EMPLOYMENT TRIBUNALS

Claimant: **Mr Neil Colbourne**

Respondent: **Johnsons Textile Services Limited**

Heard at: **Leicester**

Heard on: **13, 16,17 & 18 December 2024**

Before: **Employment Judge M Butler**

Members: **Mr K Rose**
Ms J Dean

Appearances:

Claimant: **Mr A Olatokun, Counsel**

Respondents: **Mr D Jones, Counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The Claimant was not disabled at the material time for the purposes of section 6 of the Equality Act 2010 and, accordingly, his claims of failure to make reasonable adjustments and unfavourable treatment as a consequence of something arising from disability are not well-founded and are dismissed.

2. The claim of automatic constructive unfair dismissal under section 100(1)(d) of the Employment Rights Act 1996 is not well-founded and is dismissed.

3. The claim of ordinary constructive unfair dismissal is not well-founded and is dismissed.

4. The claim of detriment after raising health and safety issues under section 44 of the Employment Rights Act 1996 is dismissed on withdrawal by the Claimant.

RESERVED REASONS

Background

1. The Claimant commenced employment with the Respondent on 2 June 2015 as a Routeman. His duties involved collecting garments from the Respondent's customers in a van, taking them to the Respondent's premises to be laundered and delivering the laundered garments to the customers after they had been cleaned. His employment terminated by resignation on 21 March 2023.

2. The Claimant submitted his claim form to the Tribunal on 2 June 2023 bringing claims of disability discrimination, ordinary constructive unfair dismissal and automatic unfair dismissal on health and safety grounds. At this hearing he withdrew his claim under section 44 of the Employment Rights Act 1996 ("ERA") but continued his claim under section 100(1)(d)(e) ERA claiming he resigned because he had to avoid a serious and imminent danger.

3. The Claimant claims to have been disabled at the material time by virtue of cervical spondylosis which he says was diagnosed in September 2022 but from which he had suffered for several years. He says this affected his ability to lift heavy objects, bend down and twist his back. The Respondent does not concede that the Claimant was disabled at the material time and consequently resists the claims for failure to make reasonable adjustments and unfavourable treatment as a result of something arising from his disability. The claim under section 100 ERA is resisted on the ground that, as the Claimant was not actually working at the time, there could not have been a serious and imminent danger and, in any event, none existed. The claims of constructive unfair dismissal are resisted on the ground that the matters relied upon did not happen or were not matters falling within the definition of a fundamental breach of the implied term of trust and confidence.

The Issues

4. There was an agreed list of issues but, after a discussion at the commencement of the hearing, these were amended and the finalised list of issues is set out below.

LIST OF ISSUES

"**DISABILITY (s.6 EQA 2010)**

Status

1. Was the Claimant a 'disabled person' within the meaning of s.6 EQA 2010 by virtue of Cervical Spondylosis at the material time (1 September 2022 - 21 March 2023)?

2. Did the physical impairment (Cervical Spondylosis) have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

3. Had the Claimant's physical impairment lasted 12 months or was it likely to last 12 months or more thus considered to be 'long term'?

4. If so, from when?

Knowledge

5. Did the Respondent know or ought reasonably to have known that Claimant was a 'disabled person'?

6. If so, from when?

<u>FAILURE TO MAKE REASONABLE ADJUSTMENTS</u> (s.20 EQA 2010)

Duty

7. From what date might the Respondent be reasonably have expected to comply with its duty to make reasonable adjustments?

PCP

8. Did the Respondent apply the following PCP to the Claimant's employment:

    8.1 Requiring employees to work on/carry out their routes alone.

Substantial disadvantage

9. If so, did the PCP put the Claimant at a substantial disadvantage in the following way(s) in comparison to with persons who are not disabled?

    9.1 Not being able to carry-out his role, despite being fit to do so with the assistance of a colleague for his 2-month phased return to work;

    9.2 A risk of worsening his condition;

    9.3 A risk of exacerbating his symptoms.

Knowledge

10. Did the Respondent and ought it reasonably to have known that the application of the PCP was likely to put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

Reasonable steps

11. If so, did the Respondent take such steps as was reasonable to have taken to avoid the disadvantage including but not limited to allowing a colleague to assist the Claimant in his duties for a period of 2 months?

<u>UNFAVOURABLE TREATMENT</u> (s.15 EQA 2010)

12. Was the Claimant unable to work on his route alone/without assistance?
13. If so, did such inability arise in consequence of his disability?
14. If so, was the Claimant subject to the following treatment?
    - 14.1 The Claimant being overlooked for reasonable adjustments which would have assisted him;
    - 14.2 The Claimant being told numerous times that the Respondent could not facilitate a colleague to assist him for a period of 2 months by way of a phased return;
    - 14.3 The Respondent changing the Claimant's work start time as of the 23rd January 2023;
    - 14.4 The Claimant being told to go home by the Respondent on the 24th January 2023, because he would not sign a Return to Work Plan saying that he was happy to go out and carry out his route alone.
    - 14.5 On the 23rd February 2023, the Respondent refusing to pay the Claimant up until the date that a colleague was available to assist him;
    - 14.6 Exacerbated symptoms of his disability;
    - 14.7 Exacerbated stress, anxiety and depression.
15. Was any such treatment unfavourable?
16. If so, was the reason for the treatment the Claimant's inability to work on his route alone/without assistance?

UNFAIR DISMISSAL

Automatic constructive unfair dismissal (s.100(1)(d) ERA 1996)

17. Did the Claimant resign from his employment on 21 March 2023 in circumstances of danger which he reasonably believed to be serious and imminent which he could not reasonably have been expected to avert?

Ordinary constructive unfair dismissal (s.94 ERA 1996)

18. Did the Respondent conduct itself in the following way(s), without reasonable and proper cause?

18.1 In the invitation to the Claimant for his back to work meeting, the Respondent informing him that a potential outcome could be dismissal.

18.2 On the 19th January 2023, the Respondent allegedly informing the Claimant that it was "highly unlikely" for him to be able to have any assistance for the phased return for 2 months, and not being able to put this in place for a period of 2 weeks.

18.3 On the 23rd January 2023, the Respondent's HR Department informing the Claimant that a phased return could not be accommodated and it was not possible for a colleague to accompany him on his routes, along with asking him to keep obtaining sick notes from his GP in order to stay off work.

18.4 On the 23rd January 2023, in a meeting with Becki Ellis and Fred Styles, the Respondent changing the Claimant's start time due to customers not being open to receive deliveries, allegedly talking over the Claimant and becoming irate, and making him feel uncomfortable and cornered.

18.5 On 23 January 2023, requesting that the Claimant sign a document stating that he would be happy to fulfil his duties alone.

18.6 On the 24th January 2023, the Claimant allegedly being told to leave work by

Becki Ellis because he was unwilling to sign a sheet saying that was happy to go out and carry out his route alone.

18.7 The Claimant being signed off from work again on the 25th January 2023, due to work related stress.

18.8 On the 23rd February 2023, the Respondent's HR team informing the Claimant that they could allocate someone to work with him for the period of one week, but that this would not be until the 6th March 2023, or the 13th March 2023.

18.9 The Respondent's refusal to pay the Claimant up until the date that a colleague could assist him.

18.10 The Respondent informing the Claimant that if he was willing to go out and work on his own from the 27th February 2023, he would be paid.

18.11 On the 27th February 2023, the Respondent informing the Claimant that risk assessments had identified a low risk of any injury in his role.

18.12 The Respondent failing to adequately address the Claimant's grievance, particularly in his grievance meeting on the 14th March 2023.

19. If so, was any such conduct undertaken in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee?

20. If so, did the Claimant resign on 21 March 2023 in response to a breach of the mutually implied term of trust and confidence and not for another reason?

21. If so, did the Claimant nevertheless affirm the contract, whether by delaying too long in resigning, or by words or actions which demonstrated that he chose to keep the contract alive?"

The Evidence

5. We heard evidence from the Claimant and for the Respondent from Mr F Styles, Transport Supervisor, Mr T Wiggins, Health, Safety, Quality and Environmental Administrator and Mr A Kellaway, formerly General Manager at the Respondent's Hinckley plant. All witnesses provided witness statements and were cross-

examined.

6. There was also an agreed bundle of documents extending to 331 pages and references to page numbers in this Judgment are to pages in that bundle.

The Facts

7. In relation to the issues, we find the following facts on the balance of probabilities:

   7.1. The Claimant commenced employment with the Respondent on 2 June 2015. The Respondent's business is selling, renting and laundering industrial workwear garments. The Claimant was employed as a Routeman and his duties included loading workwear garments, mats and runners on to a vehicle in cages, driving to customers sites, unloading the items on the cages and delivering them to customers, collecting soiled garments from customers, loading them on the vehicle to return them to the Respondent's depot and unload them. The maximum weight the Claimant would ever have to lift was around 12kg.

   7.2. Although the Claimant claims to have suffered with cervical spondylosis since June 2016 there is no medical evidence of this for that period of time.

   7.3. On 9 September 2022 the Claimant commenced a period of sickness absence after complaining of pins and needles in his leg and back pain to Mr Styles on 2 September 2022. He visited his GP on 9 September 2022 when his GP diagnosed sciatica and referred him for an MRI scan. The scan was carried out on 19 October 2022 and he was subsequently seen by Professor Shad who examined him and diagnosed cervical spondylosis (page 286). The Claimant elected to continue with conservative treatment rather than surgery at that time. Professor Shad reported to the Claimant's GP that his symptoms were not long lasting and such pain symptoms resolved within 6 weeks in 90% of people. He noted that the Claimant walked unaided and exhibited no root tension or root compression signs.

   7.4. The Respondent carried out a risk assessment for the Claimant's role on 20 September 2022 (page 135-137).

   7.5. The Claimant remained on sickness leave and was referred to Occupational Health where he was assessed on 3 January 2023 (page 93-95). The report of the Occupational Health Advisor concluded that the Claimant was fit for work with adjustments which included a phased return to work over a 2 month period during which time he would need to avoid moderate to heavy manual handling. The report does not, as the Claimant suggests advise he receives assistance from a colleague whilst undertaking his duties.

   7.6. On 12 January 2023, the Claimant was invited to a capability meeting since he had been absence from work since 9 September 2022 (page 98). That meeting took place on 19 January and was chaired by Ms B Ellis of the HR Department. The minutes of the meeting were taken (pages 99-105). During the meeting the Claimant said, "*I am okay I am feeling good, I had back pain to start with then that went, and I had pins and needles in my left leg. I went to the Doctors who*

referred me for an MRI. I then sent the sicknotes in". He also said*, "I don't mind going out and doing my journey but not on my own, I will clean vehicles, anything. Two months is the worst case scenario and we are a month into that. If I give it two weeks and feel better and that I can do it myself I will say as I will say if I still need help after two weeks, I will advise how I feel".* The Claimant also confirmed that he had no pins and needles now, he trusted what his surgeon had told him and just wanted to come back to work. He also said, "*I do everything at home."* He raised the issue that the manual handling in his role was difficult because of lack of space between the cages on each side of the van he drove which meant he had to do bending and twisting. The Claimant also said that he did not need surgery and no longer had pins and needles in his leg.

7.7. On 20 January 2023 the Respondent wrote to the Claimant proposing a return to work on 23 January 2023 with a tailored adjustment plan attached (pages 109-111). The proposed adjustments included further training and a risk assessment, the provision of a trolley to avoid some lifting of items between the van and the customers premises and the provision of a plastic box with straps which workwear could be put into and he could pull into customers premises rather than carrying them. The plan indicated that it was not feasible to have a phased return to work gradually increasing his hours of work because the nature of the role was to complete deliveries and collections from a number of customers on a designated route each day and the Respondent did not have spare employees to put one of them to assist the Claimant.

7.8. The Claimant returned to work on 23 January 2023 and attended a return to work interview with Ms Ellis (page 113-115). The minutes of that meeting confirmed that the Claimant was told that a phased return over two months was not deemed practicable. It noted that the Claimant should receive training in manual handling and that a risk assessment should be completed. Ms Ellis advised the Claimant that the Respondent was not able to run his route double manned or provide a phased return given the nature of the role. The Claimant said that the proposed adjustments were not sufficient. Mr Styles, who attended the return to work meeting, tried to engage with the Claimant but the Claimant raised his voice and talked over Mr Styles. The Claimant said the trolley was a joke. The Claimant then went to see his union representative who he says advised him to go home a raise a formal grievance which he did the same day (page 123).

7.9. In his grievance, the Claimant said, *"I understand that a phased return is not possible due to the nature of the job but I do not understand why I am unable to have assistance for two weeks as this has been provided to me and other drivers in the past".*

7.10. After an exchange of emails with Ms Ellis, the Claimant attended work on 24 January 2023 and he was given health and safety training, fire safety training and a risk assessment was undertaken in respect of the Claimant's loading and unloading of his vehicle. In this assessment, the Claimant was observed loading and unloading the vehicle and it was noted he did not seem to be in any pain, had good posture and a good range of movement. The Claimant

continued to refuse to sign his return to work and adjustments document insisting that he needed someone else to accompany him on his deliveries.

7.11. On 26 January 2023 the Claimant informed the Respondent that he had been signed off work with work related stress (page 127). As a result of this, the Respondent referred the Claimant for a further Occupational Health Assessment on 20 February 2023 (page 140-142). The report said, *"… Neil's back is continuing to improve. He is continuing with physiotherapy and providing he is careful with posture and ensuring correct manual handling techniques are applied he is managing well generally and not requiring analgesia".* The report also said that the Claimant was fit to resume work on temporary adjustments as soon as possible.

7.12. On 23 February 2023 Ms Weedon, Regional HR Advisor, wrote to the Claimant advising him that there was an opportunity for the Claimant to accompany a new relief driver for one week to train them on his route so that they could provide holiday cover. The relief driver was to be available for the week commencing either the 6 or 13 March 2023. The email stated, "*We can then review your ability to drive on your own with the adjustments we have already proposed after that week".*

7.13. On 27 February 2023 the Claimant wrote to the Respondent saying he was *"withdrawing myself from an unsafe working environment and have reliance on the law in section 44 and the full rights it allows an employee".* With that letter he also enclosed a Government sponsored note on safe working conditions in the UK.

7.14. On 3 March 2023 the Respondent replied to the section 44 letter saying they did not consider that it was designed to operate in the way the Claimant suggested (page 155-156). The letter invited the Claimant to a capability meeting to be held on 14 March 2023 on the same day as his grievance meeting.

7.15. On 16 March 2023 the Claimant attended an appointment with his consultant who subsequently confirmed that the Claimant's symptoms with his leg had almost completed resolved and the Claimant was being discharged from the consultant's care (page 280-281).

7.16. The Claimant's grievance outcome was sent to him on 20 March 2023 (page 172-173) confirming that his grievance had not been upheld.

7.17. On 21 March 2023, the Claimant submitted his resignation (page 174-176).

7.18. The following day on 22 March 2023 the Claimant appealed against his grievance outcome (page 177).

7.19. The Claimant's grievance appeal hearing was scheduled for 30 March 2023 (page 179) but on 29 March 2023 the Claimant wrote to the Respondent saying he would not be attending the hearing and requested that it be held in his absence (page 180). This was done and on 6 April 2023 the grievance appeal outcome dismissing his appeal was sent to the Claimant (pages 183-184).

7.20. On 13 June 2023 the Claimant commenced employment with Royal Mail as a Post Person. He claimed to be able to do all necessary lifting and carrying in that job due to being able to carry out correct manual handling.

Submissions

8. Both Counsel made comprehensive oral submissions. We do not rehearse them here but confirm we took full account of them in reaching our conclusions. We refer to those submissions we found to be of particular relevance in our discussion and conclusions below.

The Law

9. Section 6 of the Equality Act 2010 ("EqA") provides:

"(1)A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1)".

10. Section 20 EqA provides:

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

(2)The duty comprises the following three requirements.

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

(4)The second requirement is a requirement, where a physical feature 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.

(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column".

11. Section15 of the EqA provides:

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

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

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

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

12. Section 94 of the Employment Rights Act 1996 ("ERA") provides:

"(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239)."

Section 95(1)(c) ERA provides that *an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*.

Section 100(1)(d) ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason is that -

in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have expected to avert, he left .... or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work ....

13. We have also had regard to the case law referred to in our discussion and conclusions below.

Discussion and Conclusions

14. We do not consider the claim of suffering detriments after raising health and safety

issues pursuant to section 44 ERA any further since this was withdrawn by the Claimant at the hearing.

15. In relation to the claim by the Claimant that he was disabled at the material time, we find some of his evidence to be unreliable. For example, in his witness statement at paragraph 3 he says he has suffered with cervical spondylosis since June 2016 and, as evidence of this, he refers us to pages 84 to 86 in the bundle. The only relevant document in relation to his medical condition at the time is at page 85 which is a fit note from his GP stating he was not fit for work due to sciatica. He says in his statement that, *"I am still taking medication for my disability namely Cocodamol".* However, his GP records show that the last time he was prescribed Cocodamol was July 2023. He was not diagnosed with cervical spondylosis until September 2022.

16. But we found the most unreliable part of his evidence has its origins in his impact statement which was submitted in November 2023 (page 204-207). In that statement, he changes his evidence suggesting that he suffered from cervical spondylosis since 4 February 2016 whereas in his witness statement he says he suffered with that condition since June 2016.

17. More importantly the impact statement submitted in November 2023 is written in the present tense wherein the Claimant says, *"I suffer with bodily pain to include pain around the shoulder blade which runs along the arm and down in the fingers; increasing pain during standing, sitting, sneezing, coughing, or bending the neck backwards; muscle weakness making it difficult to lift the arm or grasp things and stiffness".* His impact statement continues to describe that his *"condition"* affects him in the following ways: *"(a) difficulties walking – I struggle to walk short distances as the pressure, strain and swelling on my knees affects my mobility. I also struggle to walk at pace due to the pain in my lower back and down my legs".* He goes on to describe difficulties with shopping saying, "*Due to the severe pain that I struggle with I am unable to carry items as it causes strain on my body, nor am I able to push a trolley around the stores due the pain I receive in my lower back and legs. I often rely on my family to shop for me or have my items delivered".* In relation to lifting and carrying, he says, *"I cannot reliably carry an object of moderate weight in one hand without readjustment and swopping the object to another hand, like a bag of shopping".* He then describes difficulties he has with household chores, climbing stairs, manual dexterity and reaching, sitting or standing continuously in one place and with sleep and selfcare.

18. All of these difficulties and consequences post-date his discharge by his consultant after appointment in which he said his issues has almost completely resolved. Further, this statement post-dates his evidence that he began work as a Post Person in June 2023 which role he said in evidence involves walking up to 10 miles a day. When challenged on this, he said he could bend down without any problem as he had had correct manual handling training and had long arms.

19. All of this evidence, as inconsistent as it is, leads us to the conclusion that it is unreliable.

20. However, we remind ourselves that in determining the question of disability, it remains good practice to state conclusions separately on the questions of impairment, adverse effect and substantiality and long-term nature (***Goodwin v***

Patent Office [1999] ICR 302). Further, impairment is to be given its ordinary meaning without more. Where the presence of a disputed impairment is not clear, it may be left until after the analysis of long-term substantial effects. In ***J v DLA Piper UK LIp [2010] ICR 1052,*** Underhill P said, "*Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense…. to start by making findings about whether the Claimant's ability to carry out normal day to day activities is adversely affected on (a long-term basis), and to consider the question of impairment in the light of those findings"*. In ***Herry v Dudley Metropolitan Borough Council UKEAT/0100/16/LA,*** HHJ Richardson said, *"An Employment Tribunal might start with a question whether the Claimant's ability to carry out normal day to day activities had been impaired. This would assist it to resolve, in difficult cases, whether an impairment existed"*. We bear in mind under the guidance made pursuant to section 6 subsection 5 of the EqA that, "substantial" means more than minor or trivial. Although this is a relatively low threshold, the Claimant carries the burden of showing it. The focus in an assessment of disability should be on what an employee cannot do or can only do with difficulty and not on what they can do. In this case, however, the Claimant gives evidence of things he cannot do several months after he began work physically carrying out those things. Even in his risk assessment when he was returning to work, the Respondent's evidence, which we accept, is that he completed his normal duties of loading and unloading a van without apparent difficulty. It is our view that the Claimant's evidence has been exaggerated for the purposes of this claim. Accordingly, we do not find his difficulties in carrying out day to day activities were substantial and the medical evidence suggests they were resolved before they could satisfy the requirement of being long-term.

21. Accordingly, we find the Claimant was not disabled for the purposes of section 6 EqA which also mean that we dismiss his claims under section 20 and section 15 EqA.

22. The claim under section 100(1)(d) ERA in our view cannot succeed. The Claimant's letter to the Respondent saying he refused to return to work does not on the evidence amount to a reasonable belief on his part that he would be exposed to a serious and imminent danger rather that it was something put in his mind by his union representative. In ***Rodgers v Leeds Laser Cutting Ltd*** both the Tribunal and the EAT held that the Claimant could not demonstrate a reasonable belief that there were circumstances of serious and imminent danger at work during the Coronavirus epidemic which meant he could not risk the virus being transmitted to him which he would then take into his home where one of his children had sickle cell disease. The EAT upheld the Tribunal's Judgment and added that there was unlikely to be a serious and imminent danger where the employer had taken reasonable steps to prevent there being one in the first place.

23. In this case, the Respondent had carried out a risk assessment which concluded there were no issues with the Claimant continuing his duties and he had been offered assistance for a week on his return to work so that his progress could be monitored. The Claimant's exaggeration of his symptoms and his evidence generally leads us to conclude there was no serious or imminent danger at all. Accordingly, this claim is not well-founded and is dismissed.

24. In relation to what we referred to as ordinary constructive unfair dismissal under section 94 ERA we consider whether the Respondent fundamentally breach a term

of the Claimant's contract of employment largely by reference to the implied term of trust and confidence. We bear in mind section 94 ERA and the decision of the Court of Appeal in ***Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA***.

25. In Western Excavating, the Court of Appeal held that the test for constructive unfair dismissal involves:

    (i) There must be a breach of contract by the employer.

    (ii) The breach must be sufficiently serious, namely a repudiatory or a fundamental breach, or the last of a series of breaches, which taken together forms sufficiently serious conduct by the employer.

    (iii) The employee must leave as a result of the breach.

    (iv) The employee must not waive or affirm the breach, for example, by delaying in resigning and terminating his employment.

26. The breaches the Claimant relies upon to support his claim of constructive unfair dismissal are at paragraph 18 of the list of issues. Some of these matters simply cannot amount to a breach of contract let alone a fundamental breach. For example, at paragraph 18.1 the Claimant says at his back to work meeting he was informed that a potential outcome could be dismissal. In fact, this was a capability meeting and it is standard practice to alert employees that continued absence may result in dismissal on capability grounds. The Claimant had by this time (19 January 2023) been absent from work for several months. In paragraph 18.4 the Claimant complains that he was told to start his deliveries later and when he complained Mr Styles became irate and raised his voice. We accept the Respondent's evidence that there had been complaints by customers that the Claimant arrived too early in the morning to make his deliveries when their premises were not open or attended. We accept the Respondent's evidence that it was the Claimant who raised his voice and talked over Mr Styles. As regards paragraph 18.6, we do not accept the Claimant was told to leave work by Ms Ellis and in relation to paragraph 18.7 the act of the Claimant being signed off work on 25 January 2023 due to work related stress was not conduct of the Respondent and so not a breach of any term of his contract of employment.

27. Clause 18.11 of the list of issues cannot amount to a fundamental breach of the implied term of trust and confidence. Risk assessments had in fact identified a low risk of any injury to the Claimant in carrying out his role and we accept their evidence. In relation to the Claimant's grievance referred to at paragraph 18.12, we considered that this was taken seriously by the Respondent and was properly addressed.

28. Paragraphs 18.2 and 18.3 refer to the Respondent advising the Claimant that they would not be able to accommodate a phased return to work for 2 months or put in place another employee to assist him with his deliveries and collections. The Respondent's evidence was that there was economic pressure to control expenditure to maintain profitability and, given the number of deliveries required to be completed by drivers each day there was no scope to reduce the Claimant's number of deliveries as this would leave deliveries which could not be completed by other drivers who were fully engaged with their own deliveries. We accept the Respondent's evidence that it was not possible to allocate another employee to assist the Claimant due to

the number of deliveries undertaken each day and the number of drivers available to make them. As the Claimant continued to maintain he could not carry out his duties, it was appropriate for the Respondent to ask him to continue providing fit notes from his GP. None of these matters amount to breaches of any terms of the Claimant's contract of employment.

29. In paragraph 18.5, the Claimant complains that he was asked to sign a document stating that he would be happy to fulfil his duties alone. This is something of an exaggeration given that it followed on from a meeting where adjustments which could and could not be made by the Respondent were explained to him. This was a document which he was asked to sign as a record of the meeting with Ms Ellis and Mr Styles and not a standalone document requiring him to sign it or not work as he seems to indicate.

30. In relation to clause 18.8 where the Respondent's HR Team on 23 February 2023 informed the Claimant that they could allocate someone to work with him for a week from 6 March 2023 or 13 March 2023 this cannot amount to a breach of contract since it effectively goes someway to providing the adjustment the Claimant wanted. If the Claimant refused to work, which he did, without the adjustments the Respondent could not make, it seems to us to be perfectly reasonable that the Respondent would not wish to pay him when he refused to attend work. It is also reasonable for the Respondent to inform the Claimant that he would be paid if he returned to his role which, as we have already found he was able to do following the risk assessment which said the risk of injury to him was very low and he seemed perfectly capable of carrying out his duties.

31. We do not find, therefore, that there was any repudiatory breach of contract by the Respondent which entitled the Claimant to resign either with or without notice. Accordingly, the claim of ordinary constructive unfair dismissal is dismissed.

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Employment Judge M Butler

Date: 29 January 2025

JUDGMENT SENT TO THE PARTIES ON

.....13 February 2025.....

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FOR THE TRIBUNAL OFFICE

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