



EMPLOYMENT TRIBUNALS

Claimant: Mr C J Tucker

Respondent: Gaiger Brothers Limited

Heard at: in person at the Bristol Employment Tribunal

On: 7, 8, 9 October 2024

Before: Employment Judge Woodhead
Mr K Sleeth
Ms J Cusack

Appearances

For the Claimant: Mr R Lassey (Counsel)

For the Respondent: Mr J Lewis-Bale (with Mr T Prees – Solicitor and Ms V Whitaker - paralegal)

JUDGMENT WITH REASONS

1. The unanimous decision of the Tribunal is:
 - 1.1 The complaint of indirect disability discrimination is not well-founded and is dismissed.
 - 1.2 The complaint of indirect age discrimination is not well-founded and is dismissed.
 - 1.3 The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.
 - 1.4 The complaint of constructive unfair dismissal is not well-founded and is dismissed.
 - 1.5 The complaint of failure to provide a written statement of employment particulars is not well-founded and is dismissed.
 - 1.6 The complaint of wrongful dismissal (notice pay) is not well-founded and is dismissed.

REASONS

THE ISSUES

2. The Claimant notified ACAS of the dispute on 6 April 2023 and the certificate was issued on 5 May 2023. By way of a claim form dated 11th August 2023, the Claimant brings the following complaints:
 - 2.1 Indirect Disability Discrimination, contrary to sections 19 and 39 of the Equality Act 2010 (“**the EqA**”);
 - 2.2 Indirect Age Discrimination contrary to sections 19 and 39 of the Equality Act 2010;
 - 2.3 Failure to Make Reasonable Adjustments, contrary to sections 21 and 39 of the Equality Act 2010;
 - 2.4 Constructive Unfair Dismissal, contrary to sections 94, 95(1)(c) and 98 of The Employment Rights Act 1996;
 - 2.5 Wrongful Dismissal, contrary to common law; and
 - 2.6 Failure to provide a Statement of Written Particulars, contrary to s.1 of The Employment Rights Act 1996
3. The issues to be determined by the Tribunal in respect of those claims were agreed at a preliminary hearing before Employment Judge Bax on 1 February 2024 [73 - 79] “**the Preliminary Hearing**” with some amendments made not long afterwards. Those issues as discussed and agreed with the parties at this final hearing is reproduced in the Appendix to this Judgment.

THE HEARING

4. This claim was listed for a hearing of three days at the Preliminary Hearing. A further hearing on the question of disability had also been listed at the Preliminary Hearing but the Respondent in the event conceded that the Claimant, at the material times, had the alleged disabilities of asthma and Chronic Obstructive Pulmonary Disease (“**COPD**”) [97].
5. The claim was listed to deal with liability and remedy (as necessary) but it was agreed with the parties that, given the time available, we would in fact only determine liability.
6. At the start of the hearing we were provided with:
 - 6.1 A bundle totalling 232 pages (with a further 26 pages being added during the course of the hearing with the agreement of both parties) (pages indicated by []);

- 6.2 A witness statement from the Claimant totalling 9 pages (references indicated with CWS[]) the Claimant also swore his disability impact statement [40-41];
- 6.3 A witness statement for Mr G Gaiger (a director or and respondent for the Respondent) of 4 pages (references indicated with GGWS[]).
7. A provisional timetable had been agreed at the Preliminary Hearing and we kept this under review with the parties as the hearing progressed.
8. We completed our reading on the first morning (Monday 7 October 2024) having seen the parties and then heard the evidence of the Claimant in the afternoon. On the morning of the second day (Tuesday 8 October 2024) we heard the evidence of Mr Gaiger. In the afternoon we read the written submissions of both parties and heard their additional oral submissions. We told them that we would endeavour to give an oral decision in the afternoon of Wednesday 9 October 2024 but could not guarantee that it would be possible. We undertook to update the parties at midday.
9. We made clear that the Claimant, and anyone else participating in the hearing, could ask for breaks if they felt they needed them. The Claimant uses a hearing aid and we made clear that it was important that he could hear what was being said throughout the hearing and that he should let us know if he did not hear anything.
10. We reminded witnesses under oath that they were not permitted to communicate with others about the case during breaks or adjournments while they were giving evidence under oath.

FINDINGS OF FACT

11. Having considered all the evidence, we find the following facts on a balance of probabilities.
12. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

Respondent

13. The Respondent is a family-owned company which trades as building contractors. It has one office and 73 employees, 75% of whom work out on site. Three Gaiger brothers are directors of the company, Sam (who focuses on finance rather than day to day operational matters) and James and Graham who are more involved in day to day operations and personnel matters.

Policies

14. Health and safety are a significant concern and focus in the construction industry.
15. In 2017 the Respondent moved to a new yard and undertook induction training, which included training on health and safety matters, with the workforce in

respect of the new yard. The Claimant was included in that training and signed to confirm that he had received Site Induction and agree to adhere to all the Site Rules. He confirmed that he had read through the Company Safety Policy and would abide by it [115].

16. We were provided with the Respondent's health and safety policy [118 – 192] and were taken to the following provisions:

[121]

Employees' Responsibilities

Employees must ensure that they:

- co-operate with management to enable all statutory duties to be complied with*
- take reasonable care of their own health and safety and the health and safety of others who may be affected by their acts or omissions*
- familiarise themselves with the health and safety arrangements that apply to them and their work functions.*

Full details of the organisation and arrangements for health and safety will be set out in the remainder of this document.

[149]

Managers' and Supervisors' Duties

Managers or supervisors will ensure:

- 1. Assessments are carried out where relevant and records are kept;*
- 2. Control measures introduced as a result of assessments are implemented, understood and followed;*
- 3. Employees are consulted with, informed of the relevant results and provided with necessary training;*
- 4. Any injuries or incidents are followed by a review of relevant assessments;*
- 5. Employees adhere to safe systems of work;*
- 6. Safety arrangements are regularly monitored and reviewed;*
- 7. Employees identified by the assessment as being at risk are provided with appropriate health surveillance;*
- 8. Special arrangements are made, where necessary, for vulnerable persons.*

[166]

It is our policy to:

- *Carry out risk assessments under the Management of Health and Safety at Work Regulations and any other applicable Regulations in order to decide if health surveillance is appropriate.*
- *Place affected employees under suitable health surveillance where the risk assessment(s) indicate that health surveillance is appropriate.*

[168]

Respiratory Disorders

Chronic Obstructive Pulmonary Disease (COPD)

Chronic Obstructive Pulmonary Disease (COPD) is a long-term illness that makes breathing difficult. The lungs and breathing tubes are damaged making it difficult to get air in and out.

Common symptoms include;

- *a persistent chesty cough and phlegm*
- *wheeze*
- *more frequent and troublesome chest infections*

COPD is a slow developing condition; the symptoms tend only to start becoming a problem in mid-life, usually in the late forties onwards.

A wide variety of dust or fumes have the potential to cause COPD if exposure is high and over a long period of time, for example studies suggest the following substances have the potential to cause COPD;

- *Hardwood dust*
- *Mineral dust*
- *Silica dust*
- *Solvent fumes in paint*
- *Welding Fumes*

Some of these occupations and substances are also linked to other diseases, for example, welding fume can cause fume fever and pneumonia. Some can also cause occupational asthma.

Occupational Asthma

Breathing in substances called respiratory sensitisers at work can cause occupational asthma.

A respiratory sensitiser is a substance which when breathed in can trigger an irreversible allergic reaction in the respiratory system. Once

this sensitisation reaction has taken place, further exposure to the substance, even to the tiniest trace, will produce symptoms. Sensitisation does not usually take place right away. It generally happens after several months or even years of breathing in the sensitiser.

The symptoms are:

- asthma - attacks of coughing, wheezing and chest tightness*
- rhinitis and conjunctivitis - runny or stuffy nose and watery or prickly eyes*

Once a person is sensitised, continued exposure can result in permanent damage to their lungs and increasingly severe symptoms. People with rhinitis may go on to develop asthma. Asthma attacks are likely to become worse and can be triggered by other things such as tobacco smoke, general air pollution or even cold air.

Respiratory sensitiser's are subject to the Control of Substances Hazardous to Health Regulations (COSHH). COSHH requires the substitution of harmful products with less harmful ones. If this is not possible then you must use adequate control measures.

Many substances and processes used in the workplace create dust and fumes. All dusts and fumes are a risk to health.

The company procedure is:-

- Adequate Information, instruction, training and supervision will be provided;*
- Avoid long term contact with machinery or tasks that would cause COPD/Asthma;*
- Suitable dust suppression should be provided with the machinery;*
- If you have any doubts about the substances or material you are to use, speak to your supervisor.*

Checks should include the following:

- Identify material or substances before use;*
- Read any information on packaging or containers or manufacturer's instructions;*
- Make sure you have been trained in the use of the equipment;*
- Clean and service all equipment after use following maintenance instructions.*

Protect the Operative. Select suitable equipment with dust suppression measures, and appropriate PPE as the last resort. When it is not possible to reduce the risk at source, respiratory equipment can safeguard health. It is available as:

- Disposable face masks;*
- Half mask respirators and full face respirators;*

- *Positive pressure powered respirators;*
- *Select the correct type of respiratory equipment;*
- *Use additional protection, such as gloves, goggles and overalls as necessary;*
- *Other equipment is designed for specialist work, e.g. in sewers;*

Check for early signs of COPD. A self assessment questionnaire will be issued and completed by each operative at least annually. Any symptoms or signs of COPD/Asthma should be brought to the attention of management. Specialist advice may be sought from an occupational health professional as necessary.

[184]

Manual Handling

(Relevant Regulations - The Manual Handling Operations Regulations 1992, as amended in 2002)

The company will endeavour to provide employees and sub-contract personnel with a safe and healthy working environment and recognises the importance of implementing the Manual Handling Regulations 1992. In all cases, a suitable and sufficient risk assessment will be carried out in accordance with the Regulations and training will be given. All personnel are to:

- *Avoid hazardous manual handling activities so far as is reasonably practicable.*
- *Assess any hazardous manual handling activities that cannot be avoided.*
- *Reduce the risk of injury, so far as is reasonably practicable.*
- *Provide or obtain information on the load to be handled.*
- *When considering how to deal; with manual handling activities, we will ensure that the below factors are addressed*
 - A. The task; (T)*
 - B. Individual capacity; (I)*
 - C. The load; (L)*
 - D. The working environment; (E)*
 - E. Other factors that may affect the activity; and*
 - F. Make full and proper use of handling aids*
- *Inform their supervisor of any physical or medical condition that might*

affect their ability to undertake manual handling operations in a safe and controlled manner.

• Inform a supervisor immediately of any injury incurred through manual handling.

Contract of employment

17. On balance of probabilities we conclude that the Claimant was issued with the contract of 21 February 2005 [98-100]:
 - 17.1 The Claimant conceded that it was possible that he had been provided with it but could not remember (which is understandable given the passage of time);
 - 17.2 Perhaps unusually the covering letter indicated that employees did not need to sign and return the contract. We find that this explains why it is not signed by the Claimant and we find that he was not the only person not to sign and return his new contract;
 - 17.3 We conclude that there was no email trail because it was issued by hand by Mr S Gaiger – as corroborated by the fact that the details in the contract have been completed by hand.

The Claimant and the requirements of his role

18. The Claimant had been storeman for 27 of the nearly 35 years of his employment.
19. As regards the Claimant's role as Storeman we find:
 - 19.1 First thing in the morning the Claimant was busy issuing stock to tradespeople who were then going out on site. This, together with the end of the day, was the busiest time.
 - 19.2 The stock that needed to be handled generally comprised of items up to 25kg in weight.
 - 19.3 It was not commonly necessary to handle heavier or bulkier items. Bricks and breeze blocks and similar materials would be delivered directly to the sites and almost never to the Claimant's stores. If there was a need to store larger items then it would be palletised and the Claimant would use a forklift truck to move them.
 - 19.4 The heavier items tended to be boxes of materials such as tiles or nails. A heavier item (of a maximum of 25kg) would rarely need to be moved more than once per day.
 - 19.5 Sacks of plaster, sand or cement would not generally be part of what the Claimant needed to move in the stores but sack trucks were used to move them if the need arose.
 - 19.6 During the middle of the day the Claimant would:

- 19.6.1 do paperwork associate with:
- 19.6.1.1 materials orders that he had made,
 - 19.6.1.2 deliveries to the stores in respect of orders he had made; and
 - 19.6.1.3 the orders of stock made by tradespeople which needed to be signed in and out of the stores;
- 19.6.2 PAT electrical testing – the Claimant took on the role of PAT testing from an employee who had retired in 2010 and who had worked on a part time basis and who did other duties as well as PAT testing. Since 2010 the need for PAT testing has significantly reduced because of the Respondent’s move to battery operated rather than mains operated tools. PAT testing is done according to a schedule and there were peaks during the year where more needed to be done but it did not mean that the Claimant spent most of his time on his feet. We do not accept the Claimant’s evidence [CWS16] that the fact that PAT Testing used to be completed by a full-time worker showed just how much of his time was spent on his feet doing this part of the job alone.
- 19.7 We accept the Respondent’s evidence that in the middle of the day the Claimant was not largely on his feet and that he would be on his feet mainly during the beginning of the day and the end of the day.
- 19.8 The end of the day was also a busy period because tradespeople returned to the stores in the late afternoon to return stock that they had not used (to avoid it being kept in their vans overnight) and pick up stock for the following day.
- 19.9 Tradespeople did come to the stores for stock during the day but it was the beginning and the end of the day that were busiest in that respect (for obvious reasons). The Claimant's evidence was inconsistent on this point but he gradually moved towards accepting that they were the busiest points from the perspective of issuing stock and receiving stock into the stores.
20. We accept the Respondents evidence that the role of storeman is more physically demanding than purely administrative roles in that it is not sedentary. However, it is not nearly as physically demanding as an on site construction role. The physical strains of the role are not significant because mechanical aids were available to cope with the physical demands (including forklift trucks that could lift heavier items to height, sack trucks and wheeled sets of stairs). The Claimant also had a colleague, Tom, who could help with heavier tasks and he did in fact help him with weeding in a solar panel field operated by the Respondent.
21. We accept Mr G Gaiger’s evidence that there was nobody scrutinising the Claimant and he could have taken breaks whenever he needed them.

Health and safety training

22. The Claimant received health and safety training on the following occasions in the years leading up to his employment ending:

22.1 November 2016 [101]– delivered by an external provider

22.2 Induction training 2017 [109] – delivered internally on the move to a new yard site

22.3 October 2020 [101] – delivered by an external provider

23. The external H&S training day programme makes clear that it covers – [107]:

By attending BSG's course you will be able to:

- *Understand the need to prevent accidents*
- *Have an understanding of health and safety law*
- *Be able to identify how your role fits into the control and management of the site*
- *Understand the need for risk assessment and method statement*
- *Appreciate the need to perform safely and to stop and ask for advice if unsure.*

[..]

Manual Handling - duties of employer and employee. Assessment (T.I.L.E)

[...]

Noise, Dust and Vibration - causes and effects.. The Noise Regulations, The Vibration Regulations - duties and control measures, Vibration White Finger - symptom and solutions

24. The internal induction training in 2017 also included training on manual handling.

25. We do not accept the Claimant's evidence [CWS11] that he had not attended any training courses since 2017. He had attended a course on October 2020 and he would have attended a further course (because it ran on a three year schedule) in October 2023, had he remained in employment.

26. The Claimant confirmed on 31 January 2017 [115] that he had received his Site Induction and he agreed to adhere to all the Site Rules. He confirmed that he had read through the Company Safety Policy and would abide by it.

Ventilation in the stores

27. The stores room where the Claimant worked was connected to a joinery workshop by doors. The machinery in the joinery workshop had dust extraction equipment as did the room as a whole. The stores room also had an extractor fan. The Claimant's evidence [CWS29] was that the doors between the stores room and the joinery shop were often left open. His oral evidence was that the extractor in the stores room was often broken.
28. We find that the stores room where the Claimant worked were not as clean as an office environment would be but it was not dusty in the same way that the joinery was. There was clearly a lot of dust in the joinery and we were provided with a September 2023 Site Health & Safety, Environmental and Welfare Report [247- 255] that highlighted this. We were only provided with the office report for 2022 (not the report for the stores and joinery workshop). The September 2023 report records:

Dust/Fumes

Excessive build ups of wood dust observed around machines in the carpentry workshop. There is suitable LEV system (in date for servicing and inspection) and M Class dust extraction devices available. I would recommend that all carpentry workshop employees are encouraged to clean down the machines they have used at the end of every working day to prevent the build up of dust that is not captured by the dust extraction systems. This dust can be quickly put into the atmosphere and the breathable particles inhaled as well as presenting a potential fire hazard. Ensure all operatives are face fit tested for their FFP/P3 filtered dust masks and I would recommend that the carpentry workshop employees are provided suitable half masks with P3 filters (JSP Force 8) as they are exposed to breathable dusts daily.

29. On the balance of probabilities we conclude that there was some degree of dust in the air in the stores room where the Claimant worked. We conclude that the Claimant did not raise this as a problem with the Respondent until March 2023 (in the events that we will come on to address). We find that the Claimant was someone who was prepared to raise concerns by e-mail, as he did in March 2023, and we conclude that had he had concerns about the air quality in the stores room or PAT testing room and felt that those concerns were not being properly addressed by the Respondent then he would have put those concerns in an e-mail. We accept the Respondent's evidence that the Claimant would have had a discussion on work related matters with either Mr J Gaiger or Mr G Gaiger around four times a week.
30. The Claimant in his oral evidence made allegations against the Gaiger brothers that they treated him as a number rather than a person or very long standing employee and that they engaged in 'bully boy' tactics. This was not an allegation that was then put to Mr G Gaiger under cross examination. There is also no evidence of this having been the case and it is not supported by the correspondence that we will come on to describe that relates to the Claimant's employment ending. We find on balance of probabilities that the Gaiger brothers were people that the Claimant could approach with concerns as he in fact did in March 2023.

Claimant's disability

31. As part of the 2017 new yard induction that we reference above, the Claimant (in the form giving confirmation that he understood the Respondent's policies) was asked if he had any medical condition or was currently on any medication.
32. The Claimant, amongst other things, confirmed that he had asthma and gave details of his medication. This was the first time that the Respondent was made aware that the Claimant had asthma. The form could and should have asked if the Claimant needed adjustments or assistance but it did not. Equally the Claimant did not raise this as a concern with the Respondent.
33. The Claimant did not have occupational asthma – it had started when he was 17, two years before his employment with the Respondent started. However, Respondent did not follow its own policy [170] as follows:

Check for early signs of COPD. A self assessment questionnaire will be issued and completed by each operative at least annually. Any symptoms or signs of COPD/Asthma should be brought to the attention of management. Specialist advice may be sought from an occupational health professional as necessary.

34. Mr G Gaiger fairly accepted in cross examination that, had they followed this policy, they may have discovered that the Claimant was being impacted by asthma at an earlier stage in that completion by the Claimant of a self assessment questionnaire would have prompted a conversation and the Claimant may then have mentioned it. For the avoidance of doubt we do not consider that the Respondent should reasonably have been expected to know that the Claimant was suffering substantial disadvantage as a result of any of his alleged PCPs at an earlier date than 23 March 2023 nor do we find that the Respondent would have known any sooner that the Claimant had COPD.
35. The Claimant was a moderate cigarette smoker / ex smoker (10-19 day) [48, 44]. However as late as October 2023 his medical records indicate "*Long chat about trying to cut down and stop smoking. Smoking advice offered today but does not think that this will work for him. [...] Will think about giving up smoking and contact us if he wants to be referred [October 2023]*".
36. In February 2023 the Claimant was diagnosed with chronic obstructive lung disease [50]. His medical records for that date confirm amongst other things:

MRC Breathlessness Scale: grade 1

Clinical history and observations Since being on braltus he feels symptoms are very much better. Long h/o asthma but very poor compliance with inhalers historically. Since being seen last time assures me he has been better with this and plans to continue! SOB is main issue Found spirometry quite hard work.- figures adjusted to take into account tiredness with spirometry Post bronchodilator spirometry shows obstruction . In view of history and previous comments and benefits of

LAMA suggest code as COPD. For CXR to check review later in the yr or prn He's happy with this plan

37. The Claimant did not tell the Respondent about this diagnosis until March 2023 as we will come on to address. The key elements of the Claimant's disability impact statement, which we accept, record as follows [40-41]:

4. Whilst COPD was not formally diagnosed until early 2023, I have suffered from the symptoms for years, with them originally being attributed to me being asthmatic. Attached which show me attending the GP for routine asthma checks initially, and then eventually be referred for further tests due to suspected, and later diagnosed, COPD.

7 The combination of inhalers which I use ease the symptoms of my COPD however they do not fully remove them. The main symptom which I suffer from is breathlessness and wheezing this was a lot worse when I was not taking specific medication however still affects me now even with the inhalers. I become out of breath much more easily than someone who does not suffer from COPD, and particularly if I over-exert myself physically.

8. This in turn has led me to suffer from significant levels of tiredness I become tired much more easily than I used to, or than people my age who do not suffer from COPD would. I am much more susceptible to fits of coughing, and have a lack of tolerance to dusty environments as compared to someone who does not suffer from COPD.

9. In relation to my working environment, as a result of my COPD I am unable to undertake tasks which require significant physical exertion, too much walking or movement or which require me to be on the go all the time. I also need to work in as clean air environment as is possible. If I am required to physically exert myself too much, I struggle significantly with my breathing, which then leads to wheezing, coughing and tiredness.

Alleged 2022 disclosure

38. The Claimant's evidence [CWS22] was that he was struggling with his role with the Respondent and he started to look at whether there were ways that he could reduce his hours with the Respondent but still maintain a full-time income. He said he was not close enough to retirement to reduce to a part-time role alone, but he also needed to reduce the physical demands on his body. He said that he had by, an unspecified time, mentioned several times to the Respondent that he was struggling in his role, but no steps were being taken by the Respondent to explore this further with him so he felt he needed to consider some alternative ways of working. We do not accept the Claimant's evidence that he raised any concerns about his health or ability to do his role until 23 March 2023.
39. We are clear, in particular based on the Respondent's subsequent actions and based on the persuasiveness of Mr G Gaiger's evidence that had the Claimant

raised concerns prior to March 2023 then the Respondent would have sought advice (including legal advice) and there would be some documentary evidence of the issues being raised and addressed. The Claimant in fact changed his evidence on this point under cross examination and went as far as to say that in the period to 2023 he was able to do his role (albeit he caveated this with the words “to the best of my ability”).

Events immediately prior to resignation

40. Before raising any concerns with the Respondent the Claimant started discussions with Wiltshire County Council (“WCC”) where his wife worked.
41. WCC were looking for someone to work part-time in school transport – driving groups of children to and from schools and other educational settings.
42. The role was part-time, working a few hours in the morning and then a few hours later in the afternoon.
43. By 23 March 2023 we find that the Claimant knew that he would be starting this new role in May 2023 (initially with training and then phasing into the full hours and duties). The precise hours of work in the new role were yet to be agreed but we conclude that, even by 23 March 2023, he had been offered or was going to be offered the role and had decided to accept it. He was looking to top up the hours in this new role with part time work for the Respondent. We conclude that he had decided to take the role, even if it proved to be incompatible with his employment at the Respondent.

23 March 2023 meeting

44. On 23 March 2023, the Claimant had an informal discussion with Mr G Gaiger. At the meeting he told Mr G Gaiger that he had had a COPD diagnosis. We accept Mr G Gaiger’s evidence that the Claimant also said words to the effect of ‘*I know it’s my own fault because I smoked for all those years*’. He told Mr G Gaiger that he was struggling working full-time in what he saw as a physically demanding role and that owing to his health, he was looking to reduce his hours at the Respondent and also limit the physical aspects of the role. We do not accept that the Claimant mentioned his age at this meeting. He asked to work part-time hours, working with the Respondent during the middle part of the day, and also to carry out more paperwork based activities, with some of the other employees helping more with the physical aspects of the role. It was an informal meeting and the start of a discussion (in particular the Claimant did not know what his hours with WCC would be) but Mr G Gaiger, understandably, expressed doubt about how the Claimant’s outline proposal for a part time hours schedule could work. It was fair for him to conclude that the Claimant’s proposal would mean that the Claimant would not be in work at the busiest times of the day.
45. The Claimant told Mr G Gaiger at the meeting that because of his COPD diagnosis, he would need additional ventilation, and an environment free from dust. Mr G Gaiger indicated to the Claimant that in order to understand the medical condition and to understand how they might need to adapt his duties or

the premises, they would need the Claimant to provide them with evidence from his doctor. We consider that this was reasonable.

46. The Claimant agreed that he would obtain a letter from his GP. We accept Mr G Gaiger's evidence (which was not contested) that the Respondent would have been happy to install additional ventilation if the doctor advised that was required and that he told the Claimant this at the meeting.
47. We do not accept the Claimant's oral evidence that he thought he was banging his head against a brick wall. If that is how he felt it was not reasonable for him to feel that way. This was the first time that the Claimant had raised these matters and they needed to be considered. The Claimant made repeated and imprecise assertions about Mr G Gaiger only being interested in getting off on holiday. We do not find this to have been the case (as the promptness of his responses and willingness to meet with the Claimant demonstrate).

24 March 2023 emails

48. The following day the Claimant sent an email to Mr G Gaiger [220] at 17:31 with the subject "Me". It read:

Graham.

Further to our conversation yesterday morning, I have been given an opportunity to work with the County Council part time, I was hoping that by doing this I could make some adjustments to the amount of time that I am in the dusty kind of environment, which has been effecting my COPD.

This something that I have noticed over the past few months. So my suggestion to you is. If you were happy with this, would it be possible for me to continue with the paperwork side of things, and at the same time, I could make up some kind of stock list for Julie to carry on as normal, just like it has been done. And if you don't mind, I could carry on with the paint . At this stage I'm not to sure when this will be commencing, but what I can and will say is that I start training in May, but this could be patchy and as you can appreciate I can't really afford to be out of pocket. So this would hopefully be a slow decreasing of hours. I still wish to be with the Gaigers company, but only on a part-time basis. But I will let you know as and when I know myself.

Would it be possible to have a face to face chat on Monday morning?

Meeting 27 March 2023 (between Claimant, Mr James and Mr Graham Gaiger)

49. The following emails ensued:

Claimant to GG 27 March 2023 12:09

Subject: Did you get my e mail?

Can we meet at 2pm pls?

[missing email]

GG to C 27 March 2023 12:11

Graham.

Yeah that's fine

50. There was then a meeting between the Claimant, Mr G and Mr J Gaiger on 27 March 2023. We find that at the meeting the Claimant said that he felt out of breath at times while at work and that his hands sometimes locked and that he felt muscle strain in his left ribs. Mr G Gaiger commented that they would need to get an occupational health report from his doctor so that they could consider what to do but repeated the suggestion of getting better ventilation installed in the stores. We find that Mr G Gaiger repeated his concerns about how the part time hours being suggested by the Claimant could be accommodated given that the Claimant would not be in work at the busiest times of the day.
51. That evening the following emails were exchanged [223]:

Claimant to GG 27 March 2023 18:14

Subject: RE: Did you get my e mail?

Thank you for the meeting we had with yourself and James.

Apologies that I need to make aware of other issues that I am experiencing with my health.

I feel that the dusty environment and physical work, of my job doesn't help my condition. However, I do appreciate you trying to place in ventilation for me.

As from a conversation that I have had with my doctor this evening he has advised me to have a occupational health care assessment done ASAP.

I am in the process of having an xray done on my hands as they lock frequently 4th April and I feel I am always out of breath when doing physically heavy work.

I don't feel as physically fit, as I use to be and in this job that I am in, alot of physical work is expected of me and this also has a impact on my COPD.

I get alot of muscle strain under my left rib which can be extremely painful too when I do movements.

If possible please respond to this email

Thank you.

GG to Claimant 28 March 2023 07:39

Subject: RE: Did you get my e mail?

Hi John

Thanks for the e mail.

Are you arranging the occupational health care assessment ?

Reading between the lines you seem keen to leave us which would be a shame .

The environment within the stores is far cleaner than many working environments I am certain, though clearly some other jobs would have even cleaner environments.

If you don't feel you are up to the job we would fully understand your decision to leave but equally we hope very much you will choose to stay with us.

Let me know what you would like to do -we would like to help where we can but,as we said yesterday , part time work is not an option for this role

Regards

Graham

52. We find that, given that he had had little opportunity to consider what was being proposed and because he is not an HR specialist (the Respondent relies on external advisers) it was fair for Mr G Gaiger to ask if the Claimant would be arranging for an OH report. We accept Mr G Gaiger's evidence that in all likelihood, had things progressed and had the Claimant not resigned when he did, the Respondent would have taken advice and would have itself arranged for a specialist OH assessment. We consider it unlikely that the Claimant's GP would have been able to provide an occupational health report as that would have needed an understanding of the Claimant's workplace.
53. We find that it was also fair for Mr G Gaiger to comment that the Claimant wanted to leave. He was disappointed by that as the Claimant had been a very long standing employee, they were prepared to consider installing more ventilation and were prepared to take advice on their obligations to the Claimant and his occupational health needs.
54. As regards the final comment in his email "*Let me know what you would like to do -we would like to help where we can but,as we said yesterday , part time*

work is not an option for this role” Mr G Gaiger fairly accepted in evidence that with the benefit of hindsight (and had he known the Claimant was considering resigning) he would have worded it differently. However, this comment has to be taken in the context of the limited conversations Mr G Gaiger had had with the Claimant, the ongoing ambiguity about the precise hours the Claimant was going to be able to work and the real and significant practical difficulties of:

- 54.1 the Claimant working only in the middle of the day (which was the least busy time); and
 - 54.2 the inability to cover the morning and the evening with existing employees who were all fully occupied; and
 - 54.3 the practical difficulties of finding part time cover for the morning and the afternoon when the Claimant was not there coupled with the need for continuity and handover of duties.
55. It was put to Mr G Gaiger in cross examination that if he could have arranged part-time cover for the middle of the day then he could also do that for the morning and afternoons. We do not consider that was a fair proposition. We accept Mr G Gaiger’s evidence that to find cover for the start and end of the day would be much more difficult and that they did not have employees with capacity to pick that up.
56. We conclude that the Claimant had already decided to leave the Respondent if his demands for his specific form or part time work were not accepted and that he wanted the WCC role because it was less demanding. However, he then gave the Respondent no reasonable opportunity to consider the options and see if a solution could be found. 23 March 2023 was a Thursday, 24 March 2023 was a Friday and this conversation and email exchange took place on Monday 27 March 2023. The discussions therefore spanned only three working days. On Tuesday 28 March 2023 the ball was in the Claimant’s court as regards whether he was going to be able to source OH advice.

30 March 2023 - the Claimant’s resignation

57. On 30 March 2023 the following emails were exchanged [223]:

Claimant to GG 30 March 2023 18:18

Subject: My Resignation

Good evening Graham.

I am typing this email to inform you that I would be handing in my notice, with affect from 31st March. I have lost trust with the company and feel the need to resign. Would you mind responding to this email, stating my last day to work please.

John

John Tucker

GG to Claimant 30 March 2023 18:37

Subject: Re: My Resignation

Hi John

Thanks for the e mail.

I am very sorry you have decided to resign but ,if it's what you want, we reluctantly accept.

It's irrelevant I guess but I'm shocked to read that you feel you have lost trust in the company over the past two days since we met. At that time you said we had been like family to you and were grateful for what we had done for you. Your written e mails are very much at odds to what you have said to us which is strange .

As you will recall it was our wish you remained in your current role and we offered to improve your working environment from its already acceptable level to an enhanced one to help you .

I believe your notice period period is two weeks but Sam will check and confirm this tomorrow .

This would make your leaving date Friday 14th April.

We will all be very sorry to see you go John-there has been a Tucker working here almost as long as the company has existed .

I am away next week but will catch up with you next week

With very best wishes

The Gaiger family

58. We accept that Mr G Gaiger's email is a true reflection of the nature of the conversations that he had had with the Claimant and that they had been friendly. There had been no suggestion on the part of the Claimant that there had been a loss of trust or that any loss of trust was building. The Claimant was clearly a very long standing and valued member of staff but it was not reasonable of him, as he appears to have expected, for the Respondent to have just accepted his demands (particularly in the timescales).
59. On 5 April 2023 Mr G Gaiger sent the Claimant the following email [231]:

Subject: Goodbye

Hi John

Hope you are well.

Shall we do a little goodbye in reception next Friday at 4?

Graham

60. The Claimant did not take up this offer. The Respondent nonetheless, and notwithstanding the Claimant's unreasonable complaint that he had lost trust in the Respondent, gave the Claimant a cheque for £1,000 as a gift to thank him for his service. On 14 April 2023 the Respondent sent the Claimant the following letter [232]:

Dear John

It is with great sadness we write to you on the day you leave our employment. There has been a member of your family in the employment of Gaiger Brothers for at least 70 years I would guess and today marks the end of an era.

Thank you so much for your long and loyal service – you really are going to be missed by a lot of people here including all of us Gaigers.

We were so sorry to hear of your health issues and hope that whatever role you find in the future works well for you and your family.

Please don't be a stranger and pop in and say hello whenever you can. Thanks again John for everything

Yours sincerely

Mike Graham James Sam

THE LAW

Time limits – the EqA

61. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.
62. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.
63. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.
64. In **Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686**, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. An example is found in the case of **Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/17** where it was determined that the respondent's decision to instigate disciplinary proceedings against the claimant

created a state of affairs that continued until the conclusion of the disciplinary process.

65. It is not necessary to take an all-or-nothing approach to continuing acts. The tribunal can decide that some acts should be grouped into a continuing act, while others remain unconnected **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548**; The tribunal in **Lyfar** grouped the 17 alleged individual acts of discrimination into four continuing acts, only one of which was in time.
66. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).
67. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the *rule* (**Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576**).
68. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**, the best approach is for the tribunal to *assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but might, depending on the circumstances, include some or all of the suggested list from the case of British Coal Corporation v Keeble [1997] IRLR 36* as well as other potentially relevant factors.
69. Where the reason for the delay is because a claimant has waited for the outcome of his or her employer's internal grievance procedures before making a claim, the tribunal may take this into account (**Apelogun-Gabriels v London Borough of Lambeth and anor 2002 ICR 713, CA**). Each case should be determined on its own facts, however, including considering the length of time the claimant waits to present a claim after receiving the grievance outcome.
70. In the case of **Harden v (1) Wootlif and (2) Smart Diner Group Ltd UKEAT/0448/14** the Employment Appeal Tribunal reminded employment tribunals that we must considering the just and equitable application in respect of each respondent separately and that it is open to us to reach different decisions for different respondents.

Discrimination under the EqA

71. The Equality Act 2010 (EqA) protects employees and applicants for employment from discrimination based on or related to a number of 'protected characteristics' (section 4). These include disability (section 6).

Indirect disability and age discrimination

72. Section 19 EqA provides:

(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— age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation.”

Meaning of provision, criterion or practice “PCP”

73. The phrase Provision, Criterion or Practice is to be construed widely in accordance with the EHCR Code. “Provision” means any contractual or non-contractual provision or policy. “Criterion” means any requirement, pre-requisite, standard, condition or measure applied whether desirable or unconditional. “Practice” means the employer’s approach to a situation if it does happen or may happen in the future. All that is necessary here is that there is a general or habitual approach by the employer **Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589**.
74. Generally PCP’s suggest that there is a state of affairs that exists or would exist if the situation were to occur again. It means that there are things that an employer does do or would do should the issue arise in the future. A one off decision can also be a provision **Starmer v British Airways Plc [2005] IRLR 862 EAT**. This may include a one off act or decision only applied to one person, but similarly, one off acts and decisions are not automatically PCPs **Ishola v Transport for London [2020] EWCA Civ 112** (see also ‘reasonable adjustments’ below).

Group disadvantage

75. For a case of indirect discrimination to succeed, there must be both personal disadvantage and group disadvantage to those who share their protected characteristic(s).
76. The correct test for this is not whether there was an adverse effect on the group, but whether a seemingly neutral requirement has a discriminatory impact **Eweida v British Airways Plc [2010] EWCA Civ 80**.

77. In doing so, the Claimant does not need to prove why a PCP is having the effect of disadvantaging the group they belong to, they just have to prove that the PCP was having that effect. Also, the Claimant does not need to prove that all people belonging to the comparison pool are in fact disadvantaged. Some will be some who will not be. What is for the Claimant to prove on balance is that the group is particularly disadvantaged as a result of the PCP whether or not it actually affects all of that group **Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice [2017] UKSC 27**.
78. The Claimant must also show that those who share the same protected characteristic were put at a particular disadvantage, which is not defined by the Equality Act 2010. This has been determined by the ECJ as meaning *“that it is particularly persons [with the relevant protected characteristic] who are at a disadvantage because of the measure at issue”* **Chez Razpredelenie Bulgaria AD v Komisia za Zashtita ot Diskriminatsia C-83/14 [2015] IRLR 746**. It has nothing to do with how grave the disadvantage is or that the disadvantage has to be unique to that particular group. The group simply has to be at more of a disadvantage compared to a comparator group who have also been subjected to the PCP.
79. The comparator group or pool of people must be people who do not share the protected characteristic relied upon, but who are in circumstances that are not materially different from the particularly disadvantaged group **Statutory code of practice paragraph 4.18**. In addition, the pool must be one that realistically tests the allegation of indirect discrimination being made by the Claimant **Ministry of Defence v DeBique [2010] IRLR 471 EAT**. Ultimately, regardless of the pleaded case and submissions by the parties, the Tribunal has the ultimate discretion to decide what the correct pool is because if the tribunal gets the pool wrong that has been found to be an error of law **Naeem v Secretary of State for Justice [2014] IRLR 520 EAT**.

Personal disadvantage

80. The Claimant must also prove that the PCP put them at the disadvantage complained about and that the disadvantage they have is the same as the disadvantage their group has because of the words “that disadvantage” in s19 (1)(c).

Causation

81. Both the group disadvantage and the personal disadvantage must be caused by the application of the PCP rather than because of any particular characteristic. In **Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice [2017] UKSC 27** Lady Hale said at paragraph 25:

“A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct

discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot”.

82. If the Claimant is not affected by the PCP themselves, for example by there being a height restriction of 5ft 9 inches or above, and they are taller than this, then their claim fails. Similarly, if on average the group relied upon was taller than 5ft 9 inches, then it cannot be said that the PCP caused the group to be disadvantaged either. So in cases where the PCP does not produce a simple outcome of having two results for the group, namely compliance or non compliance, but has a scale of effect, then, following **McNeil and others v R&C Comrs [2019] EWCA Civ 1112**, the correct approach is to look at the average impact over the group.
83. In addition, a person will still have a claim if they are personally disadvantaged by a PCP applied to a group of people that they do not belong to themselves, which causes that group a particular disadvantage **Chez Razpredelenie Bulgaria AD** above.

Reasonable Adjustments

84. By section 39 (5) EqA a duty to make adjustments applies to an employer. By section 21 EqA a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.
85. *Section 20(3) EqA* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer 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.
86. Under s.20(5) EqA the obligation to make reasonable adjustments with regard to an auxiliary aid is set out as follows:

‘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’
87. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.
88. The duty to make reasonable adjustments only arises where the employer has knowledge (actual or constructive) that its employee is disabled and likely to be

placed at a substantial disadvantage as (Paragraph 20 (1)(b) Schedule 8 of the Equality Act 2010).

89. In **Environment Agency v Rowan 2008 ICR 218** and **General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4** the EAT gave general guidance on the approach to be taken in reasonable adjustment claims. A tribunal must first identify:

89.1 the PCP applied by or on behalf of the employer

89.2 the identity of non-disabled comparators;

89.3 the nature and extent of the substantial disadvantage suffered by the Claimant in comparison with the comparators.

90. Once these matters have been identified then the tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.

91. The phrase PCP is interpreted broadly. The EHRC Code of Practice on Employment (2011) ("**the Code**") says at paragraph 6.10:

"[It] should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions."

92. The Code goes on to provide at Paragraph 6.24, that *"there is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask); At paragraph 6.37, that Access to Work does not diminish or reduce any of the employer's responsibilities under the 2010 Act. At paragraph 6.28 the factors which might be taken into account when deciding if a step is a reasonable one to take:*

Whether taking any particular steps would be effective in preventing the substantial disadvantage; The practicability of the step; The financial and other costs of making the adjustment and the extent of any disruption caused; The extent of the employer's financial or other resources; The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer.

93. In **Lamb v The Business Academy Bexley EAT 0226/15** the EAT commented that the term "PCP" is to be construed broadly *"having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability"*.

94. It is also generally unhelpful to distinguish between "provisions", "criteria" and "practices": **Harrod v Chief Constable of West Midlands Police [2017] ICR 869**.

95. There is no formal requirement that the PCP actually be applied to the disabled Claimant. The EAT said in **Roberts v North West Ambulance Service [2012]**

ICR D14 that a PCP (in this case, hot desking) applied to others might still put the Claimant at a substantial disadvantage.

96. There are some limits to what can constitute a PCP. In particular there has to be an element of repetition, actual or potential. A genuine one off decision which was not the application of policy is unlikely to be a “practice”: **Nottingham City Transport Ltd v Harvey [2013] All ER(D) 267 (Feb), EAT**. In that case the one-off application of a flawed disciplinary process to the Claimant was not a PCP. There was no evidence to show that the employer routinely conducted its disciplinary procedures in that way.
97. In **Ishola v Transport for London [2020] ICR 1204** the Court of Appeal said that all three words “provision”, “criterion” and “practice” “..carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again.”
98. The test of reasonableness imports an objective standard. The tribunal must examine the issue not just from the perspective of the Claimant, but also take into account wider implications including the operational objectives of the employer.
99. It is not necessary to prove that the potential adjustment will remove the disadvantage; if there is a “real prospect” that it will, the adjustment may be reasonable. In **Romec v Rudham [2007] All ER (D) 206 (Jul)**, EAT: HHJ Peter Clark said that it was unnecessary to be able to give a definitive answer to the question of the extent to which the adjustment would remove the disadvantage. If there was a 'real prospect' of removing the disadvantage it 'may be reasonable'. In **Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)**, EAT: HHJ McMullen said that 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage'. In **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10, [2011] EqLR 1075**, the EAT said that, when considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage.
100. Schedule 8 EqA (Work: Reasonable Adjustments) - Part 3 limitations on the duty provides:

S. 20. Lack of knowledge of disability, etc

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know— (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement. Under Part 2 and an interested disabled person includes in relation to Employment by A, an employee of A's.

101. If relied upon, the burden is on the Respondent to prove it did not have the necessary knowledge. The Respondent must show that it did not have actual

knowledge of both the disability and the substantial disadvantage and also that it could not be reasonably have been expected to know of both the disability and the substantial disadvantage.

Constructive Unfair Dismissal

102. Under section 95(1)(c) of the Employment Rights Act 1996 (“the **ERA**”), an employee is dismissed if he 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.

103. If the claimant’s resignation can be construed to be a dismissal, then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides:

“... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case”.

104. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by **Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer’s conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

105. In **Tullett Prebon PLC and Ors v BGC Brokers LP and Ors** Maurice Kay LJ endorsed the following legal test at paragraph 20:

“... whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.”

106. In **Courtaulds Northern Spinning Ltd v Sibson** it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of

significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach “played a part in the dismissal” and was “an” effective cause of resignation, rather than being “the” effective cause. It need not be the predominant, principal, major or main cause for the resignation.

107. With regard to trust and confidence cases, Dyson LJ summarised the position thus in **Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA**:

The following basic propositions of law can be derived from the authorities:

1. The test for constructive dismissal is whether the employer’s actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761.

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as “the implied term of trust and confidence”.

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: “impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer”.

108. This has been reaffirmed in **Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA**, in which the applicable test was explained as:

(i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied;

(ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;

(iii) It is open to the employer to show that such dismissal was for a potentially fair reason;

(iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally

(see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."

109. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (**Claridge v Daler Rowney [2008] IRLR 672**); and that if an employee is relying on a series of acts, then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (**Lewis v Motorworld Garages Ltd [1985] IRLR 465**). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (**Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA**).
110. The judgment of Dyson LJ in Omilaju has been endorsed by Underhill LJ in **Kaur v Leeds Teaching Hospital NHS Trust**. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.
111. In addition, it is clear from **Leeds Dental Team v Rose** that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from **Hilton v Shiner Ltd - Builders Merchants** that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.
112. There is an implied term in the contract of employment that an employer shall take reasonable care to ensure that plant, tools, equipment, premises and the system of work used are safe: see **Wilsons and Clyde Coal Co v English [1938] AC 57**, and not to subject the employee to unnecessary risk, see **Wilson v Tyneside Window Cleaning Co [1958] 2 QB 110**.
113. As re-emphasised by the EAT in the decision of **Upton-Hansen Architects ("UHA") v Gyftaki**, it is for the employer to advance in pleadings, assert in evidence, and prove a potentially fair reason for the dismissal, and a failure to do so may preclude them from a defence to a claim of constructive dismissal.

Wrongful dismissal

114. We accept the Claimant's submissions that a dismissal without notice is a dismissal in breach of contract in common law. There is no dispute in this case that if the Claimant was constructively dismissed, he was also wrongfully dismissed.

Statement of Employment Particulars

115. Under section 1 ERA 96, an employer is under a duty to provide a statement of written particulars to all employees after the first month of employment.
116. The Employment Act 2002 ("**the 2002 Act**") at Section 38 (Failure to give statement of employment particulars etc) provides:

(1) *This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5.*

(2) *If in the case of proceedings to which this section applies—*

(a) the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of particulars of change) or (in the case of a claim by an employee) under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday), the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) *If in the case of proceedings to which this section applies—*

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 or (in the case of a claim by an employee) under section 41B or 41C of that Act,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) *In subsections (2) and (3)—*

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

(6) The amount of a week's pay of a worker shall— (a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c 18), and (b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).

(6A) The provisions referred to in subsection (6) shall apply for the

purposes of that subsection— (a) as if a reference to an employee were a reference to a worker; and (b) as if a reference to an employee's contract of employment were a reference to a worker's contract of employment or other worker's contract.

(7) For the purposes of Chapter 2 of Part 14 of the Employment Rights Act 1996 as applied by subsection (6), the calculation date shall be taken to be— (a) if the worker was employed by the employer on the date the proceedings were begun, that date, and (b) if he was not, in the case of an employee, the effective date of termination as defined by section 97 of that Act or in the case of all other workers the date on which the termination takes effect.

117. Schedule 5 (Tribunal jurisdictions to which section 38 applies) of the 2002 Act covers (amongst others) Section 111 of that Act (unfair dismissal).

ANALYSIS AND CONCLUSIONS

118. We were careful to look at the evidence 'in the round' to determine whether it suggested that the Claimant had been subjected to the unlawful treatment of which he complains. Having done so we did not find cause to change our decisions on any issue or issues.
119. We note here that, pursuant to the direction by Employment Judge Cadney dated 8 November 2023, the Claimant provided the following further and better particulars of his age discrimination complaint below [21]:

As at the date of the termination of his employment the Claimant was 54 years old, and undertaking more or less the same role as he had been undertaking since he had started with the Respondent over 35 years ago.

The Claimant says that the role of 'Storeman' was, and always had been a very physical role. His duties included, amongst other things, stock management, handling deliveries and PAT testing.

The Claimant says that the requirements of the role were such that he would spend large proportions of his time on his feet rather than being based in the office, and there was a lot of walking around required within the Respondent's premises.

In addition, in managing the Respondent's stock and dealing with deliveries the Claimant was required to undertake large levels of manual handling – lifting and carrying heavy stock items within the Respondent's premises. The Respondent operates as a building contractor and, as such, its stock items are often very bulky and very heavy.

The Claimant will say that, as he grew older, he was no longer able to cope with the physical demands of the role in the same manner as he did when he was younger. The Claimant found that he became fatigued more easily through spending the full day on his feet, and would often feel aches and pains in the evening as a result of lifting and carrying heavy items.

The Claimant avers that he had requested, in principle, two adjustments to his role to alleviate these issues:

That he be permitted to move to a more office-based role, dealing with more administrative functions of the business; and/or

That he be permitted to work part-time hours.

In relation to the request to work part-time hours, the Claimant accepts that he had entered into discussions about undertaking a separate part-time role which, if part-time working with the Respondent had been agreed, would have fitted in with his role with the Respondent.

The Claimant however avers that this option was only considered by the Claimant as a means of alleviating the physical effects he was feeling consequent to his role with the Respondent (which both related to his age and his disability), without impacting his ability to earn.

The Claimant avers that had the Respondent been amenable to reducing the physical aspects of his role, he would have been happy to remain with the Respondent on a full-time basis.

The Claimant avers that the requirement to continue working full-time and the requirement that the Claimant continued to undertake heavy manual tasks are a provision, criterion or practice applied by the Respondent.

The Claimant says that, compared with his younger colleagues who are more able to cope with the physical demands of the role and the requirement to work long hours on their feet, he struggled and suffered significantly with fatigue, aches and pains including back pain (outside of the physical effects on his COPD).

120. As we have explained, we do not accept that the Claimant's role was as physically demanding as he suggests in these further and better particulars.

The PCP's

121. The Claimant relies on the same PCP's in respect of his indirect disability discrimination, indirect age discrimination and failure to make reasonable adjustments claims being:

121.1 The requirement to continue to work full-time ("**the Full-Time PCP**");

121.2 The requirement that he continue to undertake heavy manual tasks ("**the Manual Tasks PCP**").

122. The Respondent submitted that these PCP's were not applied to the Claimant. It submitted instead that the Respondent applied two different PCPs specifically to the Claimant:

122.1 A requirement to work when the role (storeman) is busiest, namely the beginning of each working day and the end of each working day.

122.2A requirement to be able to move stock to and from storage using the manual handling equipment provided.

123. **Findings on Full-Time PCP:** We find that the Full-Time PCP was applied to the Claimant. The storeman was required to work full-time in that role. It might have been possible for the role to be carried out on a part time or job share basis with one person covering the mornings and another the afternoons but the Claimant did not give the Respondent reasonable opportunity to explore that. Had the Respondent offered the Claimant part-time hours on this basis he would not have accepted it because it would not have been compatible with the role at the WCC which he had decided to accept before he resigned from the Respondent.
124. **Findings on Manual Tasks PCP:** Whether, in his role of Storeman, the PCP of being required to undertake heavy manual tasks was applied to the Claimant is a subjective question depending on how 'heavy manual tasks' is defined. There was disagreement between the parties on the physical demands of the role. For the purposes of the Claimant's claim we find that the Respondent did require the Claimant, as storeman, to:
- 124.1 move objects weighing a maximum of 25kg around once a day with mechanical aids and the assistance of his colleague Tom if needed;
 - 124.2 be predominantly on his feet during the first part of the morning and the latter part of the afternoon;
 - 124.3 generally move items that are much lighter than 25kg (such as pots of paint);
 - 124.4 use sack trucks to move sacks of plaster etc;
 - 124.5 use a forklift truck to lift heavy items to height (which the Claimant could also have used to lift lighter items to height);
 - 124.6 use portable stairs to take lighter items to or from higher shelves or from which he could slide such items to or from a storage shelf from a pallet raised by a forklift truck;
 - 124.7 to be predominantly seated during the late morning to early afternoon.
125. It is this more detailed description of the physical demands of the Claimant's role which we hereafter refer to as the Manual Tasks PCP and find was applied by the Respondent to the Storeman role.

Discussion and Review Condition

126. We find, given the evidence we heard from Mr G Gaiger, that both the Full-Time PCP and the Manual Tasks PCP were subject to a further condition that they could be varied after reasonable time for discussion and consultation with the Claimant and following occupational health and other advice being obtained (which we find the Respondent would have obtained, had the Claimant allowed time). We call this the 'Discussion and Review Condition'. Our findings on the PCPs are not subject to the Discussion and Review Condition unless we state expressly that they are.

Indirect disability discrimination – The Manual Tasks PCP

127. It is more logical for us to deal with the indirect disability discrimination complaint arising out of the Manual Tasks PCP first, for reasons we hope will become apparent. The Respondent did apply the Manual Tasks PCP to the Claimant as the Claimant was required to do the manual handling tasks described and, had someone else been in the role who did not have the Claimant's disabilities, then the Manual Tasks PCP would also have been applied to them.
128. We find that the Manual Tasks PCP would put persons with whom the Claimant shared his disability at a particular disadvantage when compared with persons who did not share that disability. Notwithstanding that the role did not require the Claimant to lift particularly heavy items we were persuaded that the fact that the Claimant had to be on his feet for parts of the day, sometimes climb stairs and carrying items such as pots of paint and occasionally heavier items and, given that he had reduced lung function, we consider that this would have been much more draining for the Claimant and would have put him at particular disadvantage compared to those who did not have his disability.
129. As such, unless the Respondent can show that the Manual Tasks PCP was a proportionate means of achieving a legitimate aim, the Claimant did suffer indirect disability discrimination and the Respondent is liable for that discrimination notwithstanding that we accept that in the circumstances it only found out about the disadvantage in the last days of the Claimant's employment and had no reasonable opportunity to address the disadvantage (albeit an annual asthma review might have prompted a discussion about it and might have prompted the Claimant to explain that he was having difficulties).
130. The next question is therefore whether the Respondent has been able to establish that the Manual Tasks PCP was a proportionate means of achieving a legitimate aim. The relevant legitimate aim relied upon in respect of the Manual Tasks PCP was that:
- 130.1 the Respondent needed stock to be moved for tradespeople attending the warehouse;
- 130.2 The items of stock generally did not exceed 25kg in weight;
- 130.3 The Respondent at all times ensured that manual handling equipment was available for moving heavy stock, including sack trucks and a forklift truck.
131. The Claimant did not dispute that these were legitimate aims but disputed that the PCP was a proportionate means of achieving them. The Respondent said that the Manual Tasks PCP was a proportionate means of achieving the aims because physically moving stocks into and out of storage promptly and efficiently, when those items were required or were returned, was the core function of the storeman's role. We accept that to be the case.
132. The Respondent argued that there was no less discriminatory way of achieving the aim because the measures it had put in place reduced to a minimum the physical demands of the role:

- 132.1 all manual handling aids that might reasonably be supplied had been provided;
- 132.2 items of stock generally weigh less than 25kg;
- 132.3 it was the fundamental function of the storeman to move building products to and from storage when they were required or returned.
133. We accept the Respondent's position. There was no practical way that the physical demands of the role could be reduced for the Claimant.
134. The Claimant's request for part time working could not reasonably be accommodated because of:
- 134.1 the practical difficulties of recruiting someone to do the more physically demanding aspects of the role at the beginning and the end of the day but not during the middle of the day;
- 134.2 the fact that there was no existing employee who had the time to pick up these duties themselves.
135. It might have been possible to recruit someone for the morning or the evening or to work in the middle of the day but none of those options would have fully alleviated the difficulties posed for the Claimant by the Manual Tasks PCP and, in any event, the Claimant would not have accepted them because they would not have been compatible with the hours of the role he had decided to accept with the WCC (whether or not it meant he could no longer work for the Respondent).
136. The Claimant said that the Respondent could have provided him with adequate rest breaks as and when he was feeling fatigued / out of breath but we accept Mr G Gaiger's evidence that there was nobody scrutinising the Claimant and that the Claimant could have taken breaks whenever he needed them in any event.
137. The Claimant said that it would have been less discriminatory for the Respondent to have provided the Claimant with assistance when heavy manual lifting was required. We find that he did have this assistance if he needed it from his colleague Tom.
138. The Claimant said that it would have been less discriminatory to have allowed the Claimant to perform lighter duties (such as PAT testing, paperwork, and other desk-based duties). We find that those duties could not practically or reasonably have been separated from the other storeman duties in the middle of the day for the reasons we have described, equally there was no distinct admin-focussed role that could have been given to the Claimant nor any such role which matched his skills.
139. We find that the Manual Tasks PCP was a proportionate means of achieving the Respondent's legitimate aim.
140. The Manual Tasks PCP is further demonstrated to be a proportionate means of achieving a legitimate aim if the Discussion and Review Condition is also taken

into account (together with the fact that the Claimant did not afford the Respondent reasonable time to apply that condition).

Indirect disability discrimination – the Full-Time PCP

141. The Respondent did apply the Full-Time PCP to the Claimant as the Claimant was required to work full time and had someone else been in the role who did not have the Claimant's disability then the Full-Time PCP would also have been applied to them.
142. Doing the role on a full time basis was more physically demanding than doing the role on a part time basis in that the longer the person doing the storeman role worked, the more fatigued they would become during the day. In a shorter day they would be less fatigued when they finished work. This is little more than a statement of the obvious. It is hard to think of a form of work (mental or physical) that would not be more fatiguing if done on a full time basis rather than a part time basis.
143. However, we consider that the Full-Time PCP would not have put persons with whom the Claimant shared his disabilities at a particular disadvantage when compared with persons who did not have that disability and it did not put the Claimant at a disadvantage. It was not the full time nature of the role that particularly caused the Claimant difficulties or which would have put others who share his disability at a disadvantage. As we have addressed above, it was the Manual Tasks PCP that put the Claimant at a disadvantage. Had the Claimant been working part time in the storeman role he would still necessarily have been doing the things that constitute the Manual Tasks PCP.
144. The particular part time hours that the Claimant sought only coincidentally corresponded with the times of day when the physical demands of the role were greatest. The reason why he sought those hours was principally because he had decided to accept the WCC role and in doing so could only work for the Respondent in the middle of the day (which just happened to be the part of the day when the storeman role was less physically demanding).
145. The Respondent said that in any event the PCP was a proportionate means of achieving the aim of delivering an efficient service to its tradespeople attending the warehouse to collect items from storage before departing to site at the beginning of the day, or at the end of the day in anticipation of the following day; those trades people needing to secure items at those particular times to complete jobs for the Respondent's clients. The Claimant accepted that this was a legitimate aim but argued that the PCP was not a proportionate means of achieving it.
146. We have found against the Claimant on the question of disadvantage, but we would in any event have found that the PCP had a legitimate aim and was a proportionate means of achieving that aim. In particular we find that there was no less discriminatory way of meeting the business' needs (and especially not in the way that the Claimant wanted part time hours to operate). We do not repeat our relevant findings in respect of the Manual Tasks PCP.
147. The Full-Time PCP is further demonstrated to be a proportionate means of

achieving a legitimate aim if the Discussion and Review Condition is also taken into account (together with the fact that the Claimant did not afford the Respondent reasonable time to apply that condition).

Reasonable adjustments – The Manual Tasks PCP

148. The Claimant argued that the Manual Tasks PCP put him Claimant at a substantial disadvantage compared to someone without his disability, in that the Claimant suffered significant breathing difficulties, affecting his ability to work and thus perform his duties, causing severe fatigue and exacerbating his condition. We do not repeat our findings on the PCP and its application to the Claimant. We have applied the ‘substantial disadvantage’ test to the PCP and find, for the same reasons as we give in respect of the Claimant’s corresponding indirect discrimination that the Claimant was put at a substantial disadvantage by the Manual Tasks PCP.
149. By 23 March 2023 the Respondent knew or could reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage given the nature of the discussion that he had with Mr G Gaiger that day.
150. As regards the adjustments that the Claimant said should have been made to avoid the disadvantage we find, in respect of all the suggested adjustments, that such was the swiftness of the Claimant’s resignation, the Respondent could not reasonably have been expected to have made them or, going further, to have assessed what, if anything else, could have been done for the Claimant.

Transferring the Claimant to a more administrative role

151. The Claimant [CWS34] accepted that the amount of admin work that he was already doing would not have been enough to fill all of his hours if he had reduced to part-time. However, he thought that if those admin duties were supplemented with lighter duties when in the warehouse (rather than at a desk) then it would have been workable.
152. This was not an adjustment that the Respondent could reasonably have been expected to make. Physically moving stocks into and out of storage promptly and efficiently, when those items were required or were returned, was the core function of the storeman’s role, all manual handling aids that might reasonably be supplied had been provided and the Claimant could call on the assistance of his colleague Tom. The Respondent could not effectively separate the administrative duties (ordering etc) from the role of storeman and the Claimant did not have administrative skills for other roles and there was no evidence that there was any such role available.

Offer additional support for the manual aspects of his role.

153. As we have explained, the Respondent had provided all additional support that could reasonably have been provided to the Claimant for the manual aspects of the role and he could have called on Tom for help.
154. As such the Manual Tasks PCP, in the circumstances, gives rise to no failure to make reasonable adjustments on the part of the Respondent.

Reasonable adjustments – The Full Time PCP

155. The Claimant argued that the Full Time PCP put him Claimant at a substantial disadvantage compared to someone without his disability, in that the Claimant suffered significant breathing difficulties, affecting his ability to work and thus perform his duties, causing severe fatigue and exacerbating his condition.
156. We do not repeat our findings on the PCP and its application to the Claimant. We have applied the ‘substantial disadvantage’ test to this PCP as well and find, for the same reasons as we give in respect of the Claimant’s corresponding indirect discrimination that the Claimant was not put at a substantial disadvantage by the Full Time PCP
157. In any event, even if we are wrong, the Respondent only knew or could reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage on 23 March 2023 and such was the swiftness of the Claimant’s resignation, the Respondent could not reasonably have been expected to have made the adjustment contended for (or any other).
158. We note again our findings (as set out in respect of the corresponding indirect disability discrimination complaint) that it was coincidence that the particular part time hours that the Claimant sought corresponded with the times of day when the physical demands of the role were lower.
159. The part time hours the Claimant wanted would have reduced but not eliminated the physical demands of the role but the Respondent could not reasonably have been expected to find cover for the Claimant’s role at the beginning and end of the day.

Indirect age discrimination

160. The Claimant is in the age group of people in their mid-fifties and makes a comparison with people who are in younger age groups in advancing his claims of indirect age discrimination.

Indirect age discrimination (Equality Act 2010 s. 19) – the Manual Tasks PCP

161. We find that the Respondent did apply the Manual Tasks PCP to persons not in the same age group as the Claimant in that, had a younger person been in the Storeman role, then they would also have had the PCP applied to them.
162. The Claimant pointed to effects of the role on his back and his thumb locking and said that he was struggling more with general aches and pains and particularly with back pain.
163. As we have found in respect of the Claimant’s indirect disability discrimination complaint, doing the role on a full time basis was more physically demanding than doing the role on a part time basis.
164. We do not consider that there is sufficient basis for concluding that the Manual Tasks PCP would put people in their mid-fifties at a particular disadvantage when compared with those in younger age groups. People in their mid-fifties

might statistically have found the physical aspects of the role more challenging than those in younger age groups but not to the extent that the Manual Tasks PCP would put them at a particular disadvantage. The extent to which the person had maintained their health and fitness would have been more influential than their age, at least in the age bracket relied upon by the Claimant.

165. We also do not find that the Full-Time PCP put the Claimant at a disadvantage as a person in his mid-fifties. The difficulties the Claimant had were not linked particularly to his age.
166. In any event, for the reasons we have set out in respect of the other complaints we consider that the Manual Tasks PCP was a proportionate means of achieving a legitimate aim.
167. The Manual Tasks PCP is further demonstrated to be a proportionate means of achieving a legitimate aim if the Discussion and Review Condition is also taken into account (together with the fact that the Claimant did not afford the Respondent reasonable time to apply that condition).

Indirect age discrimination (Equality Act 2010 s. 19) – the Full-Time PCP

168. We find that the Respondent did apply the Full Time PCP to persons not in the same age group as the Claimant in that, had a younger person been in the Storeman role, then they would also have had the Full Time PCP applied to them.
169. As with the Manual Tasks PCP, we note that the Claimant pointed to effects of the role on his back and his thumb locking and said that he was struggling more with general aches and pains and particularly with back pain.
170. Again, as we have found in respect of the Claimant's indirect disability discrimination complaint, doing the role on a full time basis was more physically demanding than doing the role on a part time basis.
171. As with the Manual Tasks PCP, we do not consider that there is sufficient basis for concluding that the Full-Time PCP would put people in their mid-fifties at a particular disadvantage when compared with those in younger age groups. People in their mid-fifties might statistically have found the role more challenging to do full time than those in younger age groups but not to the extent that the Full-Time PCP would put them at a particular disadvantage. The extent to which the person had maintained their health and fitness would have been more influential than their age, at least in the age bracket relied upon by the Claimant.
172. We also do not find that the Full-Time PCP put the Claimant at a disadvantage as a person in his mid-fifties. The difficulties the Claimant had were not linked particularly to his age.
173. In any event, for the reasons we have set out in respect of the other complaints we consider that the Full-Time PCP was a proportionate means of achieving a legitimate aim.

174. The Full-Time PCP is further demonstrated to be a proportionate means of achieving a legitimate aim if the Discussion and Review Condition is also taken into account (together with the fact that the Claimant did not afford the Respondent reasonable time to apply that condition).

Constructive unfair dismissal

175. The allegations of discrimination made by the Claimant are not well founded and the related conduct of the Respondent did not constitute a breach of any implied or express term of the Claimant's contract of employment nor did that contribute to any undermining of the implied term of trust and confidence.

176. As regards the alleged failure to risk assess the Claimant's work when he was struggling in 2022, we do not accept that there is evidence to suggest that the Respondent knew that the Claimant was struggling or that there was any evidence that the Respondent then failed in any duty towards the Claimant which might have amounted to, or contributed to, a breach of any express or implied term of the Claimant's contract employment.

177. When it came to what happened in mid-March 2023, we find that none of the Respondent's acts or alleged failures to act amounted to, or contributed to, a breach of any express or implied term of the Claimant's contract employment. In particular:

177.1 What the Respondent said in respect of the Claimant's specific proposal for reducing his working hours was entirely reasonable in the circumstances;

177.2 The Respondent would have considered further, had the Claimant given the Respondent the opportunity, the possibility of adjusting the Claimant's role towards lighter, more administrative duties but what could have been achieved was limited (particularly given the hours on which the Claimant was insisting and the fundamental need for a storeman to move materials in the stores);

177.3 The Respondent, as the Claimant himself acknowledged, made clear to the Claimant that it was prepared to look at ways to minimise the level of dust which the Claimant was exposed to and anticipated getting GP guidance and OH advice.

177.4 Mr G Gaiger's responses to the Claimant's request to work the particular form of part-time working that he sought (including his final email before the Claimant's resignation – which he fairly conceded could, with hindsight, have been worded better) were reasonable and the emails need to be read in the context of the friendly discussion that was ongoing. There was no reasonable basis for the Claimant to assert that trust had been undermined.

178. It cannot be said that 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. The Claimant's comment in his resignation email that there had been a loss of trust was unjustified and Mr G Gaiger's expression of surprise in his response fairly reflects that.

179. In any event, the Claimant did not resign because of a breach by the Respondent. He had already decided to take the role with WCC and gave the Respondent inadequate time to discuss his concerns and explore the options. The Claimant would have resigned in all circumstances that did not involve him being given part time work during the middle of the day.

Wrongful dismissal; notice pay

180. The Claimant having resigned in circumstances where he was not entitled to treat himself as constructively dismissed was not wrongfully dismissed and he is not due any amount in respect of contractual or statutory notice entitlement.

Statement of Employment Particulars

181. The Claimant was issued with a statement of employment particulars and, as his complaint of constructive unfair dismissal is not well founded, he is not entitled to an award under the 2002 Act.

Employment Judge Woodhead

Date 22 November 2024

Sent to the parties on:

25 November 2024

By Mr J McCormick

For the Tribunals Office

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

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

Appendix

AGREED LIST OF ISSUES

1. Time limits

- 1.1 The claim form was presented on 11 August 2023. The claimant commenced the Early Conciliation process with ACAS on 6 April 2023 (Day A). The Early Conciliation Certificate was issued on 5 May 2023 (Day B). Accordingly, any act or omission which took place before 14 April 2023 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.
- 1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - 1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
 - 1.2.2 If not, was there conduct extending over a period?
 - 1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
 - 1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 1.2.4.1 Why were the complaints not made to the Tribunal in time?
 - 1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Disability

- 2.1 The Respondent conceded disability [97] on 5 June 2024 (chronic asthma and Chronic Obstructive Pulmonary Disorder (COPD)) saying “having reviewed the Claimant’s medical records and his breathlessness as recorded in his notes, the Respondent will agree that the Claimant is disabled”.

3. Indirect disability discrimination (Equality Act 2010 s. 19)

- 3.1 A “PCP” is a provision, criterion or practice. Did the Respondent have or apply the following PCPs:
 - 3.1.1 The requirement to continue to work full-time;
 - 3.1.2 The requirement that he continued to undertake heavy manual tasks.
- 3.2 Did the Respondent apply the PCP to the Claimant?

- 3.3 Did the Respondent apply the PCP to persons with whom the Claimant did not share the same protected characteristic (disability), or would it have done so?
- 3.4 Did the PCP put persons with whom the Claimant shared the characteristic, at a particular disadvantage when compared with persons with whom he did not share the characteristic?
- 3.5 Did the PCP put the Claimant at that disadvantage in that he could not undertake his role as compared with work colleagues who did not share his disability?
- 3.6 Was the PCP a proportionate means of achieving a legitimate aim?
- 3.6.1 The Respondent says that its aims were:
- 3.6.1.1 delivering an efficient service to its tradespeople attending the warehouse to collect items from storage before departing to site at the beginning of the day, or at the end of the day in anticipation of the following day; those trades people need to secure items at those particular times to complete jobs for the Respondent's clients;
- 3.6.1.2 The Respondent needs stock to be moved for tradespeople attending the warehouse. The items of stock generally do not exceed 25kg in weight. The Respondent has at all times ensured that manual handling equipment is available for moving heavy stock, including sack trucks and a forklift truck.
- 3.7 That it was reasonable because:
- 3.7.1.1 Physically moving stocks into and out of storage promptly and efficiently, when those items are required or are returned, is the core function of the storeman's role.
- 3.7.2 That it was proportionate because:
- 3.7.2.1 There was no less discriminatory way of meeting the business aims and needs described above, in that with respect to working hours, this went no further than was reasonably required in order for the storeman's role to be carried out at the time when that function was most required, and,
- 3.7.2.2 As to manual handling, reduced to a minimum the need for heavy lifting, as all manual handling aids that might reasonably be supplied had been provided, the items of stock generally weigh less than 25kg in any event, and it was the fundamental function of the storeman to move building products to and from storage when they were required or returned.
- 3.8 The Tribunal will decide in particular:

- 3.8.1 Was the PCP an appropriate and reasonably necessary way to achieve those aims;
- 3.8.2 Could something less discriminatory have been done instead;
- 3.8.3 How should the needs of the Claimant and the Respondent be balanced?

4. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

- 4.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?
- 4.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:
 - 4.2.1 The requirement to continue to work full-time;
 - 4.2.2 The requirement that he continued to undertake heavy manual tasks.
- 4.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant suffered significant breathing difficulties, affecting his ability to work and thus perform his duties, causing severe fatigue and exacerbating his condition?
- 4.4 Did the Respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
- 4.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:
 - 4.5.1 Permitting the Claimant to adjust his working hours to part-time hours, in order to shorten the duration of his working day, and in particular lessen his exposure to a dusty environment;
 - 4.5.2 Transferring the Claimant to a more administrative role;
 - 4.5.3 Offer additional support for the manual aspects of his role.
- 4.6 Was it reasonable for the Respondent to have to take those steps and when?
- 4.7 Did the Respondent fail to take those steps?

5. Indirect age discrimination (Equality Act 2010 s. 19)

- 5.1 A "PCP" is a provision, criterion or practice. Did the Respondent have or apply the following PCPs:
 - 5.1.1 The requirement to continue to work full-time;
 - 5.1.2 The requirement that he continued to undertake heavy manual tasks.

- 5.2 Did the Respondent apply the PCP to the Claimant?
- 5.3 Did the Respondent apply the PCP to persons with whom the Claimant did not share the same protected characteristic (age), or would it have done so?
- 5.4 Did the PCP put persons with whom the Claimant shared the characteristic, at a particular disadvantage when compared with persons with whom he did not share the characteristic?
- 5.5 Did the PCP put the Claimant at that disadvantage in that he could not undertake his role as compared with work colleagues who were younger? (The Claimant is in the age group mid-fifties)
- 5.6 Was the PCP a proportionate means of achieving a legitimate aim?
- 5.6.1 The Respondent says that its aims were:
- 5.6.1.1 delivering an efficient service to its tradespeople attending the warehouse to collect items from storage before departing to site at the beginning of the day, or at the end of the day in anticipation of the following day; those trades people need to secure items at those particular times to complete jobs for the Respondent's clients;
- 5.6.1.2 The Respondent needs stock to be moved for tradespeople attending the warehouse. The items of stock generally do not exceed 25kg in weight. The Respondent has at all times ensured that manual handling equipment is available for moving heavy stock, including sack trucks and a forklift truck.
- 5.6.2 That it was reasonable because:
- 5.6.2.1 Physically moving stocks into and out of storage promptly and efficiently, when those items are required or are returned, is the core function of the storeman's role.
- 5.6.3 That it was proportionate because:
- 5.6.3.1 There was no less discriminatory way of meeting the business aims and needs described above, in that with respect to working hours, this went no further than was reasonably required in order for the storeman's role to be carried out at the time when that function was most required, and,
- 5.6.3.2 As to manual handling, reduced to a minimum the need for heavy lifting, as all manual handling aids that might reasonably be supplied had been provided, the items of stock generally weigh less than 25kg in any event, and it was the fundamental function of the storeman to move building products to and from storage when they were required or returned.

5.7 The Tribunal will decide in particular:

- 5.7.1 Was the PCP an appropriate and reasonably necessary way to achieve those aims;
- 5.7.2 Could something less discriminatory have been done instead;
- 5.7.3 How should the needs of the Claimant and the Respondent be balanced?

6. Constructive unfair dismissal

6.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breach(es) was / were as follows;

- 6.1.1 The allegations of discrimination above;
- 6.1.2 Failing to risk assess the Claimant's work when he was struggling in 2022;
- 6.1.3 In about mid-March 2023, Mr G Gaiger rejected his suggestions for adjustments or assistance, namely:
 - 6.1.3.1 Reducing his working hours, so that if he was to continue working in the same role he would not be undertaking the role for such a long period of time each day;
 - 6.1.3.2 Being placed on light duties and shifting the emphasis of his role onto a more administrative function rather than manual;
 - 6.1.3.3 Adjustments being made to the working environment to minimise the level of dust which the Claimant was exposed to, which aggravated his medical conditions.
- 6.1.4 On or shortly after 24 March 2023, Mr J Gaiger rejected the Claimant's request to work part time dated 24 March 2023 sent by e-mail.

(The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

6.2 The Tribunal will need to decide:

- 6.2.1 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
 - 6.2.2 Whether it had reasonable and proper cause for doing so.
- 6.3 Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end. The Respondent says that the Claimant to go to a different job.

- 6.4 Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
- 6.5 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?
- 6.6 Was the termination of the Claimant's employment a constructive discriminatory dismissal within the meaning of s. 39(2)(c) and (7)(b) of the Equality Act 2010?

7. Wrongful dismissal; notice pay

- 7.1 What was the Claimant's notice period?
- 7.2 Was the Claimant paid for that notice period?
- 7.3 Did the Claimant work that notice period?
- 7.4 If not, was the Claimant guilty of gross misconduct or did he do something so serious that the Respondent was entitled to dismiss without notice?

8. Statement of Employment Particulars

- 8.1 Was the Claimant issued with a statement of employment particulars in accordance with s. 1 of the Employment Rights Act 1996.

9. Remedy

Unfair dismissal

- 9.1 The Claimant does not wish to be reinstated and/or re-engaged.
- 9.2 What basic award is payable to the Claimant, if any?
- 9.3 If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 9.3.1 What financial losses has the dismissal caused the Claimant?
 - 9.3.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 9.3.3 If not, for what period of loss should the Claimant be compensated?
 - 9.3.4 Does the statutory cap of fifty-two weeks' pay or apply?

Discrimination

- 9.4 What financial losses has the discrimination caused the Claimant?
- 9.5 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

- 9.6 If not, for what period of loss should the Claimant be compensated for?
- 9.7 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
- 9.8 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- 9.9 Should interest be awarded? How much?

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- 9.10 When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?
- 9.11 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.
- 9.12 Would it be just and equitable to award four weeks' pay?