Case Number:- 3322812/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Paul Bannon	**v**	Bridge Heating Limited

Heard at: Norwich (by CVP)

On: 19, 20, 21, 22 and 23 August 2024

Before: Employment Judge Postle

Members: Ms L Davies and Mrs W Smith

Appearances
For the Claimant: Miss Crowther, Daughter of the Claimant
For the Respondent: Mr Flood, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The Claimant's claim under the Equality Act 2010 for the protected characteristic of disability and age discrimination are not well founded.

2. The Claimant was not constructively unfairly dismissed.

3. The Claimant's claim for breach of contract in respect of non-payment of wages is not well founded.

REASONS

Background

1. The Claimant's claims are set out in an Agreed List of Issues in the Bundle at page 68 – 74.

2. They consist of claims under the Equality Act 2010, particularly for the protected characteristic of disability and age, namely:-

2.1. Section 13, direct disability and age discrimination;

2.2. Section 15, discrimination arising from disability;

2.3. Section 19, indirect disability discrimination;

2.4. Section 20, failure to make reasonable adjustments;

2.5. Section 26, harassment (disability); and

2.6. Section 27, victimisation (disability).

3. There is also a claim for constructive dismissal under the Employment Rights Act 1996, upon which the Claimant appears to rely on 13 alleged breaches of the implied term of mutual trust and confidence.

4. The Claimant's disability is left cerebral artery stroke and that is accepted by the Respondent as a s.6 disability and indeed, the knowledge of that disability is conceded.

The Law

Jurisdiction

5. There is a jurisdictional issue, given the date of the ACAS Early Conciliation Certificate commencing on 1 September and concluding on 13 October 2021, the claim was filed on 11 November 2021. Therefore any issues prior to 2 June 2021 are prima facie out of time unless they are said to be continuing acts.

6. Section 123(1)(a) of the Equality Act 2010 states,

> 123 Time Limits
>
> (1) Subject to s.140B proceedings on a complaint within s.120 may not be brought after the end of-
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) …

7. Conciliation, s.207B of the Employment Rights Act 1996 states that the time limits for bringing a claim will effectively be stopped when ACAS Early Conciliation commences and resuming only when the ACAS Early Conciliation Certificate is received.

8. Section 123(3) of the Equality Act 2010 provides,

> 123. Time Limits

> (3) For the purposes of this section-
>
> (a) conduct extending over a period of time is to be treated as having been done at the end of that period;
>
> …

9. The test for whether conduct constitutes conduct extending over a period of time is as at in the Commissioner of Police for the Metropolis v Hendricks [2003] IRC 530 Court of Appeal where it is said,

> "The focus must be on the substance of the complaint and a distinction must be drawn between acts extending over a period on the one hand and a succession of unconnected or isolated specific acts on the other.
>
> One relevant but not conclusive factor is whether the same or different individuals were involved in those acts."

10. Clearly the first issue under the s.15 claim is out of time. Namely, the Claimant's absence from 5 February to 10 March 2021. That clearly is an isolated single act, the alleged unfavourable treatment, as was the implementation of an incompetency investigation on 8 May 2021.

11. The question then, should the Tribunal exercise its discretion to extend time. It is a high hurdle for a Claimant, it is the exception rather than the rule and the burden is on the Claimant to show precisely why they did not issue before.

12. In this case we know that the Claimant / his daughter Miss Crowther had been in contact with ACAS at a very early stage. More importantly, the Claimant has led no evidence in this Hearing as to why the Tribunal should exercise its discretion to extend time on the just and equitable principle.

13. The Tribunal, therefore, have declined to exercise their discretion and those claims are out of time. Having said that, the Tribunal for the sake of completeness will nevertheless deal with them.

Detriment

14. Before moving on it is important to consider what constitutes a detriment and for it to be one, the Claimant must be disadvantaged in an objective way such that a reasonable worker would or might take the view that he or she had thereby been disadvantaged in circumstances in which he had thereafter to work.

15. We noted an unjustified sense of grievance cannot constitute a detriment.

Burden of Proof – s.136 Equality Act 2010

16. The burden of proof in proving discrimination first rests with the Claimant and only shifts to the Respondent to provide an explanation if there are facts from which the Tribunal would decide the Respondent has discriminated against the Claimant.

17. If the burden shifts to the Respondent, it is for the Respondent to prove that it did not commit an act of discrimination and it discharges the burden by proving that on the balance of probabilities the treatment in question was in no sense whatsoever because of the prohibited reason.

Harassment – s.26 Equality Act 2010

18. There are three elements to such a claim:-

    18.1. Did the Respondent engage in unwanted conduct?

    18.2. Did the conduct in question,

        a. have the purpose, or
        b. have the effect of either:

            i. violating the Claimant's dignity, or
            ii. creating an adverse environment.

    18.3. Was the conduct on prohibited grounds?

19. In deciding whether the conduct has the effect referred to above, each of the following must be taken into account:-

        a. the perception of the Claimant;
        b. the other circumstances of the case; and
        c. whether it is reasonable for the conduct to have that effect.

Indirect discrimination – s.19 Equality Act 2010

20. This provides,

> 19. Indirect discrimination
>
> (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.

21. In order to establish a prima facie case of indirect discrimination it is sufficient to show that a provision, criterion or practice results in a particular disadvantage to those not sharing the Claimant's protected characteristic and to the Claimant personally. It is not necessary to show why the PCP resulted in that disadvantage and that it was causally linked to the Claimant's protected characteristic. Thus it is not necessary to establish the reason for the particular disadvantage to which the group is put. The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group but also by the individual.

22. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon the Respondent, nor should it be seen as casting some sort of shadow or stigma upon them.

Discrimination Arising from Disability – s.15 Equality Act 2010

23. This provides,

> 15. Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if-
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

24. There are two simple questions of fact here, what was the relevant treatment and was it unfavourable to the Claimant?

Duty to Make Reasonable Adjustments – s.20 Equality Act 2010

25. Was there a failure to make reasonable adjustments that put the Claimant at a substantial disadvantage compared with non-disabled persons? Substantial disadvantage means unable to carry out the contractual role.

Constructive Dismissal – s.95(1)(c) Employment Rights Act 1996

26. This provides,

> 95 Circumstances in which an employee is dismissed
>
> (1) For the purposes of this Part an employee is dismissed by his employer if,
>
> (a) …

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

27. This form of dismissal is commonly referred to as constructive dismissal.

28. In order to claim constructive dismissal the employee must establish that:-

    28.1. There was a fundamental breach of contract on the part of the employer;

    28.2. That the employer's breach caused the employee to resign; and

    28.3. The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

29. What a Tribunal will be looking for is, have the Respondents in some way acted without just cause or good reason.

Evidence

30. In this Tribunal we have heard evidence from the Claimant and his daughter Miss Crowther. They were not cross examined by Counsel for the Respondent as the Claimant's Witness Statement was a Victim Impact Statement and of course the Respondents have conceded disability. In the case of Miss Crowther (the daughter), in essence and that was a factual road map of what actually happened and in other areas it was simply what she had been told by her father.

31. For the Respondents we heard evidence from: Mr Grace, a former Operations Director; Ms Holmes, former Managing Director; Mrs Callender, former Health and Safety and HR Manager; and Mr Cook, former Operations Director.

32. The Tribunal also had the benefit of a Main Bundle of documents consisting of 872 pages and a Supplemental Bundle of 31 pages.

The Facts

33. The Claimant was employed as a Gas Surveyor Supervisor from 1 August 2018. His employment involved surveys and installations of gas related equipment. Clearly such an industry places an emphasis on safety, not only for its employees but also for its clients and customers. It requires each employee to be certificated at various times. It is a highly regulated

industry. The requirements for the job inevitably require a certain amount of travelling to and from customers and clients.

34. The Claimant's Contract of Employment contained a clause at paragraph 17 – 20,

> "We operate a strict no smoking policy. Smoking is not allowed in any of our buildings (including Site Offices) or vehicles at any time whether during normal business hours or otherwise. A breach of our no smoking policy is a disciplinary offence which may lead to summary dismissal."

35. Indeed, in the Respondent's Handbook there is a list of offences of gross misconduct, smoking of which is identified as one.

36. The Policy is reiterated in the Company Handbook at page 43 and is very detailed as to the no smoking Policy, whether in company vehicles or private vehicles, or leased vehicles.

37. The Company Handbook goes on to remind employees that weekly Vehicle Check Sheets must be completed for all company vehicles by their user and sent through to the allocated Manager for checking each Monday. Again, it reminds employees that failure to do so, including reporting any damage, may be the subject of disciplinary sanctions and a persistent failure to complete vehicle checks may result in disciplinary action.

38. The Claimant's Contract was updated in July 2021 to reflect the now electronic survey process that the company had implemented.

39. Sadly and unfortunately, the Claimant suffered a stroke on 5 February 2021, but was eager to return to work because of the financial constraints placed on him in his personal circumstances and the need to earn a living. At the Claimant's request he returned to work on 15 March 2021, there being no restrictions or suggestion of a phased return contained in the GP's Fit Note.

40. Mrs Callender was no doubt concerned at the Claimant's rapid return to work on 15 March 2021 and arranged for an Occupational Health Report. Before that Report came in, the Claimant called Mrs Callender to advise he had spoken to the Stroke Association and had realised that five days a week was now to much and was hindering his recovery. He wanted to drop down to three days per week, which the Respondents agreed to without hesitation. Since the Claimant returned to work on 15 March 2021, they had arranged tandem working with a colleague which was to last for

six weeks which would cease on 23 April 2021, when the colleague was returning to Dubai and in any event this arrangement was not viable in the long term.

41. The Occupational Health Report on 29 March 2021 (page 381b) referred to a phased return of three days and driving two hours at a time before taking a 20 minute break. From that Occupational Report it was reasonable for the employer to have interpreted the reasonable adjustment of tandem working for six weeks to clearly have started when he had returned to work on 15 March 2021, which is indeed what happened.

42. There was then a Review Meeting on 13 April 2021 (page 367) where the Claimant was advised that long term tandem working was not financially viable. It was also mentioned that Mr Cook was in the process of writing out some Quick Start Guides and tick sheets for Surveyors and Quality Control to follow which would assist the Claimant in working through his jobs (page 403). At this meeting the Claimant requests to increase his days to four days per week. That was agreed.

43. There is a second Occupational Health Report on 20 April 2021 which again refers to driving a maximum of two hours without a break and recognised the ongoing four day per week. It talked about having a co-driver when the tandem working ceased and suggested Access to Work may assist.

44. Ultimately, Access to Work could only provide a driver to collect the Claimant from home to work and return him at the end of the day. It could not provide one full time to drive him around all day.

45. On 30 April 2021, the Respondent became aware of performance issues relating to matters prior to the Claimant's sickness. Two investigations were to be implicated into the Claimant's work.

46. On 17 May 2021, the Claimant was sent an email, as were all staff (page 428) about the requirement to send in Vehicle Check Sheets each month and advising failure to send them in could lead to disciplinary action in accordance with the Company Handbook. Then (page 435) the Claimant was sent an email of 1 June 2021 chasing the Claimant and other staff and another email of 7 June 2021 from Mr Cook about the failure to send in Vehicle Check Sheets for three weeks and reminding him that failure could lead to disciplinary procedures. There was another email from Mr Cook about the Claimant leaving work early when it had been agreed he would come into the office to complete Surveys, but no suggestion that the Claimant was going to be subjected to disciplinary sanctions in respect of that email.

47. It was then in June 2021, following a meeting with Mrs Callender on 4 June 2021 that the Claimant requested to return to work five days per week starting on 7 June 2021. Further, that he would come into the office each day to complete Surveys and catch up with the Team.

48. On 22 June 2021, there was an internal assessment carried out, consisting of reminding the Surveyors of practical gas and safety requirements, to check their understanding and to suggest areas where further training might be required.

49. On 8 July 2021, Paul Fourmy reports to Mrs Callender (page 460) about the assessment of the Claimant and talking through the procedures and gaps in his knowledge and the need for more training.

50. On 7 July 2021, the Claimant was written to about an investigation regarding his failure to attend a booking. There was a further report around the same time that the Claimant had been smoking in a company vehicle.

51. An Investigation Meeting was arranged for 20 July 2021, at which the Claimant admits smoking in the van and at that meeting other issues were addressed. It was felt they could be dealt with by restructuring the Claimant's workload and with further training.

52. The Claimant was invited to a Disciplinary on 28 July 2021 (page 549). The letter makes it clear it is a Disciplinary Meeting and that the purpose of the meeting was smoking in a company vehicle, the possible consequence being a written warning and the fact that the Claimant was entitled to be accompanied by a work colleague or Trade Union Representative.

53. At the meeting on 4 August 2021, the Claimant admitted,

> "… well I probably shouldn't do it, I don't do it very often, I am not going to lie to you, I have probably done it on a few occasions"

54. That being reference to smoking in company vehicles.

55. The Meeting was Chaired by Mr Grace and the outcome was a Final Written Warning issued on 12 August 2021 (page 556). It should be noted that Mr Grace had on occasions previously spoken to the Claimant on an informal basis about smoking in the company vehicles.

56. On 17 August 2021, the Claimant appealed the decision to issue him a Final Written Warning. The Appeal was Chaired by Lucy Holmes and the Hearing took place on 26 August 2021 and ultimately Mrs Holmes dismissed the Appeal by letter of 1 September 2021 (page 620), setting out the reasoning for that decision.

57. Following the Disciplinary Hearing the Claimant then raised a Grievance on 25 August 2021 (page 587) alleging that the Respondents had failed to make reasonable adjustments.

58. On 31 August 2021, there is no evidence to corroborate, in the Claimant's Witness Statement or otherwise, that comments alleged to have been made by Ms Stroud about the Claimant's Grievance were actually said.

59. The Claimant's Grievance Hearing was originally scheduled for 3 September 2021. That was postponed and rearranged for 20 September 2021.

60. Prior to the Grievance Hearing there had been an informal meeting with Mrs Callender on 2 September 2021 to discuss the Claimant's work and getting him up to an appropriate level. The Claimant had accepted he was struggling and thought he would possibly never get back to normal. He accepted and agreed he needed external training.

61. The Grievance Hearing duly took place before Lucy Holmes with the Claimant's daughter Miss Crowther attending. It was clearly an extensive meeting. There were then concerns raised about the Claimant's performance and conduct.

62. On 3 September 2021, because of the concerns regarding the Claimant's competency in the gas related industry, safety being critical, discussions started between Mr Cook and the Claimant about a Performance Improvement Plan (PIP).

63. The discussions were ongoing between the Respondents regarding the PIP and a meeting was then arranged between Mr Cook and the Claimant to discuss the PIP on 7 September 2021. The contents of that PIP are at page 632. Following that meeting the Plan was sent to the Claimant for him to consider and return with his comments on 10 September 2021.

64. The Claimant then appealed the PIP by letter of 27 September 2021 (page 763) and on 30 September Mrs Callender (pages 779 – 780) responds to the Appeal against the PIP setting out clear reasoning why it was necessary and would continue.

65. On 6 October 2021, the Respondents received a complaint from a Housing Association about a serious incident in which the Claimant had been allocated to undertake a Survey and he had failed to complete paperwork regarding the uncapping and recapping of a meter, including a gas tightness test.

66. The re-scheduled Grievance Meeting took place on 21 September 2021 and on 28 September 2021 the Respondents wrote to the Claimant confirming insofar as they were concerned reasonable adjustments had been made and the reasoning for them and therefore did not uphold the Grievance.

67. ACS Gas training had been booked for the Claimant around 11 October 2021 but unfortunately the Claimant left the course before completing it, possibly on the second day. The reason why he was asked to go and undertake the training before his Certificate expired in March the following year, was to ensure he had sufficient time in which to pass the certification and also because of the issues that had arisen with the Claimant's work; and the need to ensure safety from a customer and indeed an employee perspective.

68. The Claimant went off sick following the ACS Gas Training and ultimately resigned on 1 November 2021, effective from 25 November 2021, before the PIP was implemented.

Conclusions

Discrimination Arising from Disability

69. The Respondents accept that the Claimant's absence on 5 February to 10 March 2021 amounted to something arising in consequence of his disability.

70. The question is, was there unfavourable treatment?

71. It is said that starting the investigation into the Claimant's competency on 8 March 2021 rather than assisting the Claimant to return to work was in effect the unfavourable treatment. What happened was at a catch up meeting on 8 May 2021 concerns were raised about the standard and quality of the Claimant's work. Clearly it is not unfavourable treatment to raise such matters in a gas safety environment. Further, the Claimant had been assisted in his return to work, there had been tandem working for six weeks up until 23 April 2021, there had been reduced days and the meeting was all part and parcel of the Claimant's return to work. It simply cannot be unfavourable treatment to advise an employee about shortcomings in that work, whether they are disabled or not.

Performance Improvement Plan (PIP)

72. Implementing Performance Improvement Plan on 7 September 2021, again it is accepted discussions were ongoing between the Respondent about the Claimant's work and gaps in his knowledge. They were discussed with the Claimant around 7 September 2021. He was given a draft Performance Improvement Plan to consider, he appealed the PIP (page 763), that Appeal was dismissed and the reasons clearly set out by Mrs Callender in a letter of 30 September 2021 (page 779). The Claimant had resigned and gone off sick before the PIP was activated.

73. Clearly that cannot be unfavourable treatment because of the Claimant's disability. The Plan, whatever the Claimant believed, was intended to assist him to improve his work. Had they not done so and the Respondent continued to register complaints about his workmanship, then the Respondents would be criticised for not addressing these issues and helping the Claimant through them.

74. There were genuine concerns about the Claimant's work before the stroke and after and perhaps should have been addressed earlier, particularly given the industry being highly regulated. None of these matters has a causal link between the Claimant's disability. Furthermore, the PIP was intended to help the Claimant moving forward with external training for his

ACS Gas Training Certificate renewal, given that informal training had been offered and proved unsuccessful with the Claimant.

75. These actions were not unfavourable treatment because the Claimant had been absent from work following his stroke.

Failure to Make Reasonable Adjustments

76. PCP 1 –

Did the Respondent apply a PCP of requiring employees to work their contractual hours?

77. This is factually incorrect. The Claimant was signed off as fit to work by his GP with no restrictions, which the Claimant made clear to the Respondents on 26 February 2021. The Claimant wanted to return to work. Mrs Callender had the sense to commission an Occupational Health Report on 22 March 2021. Then on 23 March 2021 she records the conversation she had had with the Claimant where he now accepts coming back to a five day working week may have been optimistic and too much even allowing tandem working with a colleague had been in place since the Claimant's return.

78. When the Occupational Health recommends three days per week, the GP's Fit Note is amended to reflect that and the Respondents without question or hesitation implemented the adjustment without delay or protest.

79. Furthermore, there is no evidence that the Respondent ever put pressure or a timeline on the Claimant returning to a five day working week. Indeed, far from it, it is the Claimant who informed the Respondent that he wished to recommence a five day working week at a meeting on 4 June 2021.

Did that PCP place the Claimant as a disabled person at a substantial disadvantage compared to those who are not disabled in that he was unable to fulfil his contractual hours?

80. Had the Respondents applied a PCP that the Claimant had to fulfil his contractual hours, (again it was the Claimant himself who indicated that he wished to do full working five days a week), then that clearly would have placed the Claimant at a substantial disadvantage. But it did not happen. The Respondents clearly did make reasonable adjustments to help avoid the potential disadvantage. The Claimant did have a phased return working, structured as working three days and then four days and then at the Claimant's request five days. The suggestion that the reasonable adjustment by the Claimant should be four hours working a day was simply not practical, reasonable or feasible. The Claimant's role required travel, sometimes long distances, therefore four hours would not have allowed him to undertake his role to travel to a job, complete the job and then write up the appointment.

81. The adjustment has to be reasonable and the Code of Practice in Employment 2011 does set out factors which a Respondent should consider when deciding whether it is a reasonable step to take amongst other steps. The practical steps are in preventing any substantial disadvantage, financial and other costs of making the adjustments, the extent of any disruption, the extent of the employer's financial or other resources, availability to the employer of financial or other assistance and the type and size of the employer. What would be appropriate and practicable for large employers may not be realistic for a small employer such as the Respondent. Here the Respondents were a small employer with approximately 34 employees and going through severe financial constraints, rebranding, restructuring and redundancies. Accepting the adjustment of four hours per day in the circumstances was simply not practical.

82. PCP 2 –

Did the Respondent apply a PCP requiring its employees to carry out lone working?

83. It was accepted this applied to some of the Respondent's employees and also to the Claimant post 23 April 2021 following six weeks of tandem working.

Did that put the Claimant at a substantial disadvantage in that he was unable to carry out his contractual role?

84. The answer to that is clearly no. The Claimant wanted to return to work, initially without restrictions. When he realised he could not do five days and suggested three days, it was indeed Occupational Health advice and again that was implemented immediately by the Respondents. At the catch up meeting on 8 May 2021, the Claimant is recorded as saying and it is not challenged (page 410),

> "Paul reported that although he still gets very tired, he feels that the return to working independently has been going well and that he is coping and will not be able to increase his days to full time and as agreed will keep to four days."

85. Later, at a further catch up meeting on 4 June 2021,

> "Paul recorded feeling much better and the tiredness is not as bad as it has been before, it is not so debilitating as previously. Paul said that he's coming in for five days from 7 June 2021 and finding driving okay."

86. So when the Claimant wants his hours and days changed, he was able to do so. Furthermore, there was no evidence had the tandem working

continued for a longer period that he would have been able to return to five days working sooner than he did.

Did the Respondents make reasonable adjustments to the PCP to help avoid the disadvantage?

87. The Respondents implemented the tandem working arrangements for the Claimant on his return to work, until 23 April 2021. The Claimant says this should have lasted longer. Mrs Callender's evidence was that she thought tandem working would only be required for three to four weeks. It was then realised it was needed for longer and so remained in place until 23 April 2021 when the tandem worker Alan was leaving. The period of time offered was reasonable, realistic and practical in terms of what the Respondents could provide. That was therefore a reasonable adjustment and got the Claimant to a point where he could work his days that had been agreed without further assistance.

88. PCP 3 –

The driving requirement.

89. It is accepted that this is a PCP. Part and parcel of the job was the requirement to drive. There was no evidence the Claimant was unable to drive any more than two hours without a break and in any event, there was no objection to him stopping for a break.

Did the Respondents make reasonable adjustments to the PCP to avoid the disadvantage?

90. The Claimant says the Respondent should have provided support for the driving. This was investigated with Access to Work and they could provide assistance to and from work, but it was not something that Access to Work could provide in terms of full time and was not pursued by the Claimant.

91. PCP 4 – Refresher Training

Did the Respondent apply a PCP requiring employees to attend refresher training?

92. The Tribunal assume it is the ACS Gas Training that is being suggested. Clearly the PCP applied to all Gas Engineers, they had to pass in order to be Certified and it was a requirement of the role given the nature of the industry.

93. The reason the training was brought forward was to assist the Claimant to get up to speed well in advance of the expiration of his Certificate in March 2022 to ensure that he passed the training. The PCP did not therefore put the Claimant at a disadvantage. It was a positive advantage to enter the training earlier.

94. The reasonable adjustment the Claimant says should have been available was given additional support / training.

95. Firstly, every Gas Engineer was required to complete and pass the training and the Claimant had been offered internal in-house training which had not been well received by the Claimant. Putting the Claimant on a PIP was intended to help with the training.

96. Auxiliary aids –

Did the Respondent require employees to carry out their contractual role?

97. Yes, clearly they did, but this was not applied to the Claimant after returning to work following his stroke as he was not carrying out his full contractual role which he was paid to do, namely a Gas Surveyor Supervisor.

Did the requirement place the Claimant at a substantial disadvantage in that he might struggle to remember to carry out all aspects of his role following the stroke?

98. What we have here is the Claimant believing he was not failing in his role and further he has not said precisely what he was failing. On the contrary the Respondent's evidence was that concerns about the Claimant's confidence and knowledge gap had been raised and their attempts were to resolve these issues through informal training, formal training and a PIP. Therefore the Claimant has failed to advance a substantial disadvantage.

99. In relation to the provision of auxiliary aids to help avoid any disadvantage, in particular the Claimant asserts in 13 April 2021 meeting he requested Quick Start Guides, tick sheets and an iPad to assist. Mr Cook clearly provided on 27 April 2021 the Claimant with check lists for each contract and what was required. The Claimant did not question the value of them at the catch up meeting on 8 May 2021 (page 410).

100. It was also acknowledged on 8 May 2021 an apology that the iPad had not come through, but it had arrived by 10 May 2021. Therefore this claim fails.

<u>Victimisation</u>

101. It is accepted that the protected act is clearly the Grievance of 26 August 2021.

102. The comments attributed to Tracey Stroud are said to have been made on 31 August 2021. There is simply no evidence from the Claimant in his Witness Statement that this was said, it is strange that his Witness Statement is silent. The Tribunal concluded on the balance of probabilities this simply did not happen.

103. Further, the allegations of being put on a PIP on 7 September 2021, clearly there were discussions by the Respondent with the reasons why. The motive was clear, it was to address the Claimant's gap and training was appropriate. Clearly there is no causal link between the protected act and the PIP related to the Claimant's disability.

Direct Disability Discrimination

104. The Claimant relies on the hypothetical comparator with the same performance history as the Claimant, but of course does not have a disability. The Claimant asserts the PIP of 7 September 2021 was an act of direct discrimination.

105. It is clear if a hypothetical comparator showed the same shortcomings as the Claimant and was not disabled, that person would have been treated in exactly the same manner as the Claimant. Therefore the reasons for the treatment were clear and not related to the Claimant's disability.

Indirect Disability Discrimination

106. If this is in relation to applying a PIP Policy towards employees, clearly it is a proportionate means of achieving a legitimate aim and it is consistent with the need to obtain safe levels of performance across the workforce. Therefore the reason and motive for the PIP is clear.

Harassment

107. The conduct relied upon is said to be sending disciplinary threats in three emails from Nathan Grace between 1, 7 and 25 June 2021:-

    107.1. The first appears to have been a request that Van Check Sheets be submitted in a timely and regular manner;

    107.2. the second regarding his work van and damage to the bumper and screwdrivers in Windscreen housing and reminders; and

    107.3. the third being regarding leaving work early.

108. The first point to make is the Claimant has not advanced any evidence as to the effect of these emails. What we can conclude is two of the emails were sent to all staff for failing to provide Vehicle Check Sheets and warns of disciplinary action which is in accordance with the Company Handbook. There is a follow up to all staff and a further email to the Claimant where he has failed after three weeks to provide the information and the threat of disciplinary action.

109. None of this can possibly amount to harassment having that purpose or effect and clearly has nothing to do with the Claimant's disability.

Direct Age Discrimination

110. The Claimant was 59 years old at the date of resignation. In this Tribunal the Claimant has failed to adduce or advance any evidence that because of his age the conduct towards him by the Respondent was an attempt to force him out of the business.

Breach of Contract

111. This is in respect of an alleged non-payment of wages at the end of the Claimant's employment.

112. Again, no evidence has been advanced and no Witness has been cross examined on this point, therefore this claim must fail.

Constructive Dismissal

113. Again, the Tribunal reminds itself, has the Respondent in any way acted without just cause of reason? Dealing with the Claimant's allegations as follows:-

113.1. *Backdating the six week tandem working arrangements from the Claimant's return to work on 11 March 2021, they should have run from the OH Assessment on 29 March 2021*.

What happened here was quite simply there was no backdating, tandem working began when the Claimant returned to work on 11 March 2021 and there was no question of it being back dated. It was obvious that it would start when the Claimant returned to work. There clearly cannot be any breach or suggestion that the Respondents were acting without just cause or reason.

113.2. *Informing the Claimant that two investigations were underway on 8 May 2021*.

That clearly happened in respect of issues that arose prior to the Claimant going off sick and given the nature of the Respondent's business, gas safety being critical, it was correct, appropriate and proper to investigate any shortcomings in the Claimant's workmanship. That cannot be a breach or a suggestion that the Respondent's were acting without just cause or reason.

113.3. *Sending disciplinary threats in the form of three emails from Nathan Grace from 1, 7 – 25 June 2021*.

This has of course already been addressed under harassment, but quite simply the Claimant, as indeed other staff, are not sending in

their Vehicle Check Sheets or reporting damage to their vehicles. The Claimant, as well as other staff, were reminded of the importance of sending them in and if they failed to send them in it could lead to disciplinary action. That cannot, under any circumstances, given what is in the Company Handbook the requirement to send in the completed Vehicle Check Sheets, be a breach by the Respondents.

113.4. *Informing the Claimant at the meeting on 20 July 2021 of the complaint that he had been smoking in his van*.

It is accepted this happened, ultimately the Claimant admits it. Therefore that cannot be a breach.

113.5. *Issuing an updated job description at the meeting on 20 July 2021 without the Claimant's agreement*.

The issue here was quite simply a small amendment to the Claimant's contract to reflect a new electronic survey process and indeed that was in respect of the job description. That clearly was not the Respondents acting without just cause or reason.

113.6. *Conducting the meeting on 4 August 2021 as a full disciplinary hearing rather than a mere informal disciplinary meeting*.

It matters not whether the arrangement is referred to as a disciplinary hearing or disciplinary meeting, it is quite clear from the letter inviting the Claimant to the meeting that it was for the purposes of a disciplinary to consider smoking in the company van and warned an outcome could be a warning. This clearly is not a breach of a fundamental term and is not the Respondents acting without just cause or reason.

113.7. *Conducting the meeting on 4 August 2021 in a way that breached the ACAS Code, namely by not providing evidence to the Claimant before or during the hearing and not giving sufficient time or instruction to prepare for the hearing*.

The Claimant had adequate time to prepare for the meeting, he knew what it was about and that was following the investigatory meeting regarding smoking in the company van. He had admitted this on more than one occasion. There is no breach of the ACAS Code. This cannot be described as the Respondents acting without just cause or reason.

113.8. *Issuing a Final Written Warning on 12 August 2021 (for smoking)*.

The Claimant accepted this happened. The Claimant admitted certainly on three occasions that he had been smoking and on more than one occasion. It was against Company Policy and the Claimant's own Contract of Employment, which could itself be seen

as a breach by the Claimant. The Company Handbook provides examples of gross misconduct and smoking at work could result in summary dismissal. Therefore to receive a Final Written Warning, the Claimant could consider himself fortunate.

113.9. *Tracey Stroud making comments on a telephone call of 31 August 2021*.

There is absolutely no evidence that these comments were ever made. There is no corroborative evidence by any employee that the comments were made and interestingly enough the Claimant's own Witness Statement is silent on this.

113.10. *Rejecting the Claimant's Appeal against the Warning of 1 September 2021 (re smoking).*

Clearly it was not unreasonable to uphold the Final Written Warning for smoking given the fact it was in breach of the Claimant's own Contract of Employment and in breach of the Company Handbook and the Claimant could well have been dismissed for that breach. Therefore it is not the Respondents acting without just cause or reason.

113.11. *Placing the Claimant on a PIP on 7 September 2021 which is alleged was unfair as it was based on an unagreed updated job description and because the Respondent did not provide any training, support or guidance*.

This has already been dealt with in the main body of this Judgment. The reasons for the PIP had nothing to do with an unagreed updated job description. The Claimant had been provided with support, training and guidance. In any event, although discussions were ongoing about the PIP, the Claimant was off sick and resigned before it was activated.

113.12. *Refusing on 30 September 2021 to delay the PIP requirement for the Claimant to carry out ACS Gas Training despite the fact the Claimant's ACS Gas qualification did not expire until March 2022*.

There was a perfectly good reason for the Claimant entering his ACS Gas Training well before his Gas Certification expired in the following March. This was to ensure he had adequate training and support to make sure he passed well in advance as it was a requirement of his job. This cannot be without just cause or reason or a fundamental breach.

114. In the circumstances, taking all of those cumulatively and singularly, there is nowhere near a breach of the implied term which can be said the Respondent was acting without just cause or reason.

_____
Employment Judge Postle

Date: 4 - 09 - 2024

Sent to the parties on:
15 November 2024

For the Tribunal Office.

Public access to Employment Tribunal decisions

Judgments and Reasons for the Judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal Hearing has been recorded you may request a transcript of the recording, for which a charge is likely to be payable in most but not all circumstances. 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/