [2009] ICR 724*.*

141. The two stage burden of proof set out in section 136 Equality Act (see below) applies equally to claims of harassment. It is for the claimant to establish facts from which the Tribunal could conclude that harassment had taken place.

142. In ***Hartley v Foreign and Commonwealth Office Services [2016] ICR D17*** the EAT held that the words 'related to' have a wide meaning, and that conduct which cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it. The Tribunal should evaluate the evidence in the round, recognising that witnesses will not readily accept that behaviour was related to a protected characteristic. The context in which unwanted conduct takes place is an important factor in deciding whether it is related to a protected characteristic (***Warby v Wunda Group plc EAT 0434/11***).

<u>Victimisation</u>

143. Section 27 of the Equality Act states as follows:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

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

144. Although Tribunals must not make too much of the burden of proof provisions **(*Martin v Devonshires Solicitors [2011] ICR 352*)**, in a victimisation claim it is for the claimant to establish that he has done a protected act and has suffered a detriment. There needs to be some evidence from which the Tribunal could infer a causal link between the protected act and the detriment, for example, the detriment occurs soon after the protected act, or others were not treated in the same way.

145. It has been suggested by commentators that the three stage test for establishing victimisation under the pre-Equality Act legislation, endorsed by Baroness Hale in ***Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] ICR 841*** can be adapted for the Equality Act so that it involves the following questions:

1. Did the alleged victimisation arise in any of the prohibited circumstances set out in section 27?
2. If so, did the respondent subject the claimant to the alleged detriment(s)?
3. If so, was the reason the claimant was subjected to the detriments that the claimant had done, or might do, a protected act?

146. Following the decision of the House of Lords in ***Nagarajan v London Regional Transport [1999] ICR 877*** it is not necessary in a victimisation case for the Tribunal to find that the employer's actions were consciously motivated by the claimant's protected act. Victimisation may occur if the discriminator was subconsciously affected by the protected act, and it had a 'significant influence' on his or her treatment of the claimant. An employer can be liable for an act of victimisation even where the motives for the treatment of the claimant are benign.

Constructive unfair dismissal

147. Where an employee resigns, as the claimant in this case did, he can still claim unfair dismissal if he can establish that his resignation falls within section 95(1)(c) of the Employment Rights Act 1996, which provides that:

"*(1) For the purposes of this Part an employee is dismissed by his employer if….*

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

148. The questions that the Tribunal needs to consider in a constructive dismissal claim in which, as in this case, the claimant alleges that the respondent breached the implied term of trust and confidence, are:

1. Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;
2. Did the respondent have reasonable and proper cause for doing so;
3. Did the claimant resign in response to the breach of contract by the respondent; and
4. Did the claimant affirm the contract before resigning?

(***Western Excavating (ECC) Ltd v Sharp 1978] ICR 221, CA*** and ***Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) [1997] ICR 606***)

149. It is well established that a course of conduct by an employer can, when looked at as a whole, amount to a fundamental breach of contract even if the 'last straw' incident which prompts the employee to resign is not in itself a breach of contract (***Lewis v Motorworld Garages Ltd [1986] 157 CA***).

Conclusions

150. The following conclusions are reached on a unanimous basis.

<u>Indirect race discrimination</u>

151. The first question in the indirect discrimination claim is whether the respondent applied a PCP of holding meetings and important conversations in English without a suitable interpreter. The respondent denies applying the PCP generally, and also denies applying it to the claimant.

152. The respondent's position, in summary, is that:

1. The claimant has a sufficient level of English that he can participate in work related conversations without the need for an interpreter and for someone who can participate in English a 'suitable interpreter' means no interpreter;

2. On 8 July Ms Vazheva was present and able to interpret if the claimant needed it; and

3. The respondent's policy is to provide interpreters where they are requested and required.

153. We accept that the respondent's normal approach is to hold work related conversations in English. For many years this did not appear to cause the claimant

any difficulties. He was able to communicate with his managers in English and to discuss his health both with his managers and with occupational health.

154. On the evidence before us we find that the first time the claimant asked for an interpreter was for the grievance hearing. This was some 9 years after his employment had started and there was no evidence before us to suggest that the claimant had asked for an interpreter prior to the events that this claim is about, which all took place in 2022.

155. As soon as the claimant put in a request for an interpreter it was granted. Interpreters were then arranged for any subsequent meetings, including health related meetings, and for the grievance hearing. Ms Dean also told the claimant that an interpreter could be provided to help the claimant with emails.

156. Even before the grievance hearing the claimant was able to request interpreting services or bring someone who could interpret to a meeting if he wished to do so.

157. The respondent's normal policy where an employee does not speak English as their first language and may need help with translation, is to try and find a colleague who speaks the relevant language, and to ask them to help. If that is not possible, then the respondent will look to source an interpreter externally.

158. We find that the respondent did not have a practice of holding meetings and important conversations in English without a suitable interpreter. This is evidenced by the fact that Ms Vazheva was present and available to interpret for the claimant as needed at the meetings on 12 April and 8 July. The respondent took steps to enable her to attend on 8 July by agreeing to pay her salary for the time that she was at the meeting.

159. As soon as the claimant requested a professional interpreter, one was provided for him. This in our view demonstrates that the respondent would provide an interpreter if asked to do so. Where an employee has worked and, it appears, communicated successfully in English for a number of years, it is not in our view unreasonable for an employer to assume that he can continue to do so until it is told or there is evidence to suggest otherwise. There was no evidence before us to suggest that the claimant had ever requested or suggested the need for an interpreter previously.

160. Notwithstanding our finding on this issue, we have nonetheless considered whether the respondent applied the alleged PCP on the occasions relied upon by the claimant.

161. On 8 July Ms Vazheva was present and able to interpret for the claimant. In the circumstances at the time she was a suitable interpreter. She is a fluent Greek speaker who has lived in Greece for many years and has a Greek mother. Moreover the claimant was represented by his trade union at the meeting, and neither the claimant nor his trade union representative raised any concerns at the time about the lack of a professional interpreter. They appear to have been happy to proceed with the meeting using Ms Vazheva to interpret as and when required.

162. Turning next to 10th July, the conversation that day was not a formal meeting, and the respondent could not reasonably have anticipated what was going to happen. Whilst the conversation between the claimant and Ms Pickard could not be described as a normal day to day interaction, it was a conversation about work. There was no indication that the claimant struggled to discuss his routes or normal work matters, and indeed he had communicated with Ms Pickard in English about work matters for some time previously. It is difficult to see how the respondent could have arranged an interpreter for what was an unexpected conversation, unless it had one present all the time whilst the claimant was at work, which would have been unnecessary given the claimant's ability to communicate in English about normal work matters, There was no evidence before us to suggest that the claimant struggled to understand what Ms Pickard said to him that day, on the contrary he gave evidence about what she had said to him. One of his key allegations in this claim was about comments allegedly made by Ms Pickard during a conversation when only he and she were present. He appeared to the Tribunal to have understood the conversation.

163. The final occasion on which the claimant alleges that the respondent applied the PCP was the 20th July when he went into work and had a brief conversation with Ms Pickard. Again, this was an unexpected conversation so it is difficult to see how the respondent could have foreseen it or arranged for an interpreter to be present. There was no suggestion by the claimant that he didn't understand what was being said that day.

164. For the above reasons we find that the respondent did not apply a PP of holding meetings and important conversations in English without a suitable interpreter on any of the occasions alleged.

165. In light of our findings on the questions above, it has not been necessary for us to consider the questions of group disadvantage and individual disadvantage to the claimant.

166. The claim for indirect race discrimination fails and is dismissed.

Reasonable adjustments claim

167. The PCP relied upon for this claim was the requirement to drive more than 10 hours during a shift. The respondent says that it did not apply this PCP, and indeed that it would have been unlawful for it to do so.

168. We accept the evidence given by Mr Davidson that the maximum daily driving time permitted for drivers is 9 hours a day, except on 2 days a week, when they are allowed to drive up to 10 hours a day. There was no evidence before us of the respondent asking the claimant or other drivers to drive more than 10 hours a day.

169. We find that the respondent did not apply a PCP of requiring drivers to drive more than 10 hours during a shift. It would have been unlawful for it do so because of the legal restrictions on driving hours for HGV drivers

170. The claimant did not adduce any evidence to suggest that he had been required

to drive for more than 10 hours a day. In fact his real complaint, it seemed to us, was being required to work for more than 10 hours a day. That was not the claim before us however. The list of issues, agreed by the claimant's then solicitor, set out clearly that the PCP relied upon for the indirect discrimination claim was the requirement to drive for more than 10 hours a day.

171. The claim for reasonable adjustments therefore fails at the first hurdle because the respondent did not apply the PCP that was before us in this case.

Harassment

172. There are two allegations of harassment before us. The first relates to the 10 July 2022 when the claimant alleges that Laura Pickard told him to "fuck off" and "leave the yard now, now" whilst making offensive hand gestures to him .

173. As set out in our findings of fact above, we find that the alleged behaviour did not in fact happen. We accept that there was a conversation between Ms Pickard and the claimant on 10 July, but it did not happen as described by the claimant.

174. Moreover, the claimant's suggestion that Ms Pickard's treatment of him that day was related to disability because he was experiencing difficulty walking and needed to take a break and sit down, is not supported by the evidence before us. The CCTV footage did not show the claimant sitting down or having any visible difficulty walking. We find that Ms Pickard acted as she did on 10 July because she believed that the claimant was unreasonably refusing to do the run that been allocated to him.

175. The second allegation of victimisation relates to events on 20 July, which the claimant says are related to race because Ms Pickard ignored his comments due to English not being his first language.

176. There was no evidence before us to suggest that Ms Pickard did ignore the claimant’s comments that day because English was not his first language. The claimant and Ms Pickard regularly communicated in English, as they did on 20 July. Ms Dean’s evidence, which we accept, was that the claimant communicated clearly in English that day.

177. Whilst we accept that the claimant was upset at being asked to leave site, and subsequently escorted off the premises by security, it cannot in our view be said that the comments made by Ms Pickard on 20 July had the purpose of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Whilst being told to leave and escorted off site may very well have had that effect, Ms Pickard’s behaviour was not related to race.

178. We find that Ms Pickard did act in a professional manner that day and the reason she asked the claimant to leave site, and subsequently asked security to escort him off was because she genuinely believed that the claimant was suspended and should not have been on site. It is regrettable that Tyrone Fox did not tell Ms Pickard that the claimant's suspension had been lifted, but we accept that she did not know that at the time.

179. Ms Pickard's behaviour on 20 July was not related to the claimant's race – the claimant was able to communicate that day. Rather the reason for Ms Pickard's actions that day were that she believed the claimant should not have been on site when he was suspended and had been advised by Ms Dean in HR to ask him to leave.

180. The claim for harassment is therefore not well founded and fails.

Victimisation

181. The respondent admits that the claimant did a protected act falling within section 27 of the Equality Act 2010 when he raised a grievance on 23 July 2022 in which he complained of discrimination.

182. The question we have had to decide therefore is whether the respondent's refusal to allow the claimant to bring a friend to the grievance meeting (which we find took place on 19 August not on 10 August as suggested in the list of issues) was because he did the protected act.

183. In ***Warburton v Chief Constable of Northamptonshire Police [2022] EAT 42*** the EAT held that in a victimisation case, the correct test for the Tribunal to apply is whether the protected act had a "*significant influence*" on the outcome.

184. The claimant alleges that it was because he raised a complaint of discrimination that he was not allowed to bring his friend to the grievance hearing. The claimant had been allowed to bring another friend, Ms Vazheva, to the investigation and disciplinary meetings, and it is therefore understandable why the claimant believed that something had changed.

185. The difference however between the previous meetings and the grievance meeting was that the respondent had arranged a professional interpreter to attend the grievance hearing, at the claimant's request. Ms Vazheva had been permitted to attend the previous meetings because she had been providing help with interpretation. That was not required at the grievance hearing because of the attendance of the professional interpreter.

186. The respondent's disciplinary and grievance policy makes clear that employees are only entitled to be accompanied at disciplinary and grievance hearings by employee or union representatives. The friend that the claimant wished to bring to the grievance hearing was neither, and her presence would have been as an additional and personal support to the claimant.

187. It is clear from the emails between Ms Dean and the claimant in the run up to the grievance hearing, and from the respondent's previous practice at the investigation and disciplinary hearings that the respondent was not closed to the idea of the claimant bringing a friend, provided that the friend could also interpret. Once the respondent was able to source a professional Greek interpreter, there was no need for anyone else to attend. The claimant was already represented by his trade union who attended the grievance hearing with him.

188. We find that the raising of a grievance complaining of discrimination did not have a significant influence, or indeed any influence, on the respondent's decision not to allow the claimant's friend to attend the grievance hearing. That decision was taken because of the respondent's grievance policy and the facts that the claimant already had a union representative attending, and that a professional interpreter had also been booked.

189. The claim for victimisation therefore fails and is dismissed.

Constructive dismissal

190. The alleged breaches of contract relied upon by the claimant were:

1. The alleged discrimination, harassment and victimisation;

2. Asking the claimant to work between 15 and 19 April 2022 and then telling him he should not be working and not paying him properly;

3. Ignoring the claimant's request for a Greek translator at the disciplinary hearing and issuing him with a final written warning; and

4. Assigning the claimant a shift of 10 hours and 45 minutes on 10 July and the alleged behaviour of Laura Pickard after the claimant says he told Ms Pickard that he could not do the shift because it would have a negative impact on his osteoarthritis and diabetes.

191. We have, for the reasons set out above found that there were no acts of discrimination, harassment, and victimisation.

192. We accept that the claimant was asked to work between 15 and 19 April 2022 when he was suspended, that he was subsequently told he should not be working, and that he was not paid properly. The respondent has not challenged that evidence and admits that the claimant was not properly paid.

193. We find, on balance, that telling the claimant he should not have been working when a manager had asked him to work, was a breach of the implied duty of trust and confidence. Such behaviour was likely to seriously damage the relationship of trust and confidence. The respondent did not have reasonable and proper cause for acting as it did – the actions concerned were as a result of a breakdown in communication between the respondent's managers, such that the manager who put the claimant on the rota to work was not aware of the suspension.

194. The claimant understandably believed that when he was asked to work, he should do so. On other occasions when he had refused to work he was suspended and disciplined. It ill behoves this respondent, which subsequently disciplined the claimant for not working when he was asked to do so, to criticise him in April 2022 when he did work as asked.

195. We also find that the failure to pay the claimant properly for the hours that he worked in April 2022 was a breach of the implied duty of trust and confidence. Pay

is fundamental to the employment relationship and no explanation has been provided for the failure to pay the claimant properly. Whilst the respondent did admit at the start of these proceedings that it owed the claimant £235 for the work he did in April 2022 that admission came more than two and a half years after the underpayment in question.

196. Turning to the next alleged breach of contract, we find that the respondent did not ignore the claimant's request for a Greek interpreter at the disciplinary hearing on 8 July. The claimant did not ask for a professional interpreter, and was allowed to bring a friend, Ms Vazheva, to translate. The respondent took steps to facilitate her attendance by agreeing to pay her salary during the meeting.

197. We do find however that the claimant was issued with a final written warning in July 2022. We find that this decision was harsh because little if any consideration was given to the medical reasons which explained the claimant's behaviour on 1 April and in the following days. On balance we find that the issuing of the final written warning did amount to a breach of trust and confidence. Disciplinary action is likely to damage the relationship of trust and confidence and the respondent did not, in this Tribunal's view, have reasonable and proper cause for taking such a stringent approach as to treat the behaviour as gross misconduct and issue a final written warning. The claimant was a long standing employee and there was no evidence before us to suggest that there was any history of him not complying with instructions.

198. All of the members of the Tribunal were concerned about the approach taken by the respondent both in April 2022 (and again in July 2022). The claimant clearly had long term and serious health conditions, which had resulted in lengthy periods of sickness absence. He had been open with the respondent about these conditions and shared information from his GP. He was a long standing employee who clearly wanted to work, within the limitations imposed by his medical conditions

199. It is, in the Tribunal's view, surprising that the respondent moved so quickly to suspension and disciplinary action in relation to an employee who it knew or ought reasonably to have known, had restrictions on what he could do at work because of his health. Neither in April nor in July did any of the managers show any empathy or concern for the claimant.

200. The final alleged breach of contract relied upon by the claimant is the behaviour of Laura Pickard on 10 July and the decision to suspend him that day. For the reasons set out above, we have found that Laura Pickard did not behave as alleged on 10 July. We have also found that the claimant was able to understand what was happening that day.

201. We do however find that the decision to suspend the claimant on 10 July was harsh, particularly given that it took place just 2 days after the disciplinary hearing at which Laura Pickard had taken notes, when there had been a discussion about the limitations on the claimant's ability to work as a result of his health. No consideration appears to have been given on 10 July to why the claimant was not willing to do the Swindon run. It does not appear to have crossed Ms Pickard's mind that the reason he was refusing to do the run may be health related, and she did not ask him.

202. We therefore find that the decision to suspend the claimant on 10 July was a breach of the implied duty of trust and confidence.

203. The agreed List of Issues contained a further alleged breach of contract, described as the claimant alleging that his mental health deteriorated due to the way in which he was treated by the respondent. Whilst there was evidence before us that the claimant's mental health deteriorated, that seems to be a result or consequence of the treatment rather than a separate breach of contract by the respondent.

204. We have then gone on to consider whether the claimant waived any breach of contract such that he affirmed the contract.

205. The Tribunal recognises that resignation is a difficult and significant decision for any employee to make, particularly one in the claimant's position, with nearly 10 years' service and significant health issues. It is not a decision that can be taken lightly.

206. However, in this case the length of time that elapsed between the last breach of contract on 10 July 2022 and the claimant's resignation on 5 January 2023 was almost six months. Whilst we accept that the claimant was off work sick during that period, he did nonetheless take a number of steps to affirm the contract.

207. He raised a grievance on 23 July and attended a grievance hearing on 19 August. He subsequently raised an appeal against the outcome of that grievance and continued to engage in both the disciplinary and grievance appeal processes until the end of November 2022 when he told the respondent that he did not want to go to any more meetings. The claimant attended an occupational health review on 13 October 2022 and a health review meeting on 29 November 2022. During the health review meeting he was asked what his intentions for returning to work were and said that he would like to return to work when he felt better.

208. We therefore find that the claimant delayed too long in resigning from his employment and took a number of steps to affirm the contract before finally resigning. The claimant has therefore waived any breaches of contract.

209. The claim for constructive unfair dismissal therefore fails.

<u>Unauthorised deduction from wages</u>

210. The unauthorised deduction from wages claim succeeds due to the admission by the respondent. The respondent is ordered to pay the sum of £235 to the claimant.

Employment Judge Ayre

Date: 21 January 2025

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