



EMPLOYMENT TRIBUNALS

Claimant: Mr M.J. Ashwood
Respondent: DHL Services Limited

Heard at: Watford Employment Tribunal
On: 6,7,8 and 9 October 2025
Before: Employment Judge S. Matthews
Mr M Bhatti
W. Dykes

Representation:
Claimant: In person
Respondent: Miss K Nowell

RESERVED JUDGMENT

The unanimous judgment of the tribunal is:

1. The complaint of unfair dismissal is not well-founded and is dismissed. The claimant was not unfairly dismissed within the meaning of s.98 or s.100 of the Employment Rights Act 1996.
2. The complaint of direct disability discrimination is not well-founded and is dismissed.
3. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.
4. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.
5. The complaint in respect of holiday pay is not well-founded and is dismissed.

REASONS

Introduction

1. The respondent, a logistics and transportation company, employed the claimant as an HGV driver from 27 October 2014 until 14 December 2023 when the respondent dismissed the claimant for the stated reason of misconduct. The claimant says that the dismissal was unfair and brings complaints of unfair dismissal, automatic unfair dismissal on the grounds that he took steps to protect himself or other persons from serious and imminent danger, disability discrimination and a claim for holiday pay which the claimant says he was owed at the termination of his employment.
2. The tribunal was provided with a bundle of 810 pages and heard evidence from the following witnesses:

For the claimant:
The claimant;
Bruce Smith, senior shop steward, employee of the respondent.

For the respondent:
Georgina Abbott, HR Business Partner;
Darren Franklin, General Manager based at Daventry;
Samantha Neal (previously Fletcher), Operations Director.
3. These individuals provided written statements in advance, and the tribunal took time to read them. Each witness was asked questions about the evidence contained in their statements.
4. The tribunal was provided with 2 witness statements from witnesses for the claimant who were not called; Warren Tyler, who worked with the claimant on the Homebase contract and Brian Hart, National officer for the United Road Transport Union. As they did not attend the tribunal and their evidence was of limited relevance, we disregarded their statements when reaching our decision.
5. References to pages in the bundle are set out in brackets [x]. References to paragraphs in the witness statements consist of the witness's initials or 'C' in the case of the claimant and the number of the paragraph (AB-YZ).
6. The relevant procedural background to this hearing is that a case management hearing took place before Employment Judge (EJ) Knowles on 24 September 2024. A draft list of issues was drawn up. EJ Knowles listed a public preliminary hearing on 17 January 2025 to determine whether the claimant was a disabled person due to neck pain as defined by the Equality Act 2010. The hearing did not take place because the respondent conceded that the claimant was disabled due to neck pain. The respondent agreed to amendments made by the claimant to his claim. The list of issues was finalised by agreement between the parties.

Issues

7. The issues to be decided by the tribunal were agreed as follows:

Time limits

- 1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 31 October 2023 may not have been brought in time.
- 1.2 Were the discrimination 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 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?

Unfair Dismissal

- 2.1 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. (The Claimant claims it was because of his disability and the need to make reasonable adjustments). The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
- 2.2 If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:
 - 2.2.1 there were reasonable grounds for that belief;
 - 2.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

- 2.2.3 the respondent otherwise acted in a procedurally fair manner;
- 2.2.4 dismissal was within the range of reasonable responses.

Automatically unfair dismissal S.100 (1) (e) ERA

- 3.1 On 23 October 2023, did the claimant believe that there were circumstances of serious and imminent danger?
- 3.2 If so, was that belief reasonable?
- 3.3 If so, did the claimant take (or propose to take) appropriate steps to protect himself or other persons from such danger?
- 3.4 Was the reason or principal reason for dismissal that the claimant had taken (or proposed to take) such appropriate steps?
- 3.5 Has the respondent shown that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them?

Remedy for unfair dismissal

- 4.1 If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 4.1.1 What financial losses has the dismissal caused the claimant?
 - 4.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 4.1.3 If not, for what period of loss should the claimant be compensated?
 - 4.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - 4.1.5 If so, should the claimant's compensation be reduced? By how much?
 - 4.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - 4.1.7 Did the respondent or the claimant unreasonably fail to comply with it?
 - 4.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - 4.1.9 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

4.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

4.1.11 Does the statutory cap of fifty-two weeks' pay or £105,707 apply?

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

4.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Disability

5.1 The respondent accepts that the claimant was disabled by spinal fusion, left ankle weakness and by reason of his neck.

Direct disability discrimination (Equality Act 2010 section 13)

6.1 Was the claimant's dismissal on 14 December 2023 less favourable treatment?

6.2 Was the decision to provide the Claimant with a different vehicle to his "normal vehicle" on the 10th July 2023 and/ or the requirement for him to take his belongings with him, rather than leaving them in his "normal vehicle" less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant has not named anyone in particular who they say was treated better than they were.

6.3 If so, was this unfavourable treatment because of disability?

Discrimination arising from disability (Equality Act 2010 section 15)

7.1 Did the respondent treat the claimant unfavourably by:

7.1.1 On 10 July 2023, Kojo Wood criticising the claimant for leaving his back brace in a cab.

7.1.2 Dismissing the claimant on 14 December 2023.

- 7.2 Did the following things arise in consequence of the claimant's disability:
- 7.2.1 (in relation to 7.1.1) The claimant needed to wear his back brace due to his spinal fusion and needed somewhere to store it?
 - 7.2.2 (in relation to 7.1.2) The claimant could not work more than 10 hours each day because of his disabilities.
 - 7.2.3 (in relation to 7.1.2) The claimant's sleep problems caused by disability related pain affected the way he conducted himself on 23 October 2023.
- 7.2 Was the unfavourable treatment because of any of those things?
- 7.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:
- 7.4.1 to ensure some flexibility in the use of the vehicles.
- 7.5 The Tribunal will decide in particular:
- 7.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
 - 7.5.2 could something less discriminatory have been done instead;
 - 7.5.3 how should the needs of the claimant and the respondent be balanced?
- 7.6 The respondent accepts that at all material times it knew that the claimant had the disability.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

- 8.1 The respondent accepts that at all material times it knew that the claimant had the disability.
- 8.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:
- 8.2.1 A requirement to pull the curtains on a trailer.
 - 8.2.2 A requirement that drivers use different trucks.
- 8.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:
- 8.3.1 Pulling curtains caused pain to his neck, back and shoulders
 - 8.3.2 He needed to store his back brace in his truck and so needed to

use the same truck each day.

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

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

8.5.1 The respondent should have ensured the claimant had a trailer with a loaded box only, and no curtain side work.

8.5.2 The respondent should have ensured that the claimant was allowed to use the same truck each day.

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

8.6.1 The Claimant states that the adjustment should have taken place from April 2023 to 6th November 2023.

8.6.2 Should the respondent have made sure that the claimant could use the same truck every day by, and on, 10 July 2023?

8.7 Did the respondent fail to take those steps?

Remedy for discrimination

9.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

9.2 What financial losses has the discrimination caused the claimant?

9.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

9.4 If not, for what period of loss should the claimant be compensated?

9.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

9.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

9.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

- 9.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 9.9 Did the respondent or the claimant unreasonably fail to comply with it?
- 9.10 If so is it just and equitable to increase or decrease any award payable to the claimant?
- 9.11 By what proportion, up to 25%?
- 9.12 Should interest be awarded? How much?

Holiday Pay (Working Time Regulations 1998)

- 10.1 Did the respondent fail to pay the claimant for 1-2 days annual leave the claimant had accrued but not taken when their employment ended?

Findings of Fact

Background

- 8. This Judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues that the tribunal must consider in order to decide if the claim succeeds or fails. If we have not mentioned a particular point it does not mean that we have overlooked it, it is simply because it is not relevant to the issues.
- 9. The claimant commenced employment as an HGV driver with the respondent on 27 October 2014. He was engaged on the respondent's contract with Homebase which required him to deliver goods to Homebase sites.
- 10. The claimant served as union shop steward for the United Road Transport union from approximately February 2017 and took on the role of health and safety steward around June 2021 (C/1).
- 11. The claimant suffered a workplace injury in November 2019. He was off work for spinal surgery until January 2021.
- 12. The claimant was given a 12 month written warning for swearing during a conversation with a line manager following an incident on 24 May 2023 (C/34). The start date of the warning was 3 July 2023 and the end date was 2 July 2024 [234].

Disability

13. The respondent accepts that the claimant was disabled by spinal fusion, left ankle weakness and by reason of his neck. The respondent accepts that it had knowledge of the disability at the relevant time.
14. The respondent agreed adjustments relating to the claimant's disability at a meeting on 16 December 2022. The meeting was chaired by Stewart Morris, Transport Operations Manager. It was acknowledged the claimant had difficulty pulling back curtains on curtain sided trailers because of pain and numbness in the left side of his neck and arm and pain and numbness on his right side. On 12 January 2023 a letter headed 'Health Review Meeting Outcome' confirmed [195]:

'We would ensure you were given a box trailer wherever possible. If on an occasion you were not able to have a box, we would support you with opening your curtains so you can check your load.'

15. A new transport manager, James O' Leary was appointed from March 2023. The claimant did not feel he had such a good working relationship with James O' Leary as he had had with Stewart Morris (C/18/22).
16. The claimant asserts that Barry Elston (General Manager) and James O' Leary (Transport Manager) threatened to terminate his employment if he did not cooperate with them at a Trade Union catch up meeting on 6 April 2023 attended by James O' Leary, Barry Elston, himself and Brian Hart, (union officer). He claims Barry Elston said:

'that if I kept seeking resolutions to problems at site, Barry would take me to tasks via the processes available to him. I took this to mean that they would go down the lines of trying to remove my employment' and this was later confirmed by Brian Hart who said after the meeting that 'watch yourself Mike they are gunning for you' (C/25).

17. Brian Hart provided a statement but did not attend the tribunal to give evidence. No explanation for his non-attendance was given. The tribunal disregarded his statement. The meaning of the alleged comment and the context is unclear. The tribunal were not persuaded that the respondent's alleged threat was in any way related to the claimant's disability or had any relevance to the decision to dismiss. We refer to this allegation in relation to the procedural fairness of the dismissal at paragraph 51 below.
18. The claimant complains that, notwithstanding the adjustments referred to at paragraph 14 above, he was regularly assigned curtain sided trailers from April 2023 when James O' Leary became his manager and that this put him at a disadvantage because the curtains needed to be pulled back in the morning to enable loading of the trailer and his disability meant he could not pull back the curtains.
19. The claimant accepted in his oral evidence that whenever he was allocated a curtain sided trailer colleagues helped him pull back the curtains. When the load

was delivered to the customer's premises the curtains would be pulled back by employees of the customer.

20. The claimant used a back brace when driving because of his disability. He kept it in his truck. On 10 July 2023 he arrived at work to find that his usual truck had been assigned to another driver for that day. Consequently he did not have his back brace, and he was unable to drive that day. He was given alternative work and did not lose any pay. A note was placed on his file stating that going forward 'he is expected to be ready for work with any appropriate kit he needs to complete his planned run' and is to remove such kit from his cab in future in case there is a last minute vehicle change' [237]. The claimant asserts that if it were not for the back brace, which was related to his disability, he would not have received the file note. He perceived the file note as a criticism.
21. The claimant asserts that he should have been allocated his own truck every day as a reasonable adjustment so that he did not have the inconvenience of having to take his back brace (which he conceded was not very heavy) out of the truck. He would usually be allocated his own truck. There would be times when that was impossible, such as when it had to go in for a service or MOT and the claimant said he usually chose to take holiday then. Indeed he could only recollect his truck not being allocated to him on this one occasion. The claimant accepted in evidence that sometimes other drivers were allocated other trucks.

Incident on 23 October 2023

22. In early November 2023 a routine audit at Homebase's East Dereham store picked up a health and safety incident on CCTV, involving the claimant and a forklift truck (FLT). The respondent was alerted to the incident by a series of emails [255-258] between Homebase and the respondent headed, 'East Dereham H&S incident/ Near Miss- FLT and driver used steps and FLT to help him get in trailer'. The emails attached a Homebase Health and Safety incident report [257] which stated that the claimant had used the steps and the FLT to help him get in his trailer.
23. Standing on an operational FLT and inside a trailer where it is not possible to maintain a safe distance from an operating FLT is in breach of the respondent's health and safety procedures (SSOW 08 and SSOW 25) [168-177] [240-251] and considered very high risk [242].
24. The claimant asked the tribunal to note that the Homebase Health and Safety report entry states, 'Serious: No'. The tribunal do not accept that categorisation is material. The meaning and context are unclear. The tribunal note that Homebase suspended the FLT driver from driving the FLT [257]. The tribunal find that on any reasonable view standing on or near an operating FLT is dangerous
25. On 6 November 2023 the claimant was suspended pending investigation.

Investigation

26. The claimant was invited to an investigation meeting by letter dated 7 November 2023 [263-264] which set out the following allegations against him:

‘On 23rd October 2023, it is alleged that whilst delivering to East Dereham store, you entered the back of trailer HB248, whilst a Fork Lift Truck was in operation. Furthermore, it is alleged that you climbed on the Forklift Truck whilst entering the trailer.

This allegation constitutes a serious breach of health and safety, as specifically outlined in:

SSOW 08, Access and Egress to Vehicles and Trailers

SSOW 25, Loading and Unloading Hort Trolleys’

27. The investigation meeting took place on 9 November 2023. The investigator was Lee Partridge (Operations Support Manager). The claimant was accompanied by Brian Hart. Notes were taken by Georgina Holling (HR) [267-281].

28. The claimant explained that there were two EFCs (plastic containers with open tops) strapped together, and he decided to get in the back of the trailer to cut the shrink wrap in order to separate them:

‘as [the FLT driver] went under the EFCs, he pulled them back and said they're strapped together and would pull them over, one was leaning against the other, back one stayed where it was. I conversed with the guy and said stay where you are, let me get into the back of the trailer so I can get up and cut the shrink wrap, as safer with him leaving the forks in, talked to the guy the whole time, he puts his hand up and holds out a safety knife to give me, but I said don't worry got a pen knife. Got up by the straps and cut the shrink, he then moved the EFC and he carried on to unload’. [269]

29. The claimant's reason for climbing up was that ‘if someone is going to have something over, best way is to converse with one another, I don't want to clean paint up and pretty sure the store doesn't want the loss of stock’ [270]. He was concerned about ‘mess’ [271].

30. The course of action indicated by the health and safety procedures when there is difficulty with a load is to contact the transport office for ‘support and advice’[248]. The claimant maintains that was not possible because his TC57 (allocated communication device) was faulty [273-274] and he did not have a work phone. The tribunal do not consider this to be a credible excuse. The claimant could have asked one of the Homebase employees if he could use a phone.

31. The claimant initially claimed that he climbed up on to the trailer using the steps and straps attached to the side of the trailer, and ‘from what I can remember I didn't touch the actual forklift’ [270].

32. Part way through the meeting the claimant was shown a short CCTV clip [273]. This was part of the CCTV footage recorded on a mobile phone.

33. The claimant on seeing it said 'looks like my hand caught the white bar on the FLT but I never touched it...I didn't stand on the fork lift...' [273].
34. Lee Partridge decided to adjourn the meeting to interview the FLT driver [274]. He interviewed him on 15 November 2023. The FLT driver said he could not see the claimant climb on the truck from his position. He confirmed the FLT was operational, he had both feet on the brake at the time and the claimant did not ask him to turn the FLT off. He did not perceive any health and safety risk if he had pulled out the forks before the claimant had got in the trailer but there was a risk the EFCs could have fallen on the claimant when he climbed up and cut the shrink wrap. He noticed the first EFC had curtain poles and rugs in but did not remember what was in the second one [780-787].
35. Lee Partridge reconvened the meeting on 17 November 2023. In the further discussion the claimant raised health and safety concerns, saying that somebody could have ended up with eye damage if what was in the containers had spilled [277].
36. Lee Partridge concluded that there had been a deliberate breach of health and safety when the claimant climbed on the trailer using the FLT and chose not to report the difficulty with the load. He decided there was a case to answer and the matter should proceed to a disciplinary hearing [280].

Disciplinary Hearing

37. The disciplinary hearing commenced on 29 November 2023. It was chaired by Darren Franklin, General Manager at Daventry site. The claimant was accompanied by Brian Hart. The hearing was also attended by Lisa Little (Lead HR Business Partner) and Emma Macfarlane (HRBP and note taker) [295].
38. The meeting was adjourned and reconvened on 14 December 2023 because Darren Franklin decided to look at the trailer structure and examine the CCTV footage in more detail [310]. Darren Franklin obtained the full CCTV footage, and it was shown to the claimant at the reconvened hearing.
39. Prior to seeing the full CCTV footage the claimant continued to deny touching the FLT. He maintained that the contents of the containers could contain paint or glue which might be hazardous. On seeing the footage at the reconvened hearing he conceded that he touched the A frame of the FLT and used it for balance but still denied climbing on it. Although it was clear from the footage that the EFC contents were rugs and curtain poles or blinds the claimant continued to argue that there could have been paint in the bottom [295-307].
40. Darren Franklin found that the claimant used the FLT to gain access to the trailer, and that the EFCs clearly contained curtain poles and rugs. He noted that the

claimant did not report difficulties with the load, either at the time or on return to site. In the letter setting out the outcome Darren Franklin wrote:

'In summing up I confirmed that you had breached your SSOWs by not keeping a safe distance from a working FLT, by using that FLT to gain access to the back of the vehicle and by failing to report this to anyone. I advised that as a Union and Health and Safety representative these were not acts that I would have expected from someone holding that position in the Company.

I also commented that I felt your honesty was called into question as you did not at any point mention that you could see items protruding from the EFCs in the meeting on 29th November and you only acknowledged this when we obtained the clearer and longer footage. In addition, you denied putting your hands on the FLT on 29th November and only acknowledged that you had touched the A frame when clearer footage was obtained.' [340-342].

41. The tribunal viewed the CCTV. It showed the claimant approaching the FLT and remaining within 3 metres, the FLT operating whilst the claimant was in close proximity to it and the claimant climbing onto the trailer by holding on to the operating FLT. The CCTV also showed that the top part of the EFCs was transparent and rugs and curtain poles or blinds could be seen poking out of the top. The bottom half of the EFCs was opaque. The tribunal decided that it was unlikely that anyone viewing the cartons would think they contained paint or glue.
42. Darren Franklin decided that the claimant's actions were sufficiently dangerous that it was appropriate to terminate the claimant's employment without notice. He took into account that the claimant was a health and safety representative and knew that what he had done was in breach of procedures. He could and should have called for help when he realised that there was a problem with the load.
43. He sets out his thoughts at the time of the disciplinary in his statement (DF/25):

'I was struck throughout the process that Michael failed to appreciate the seriousness of this incident. Whilst it was a case where no serious injury or damage had occurred, our procedures and reporting of events are very important to us as an organisation. In the first instance this is to keep people safe but it is also vital for the management of risk and insurance considerations that we have the processes. I am entirely satisfied that Michael chose to act as he did on 23 October 2023, that it was not a genuine emergency situation and that he failed to properly report his actions and/ or the incident.'

Appeal

44. The claimant was dismissed with effect from 14 December 2023 and he appealed the decision by letter dated 18 December 2024 [346 to 347]. His appeal raised concerns that the disciplinary process was biased or predetermined. He alleged that he had been targeted due to his role as a union representative. He alleged he had been treated unfairly on account of his disability but was not specific other than saying he had to wear a back brace. He did not mention being tired or having sleep problems. There was a brief reference to him working restricted hours and a comment that this was a way of dismissing him without disability discrimination,

but he did not expand on this. He raised concerns regarding the use of CCTV [361-367].

45. The appeal hearing was held on 17 January 2024 before Sam Neal, previously Fletcher (Operations director). She did not know the claimant before the hearing (SN/7). The claimant was accompanied by his union representative, Brian Hart. The claimant was given a full opportunity to put his case forward. He did not put any further evidence forward (SN/23).
46. Sam Neal found no credible evidence to support allegations of disability discrimination or bias. She was particularly concerned that he had not reported the incident as a near miss. The appeal was upheld.

Overall fairness of disciplinary procedure

47. The claimant's submissions largely focused on alleged procedural irregularities. The tribunal set out their relevant findings on procedural fairness in this section of the judgment.
48. The claimant complains that he was not supplied with the emails and the incident report referred to a paragraph 22 above until disclosure took place in these proceedings and therefore he did not see the Homebase incident report at the time of the investigation. As stated above the tribunal do not consider the words 'not serious' in the report are relevant to the outcome of the disciplinary in any way. The tribunal do not consider that the claimant seeing the report at an earlier stage would have changed the outcome of the investigation or disciplinary. The respondent were entitled to make their own mind up about the seriousness of the incident.
49. Lee Partridge took a statement from the FLT driver. There was a yardman who may have witnessed the incident. He can be seen watching on the CCTV. He was not interviewed. That was reasonable because it was clear to the tribunal that the yardman had the same vantage point as the CCTV and his evidence would not have added anything.
50. Darren Franklin undertook a reconstruction of the relative positions of the vehicles [422] so that he could understand the trailer structure and obtained fuller and clearer CCTV footage.
51. The claimant has not produced any evidence that Barry Elston or James O' Leary were involved in the decision to dismiss him. Although the first email from Homebase was addressed to Barry Elston and James O' Leary (as might be expected as they were the relevant managers) it was Kevin O' Brien who responded the following day asking for further information and the incident was subsequently independently investigated by Lee Partridge.

52. Darren Franklin and Sam Neal were independent and did not know the claimant before the disciplinary process (DF/4-7) (N/10). The claimant has put forward no evidence to suggest that they were in any way influenced by James O' Leary or Barry Elston.
53. The claimant argues that the respondent should not have relied on the CCTV because it was recorded at a customer's site and he did not know he was being filmed. Paragraph 13 of the Claimant's contract of employment states that he is subject to the respondent's policies at all times [104]. The respondent's CCTV policy [550 to 556] provides that CCTV footage will be used for grievances and disciplinaries [551].
54. Darren Franklin had told the claimant that he was going to examine the footage again. The respondent used a large screen and the claimant was given a chance to comment on it.

Holidays

55. The claimant was entitled to 29 days holiday a year, excluding Christmas and Boxing day [594-597], which are referred to as 'non-contracted working days'. The meaning of the latter expression is not clear to the tribunal but we assume it means that in practice the claimant was not required to attend work on those days. In 2023 the claimant was also entitled to an extra day's bank holiday for the King's Coronation. In total the claimant was therefore entitled to 32 days holiday in 2023, counting Christmas and Boxing day.
56. Paragraph 5.6 of the Claimant's contract of employment [102] states:

"Unless required by law, there is no pro-rata calculation of Public Holidays for employees who leave during the holiday year."

57. The tribunal find the meaning of this clause is that when calculating holiday entitlement pro rata for employees who leave before the end of the holiday year the respondent uses statutory minimum holiday entitlement. The statutory minimum entitlement for 2023 was 29 days, to include the King's Coronation extra day. The respondent therefore calculated the claimant's remaining holiday entitlement using 29 days, not the 32 days that the claimant would have been entitled to if he had worked the whole year.

Law

Unfair Dismissal

58. An employee's right not to be unfairly dismissed is set out in section 94 of the Employment Rights Act (ERA) 1996.

59. Section 98 (1) ERA 1996 provides that it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Section 98 (2) provides that conduct is a potentially fair reason for dismissal.
60. In misconduct cases guidance was set out by the Employment Appeal Tribunal (EAT) in British Home Stores Ltd v Burchell 1980 ICR 303, EAT. A three-fold test applies. The employer must show that:
- 1) It believed the employee guilty of misconduct
 - 2) It had in mind reasonable grounds upon which to sustain that belief, and
 - 3) At the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.
61. The burden of proof rests with the employer for the first ground but it is neutral for grounds 2 and 3. The employer need not have conclusive direct proof of the employee's misconduct, only a genuine and *reasonable* belief. Reasonableness is neutral test.
62. When assessing whether the Burchell test has been met, the tribunal must ask itself whether what occurred fell within the 'range of reasonable responses' of a reasonable employer. The Court of Appeal has held that the 'range of reasonable responses' test applies in a conduct case both to the decision to dismiss and to the procedure by which that decision was reached. In J Sainsbury plc v Hitt 2003 ICR 111, CA, the Court found that a tribunal had substituted its own decision as to whether an investigation into alleged misconduct was reasonable. This was an error of law. The relevant question was whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted.
63. In a case where the tribunal decides that there has been an unfair procedure, the employer is unable to argue that even if it had followed a fair procedure, it still would have dismissed the employee. This was established by the House of Lords in Polkey v AE Dayton Services Ltd 1988 ICR 142, HL. However, the issue of whether a failure to follow a proper procedure made any difference to the decision to dismiss could be taken into account when calculating the compensatory award at the remedies stage. A tribunal may reduce such an award proportionately to the chance that the employee would have been fairly dismissed in any event had a proper procedure been complied with.
64. The ACAS code of practice on grievance and disciplinary procedures sets out guidance for the conducting disciplinary investigations and meetings. It provides that tribunals can take the size and resources of an employer into account and it may sometimes not be practicable for all employers to take all of the steps set out in the Code.

65. In Philander v Leonard Cheshire Disability EAT 0275/17 the EAT confirmed that misconduct can be deliberate or inadvertent. Gross negligence, as well as deliberate wrongdoing, can amount to misconduct and can constitute repudiatory conduct even where the behaviour is not wilful or blameworthy.
66. Section 100 (1) of the Employment Rights Act 1996 provides that:
- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
.....
 - (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.
 - (2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.
 - (3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.
67. In ***Oudahar v. Esporta Group Limited [2011] ICR 1406***, Judge Richardson concluded that the Employment Tribunal should apply Section 100(1)(e) in two stages, as follows:
- ‘25. First, the Tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger?..... If these criteria are not satisfied, Section 100(1)(e) is not engaged.
 - 26. Secondly, if the criteria are made out, the Tribunal should then ask whether the employer’s sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was then the dismissal must be regarded as unfair.
 - 27. In our judgment, the mere fact that the employer disagreed with an employee as to whether there were (for example) circumstances of danger, or whether the steps were appropriate, is irrelevant. The intention of Parliament was that the employee should be protected from dismissal if he took or proposed to take steps falling within Section 100(1)(e).’
68. The Court of Appeal in Rodgers v. Leeds Laser Cutting Limited [2023] ICR 356 considered the words of Section 100(1)(d) “*In circumstances of danger which the employee reasonably believed to be serious and imminent*”. The same words

appear in Section 100(1)(e). At paragraph 21 of the Judgment Underhill LJ stated as follows:

“21. On that basis the questions which the Employment Tribunal has to decide in a case under Section 100(1)(d) can be analysed as follows:

- (1) Did the employee believe that there were circumstances of serious and imminent danger in the workplace? If so:
- (2) Was that belief reasonable? If so:
- (3) Could they reasonably have reverted that danger? If not:
- (4) Did they leave or propose to leave or refuse to return to, the workplace, or the relevant part, because of the perceived serious and imminent danger? If so:
- (5) Was that the reason or principal reason for the dismissal?”

Discrimination

69. Direct discrimination is defined in section 13(1) Equality Act (EqA) 2010 as follows:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

70. The EqA 2010 provides for a shifting burden of proof. Section 136 provides as follows:

- “(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

71. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. Those facts include whether the claimant had a disability at the relevant time, that he or she was subject to unfavourable treatment, a link between the disability and the ‘something’ that is said to cause the unfavourable treatment, evidence from which the Tribunal can infer that the ‘something’ was an effective reason or the cause of the unfavourable treatment.

72. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment. The respondent is expected to produce ‘cogent evidence’ to discharge the burden of proof. If there is a prima facie case and the

explanation for that treatment is unsatisfactory or inadequate, then the Tribunal must make a finding of discrimination.

73. In Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) ICR 337, Lord Nicholls in the House of Lords (NI) said that the Tribunal should focus on the primary question which was why the complainant was treated as he or she was? The issue essentially boiled down to a single question: did the complainant, because of a protected characteristic, receive less favourable treatment than others?
74. In a complaint of failure to make reasonable adjustments, for the burden to shift, the claimant must demonstrate that there is a PCP causing a substantial disadvantage and evidence of some apparently reasonable adjustment that could have been made (Project Management Institute v Latif 2007 IRLR 579, EAT). Where the burden shifts to the respondent, the respondent must then prove on the balance of probabilities that the respondent did not fail to make reasonable adjustments.
75. In a complaint of discrimination arising from disability, the claimant must show that they have a disability and have been treated unfavourably by the employer. It is also for the claimant to show that 'something' arose as a consequence of their disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment. Where the burden shifts to the respondent the respondent can defend the claim by showing that the treatment was a proportionate means of achieving a legitimate aim.

Limitation

76. The time limit for discrimination claims is set out at s.123 of the EqA 2010, (subject to ACAS early conciliation provisions):

“123 (1) proceedings on a complaint within section 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) such other period as the employment tribunal thinks just and equitable.

.....

(3) For the purposes of this section—

- (a) conduct extending over a period is to be treated as done at the end of that period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.”

77. The position relating to time limits for reasonable adjustments was considered by the Court of Appeal in Matuszowicz v Kingston Upon Hull City Council [2009]

ICR 1170. There was no clear moment in time where the employer consciously decided not to make the adjustment in question. This engaged section 123(4) which specifies when a person is deemed to have decided to fail to do something. There are two alternatives:

- (a) when the person does an act inconsistent with making the adjustment; or
- (b) at the end of the period in which the person might reasonably have been expected to have made the adjustment.

78. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 (CA) the court emphasised the difference between the date when the duty to make reasonable adjustments arose and the date by which an employer might reasonably have been expected to have made those adjustments, setting time running.

Holiday pay

79. Section 13 ERA 1996 sets out the right not to suffer unauthorised deductions:

“13 Right not to suffer unauthorised deductions.

- (1) An employer shall not make a deduction from wages of a worker employed by him unless—
 - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or
 - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
- (2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—
 - (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
 - (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
- (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”

80. Wages are defined in s. 27 ERA 1996 and include holiday pay. The right to holiday pay is granted by the Working Time Regulations (WTR) 1998, regulations 13(1) and 13A. A full time employee is entitled to a minimum of 28 paid holiday days per year. The entitlement can include bank holidays if the employer chooses to include them.

81. The question of what is properly payable under s.13 (3) requires interpretation of the relevant terms of the contract and a factual analysis of the claim (Agarwal v Cardiff University and anor 2018 EWCA Civ 2084 CA). The meaning of the terms is to be construed objectively.

CCTV

82. Article 8(1) of the European Convention on Human Rights (ECHR) states:

“Everyone has the right to respect for his private life, his home and his correspondence.”

83. An employee’s right to privacy was considered by the Employment Appeal Tribunal (EAT) in City and County of Swansea v Gayle [2013] UKEAT/0501/12/RN. In that case covert surveillance of the claimant took place at a sports club at a time when the claimant was supposed to be at work. The EAT held that there was no breach of Article 8, bearing in mind that the employee was filmed in a public place where there could be no expectation of privacy. The EAT pointed out that the tribunal’s competence to consider Article 8 is limited to the Article’s interaction with the employment rights within the tribunal’s jurisdiction and it is only where a breach of that Article is relevant to the dismissal that it is likely to be held unreasonable. The EAT made the point that even if Article 8 was involved the tribunal should consider the legitimate aim. It is necessary to carry out a balancing exercise.

Submissions

84. Both parties presented oral and written submissions which the tribunal have taken into account when reaching their conclusions. We have referred to the submissions in our factual findings above where relevant.

Conclusions

Reason for dismissal

85. The task of the tribunal is to consider whether the respondent’s actions were within the range of responses of a reasonable employer and where we refer to the respondent’s actions being reasonable we are applying that test. We do not substitute our own view.
86. The tribunal found that the principal reason for dismissal was the claimant’s misconduct on 23 October 2023 by breaching the SSOWs. The tribunal were satisfied that Darren Franklin genuinely believed that the claimant had committed misconduct, and he decided to dismiss the claimant for that reason.
87. We found Darren Franklin had reasonable grounds on which to reach that belief. Indeed the claimant himself admitted that he came within 3 metres of the operational FLT and breached the SSOWs. The CCTV footage seen by the

tribunal confirmed that the claimant used the FLT to climb on the truck, despite his initial denial, and that there was nothing about the appearance of the cartons to suggest that they contained paint or other substances that could spill.

88. Darren Franklin's decision to terminate the claimant's employment was within the range of reasonable responses because the claimant committed a breach of health and safety which could potentially have been very serious. The claimant did not accept seriousness and potential danger of his conduct, which concerned the respondent because his lack of insight may have meant he would do it again, potentially leading to a serious accident.
89. The claimant's submissions regarding unfairness focused on alleged procedural irregularities. The tribunal considered the overall fairness of the process. We were satisfied that the process the respondent followed was within the range of reasonable responses. The allegations against the claimant were clearly communicated from the outset. The investigation by the respondent was thorough and reasonable. The claimant was accompanied at all the hearings, including the investigation and given a full opportunity to put his case forward and appeal. The persons conducting the hearings were independent.
90. We found that obtaining the CCTV recording from Homebase was within the range of reasonable responses. We have considered the claimant's submissions regarding whether it was a breach of his Article 8 Convention right to privacy and decided that using the CCTV did not breach his Convention right. He was filmed while he was working and in an open/semi- public setting, not during his private life. He cannot realistically have had an expectation of privacy at the Homebase site. Although the respondent's CCTV policy specifically relates to the respondent's CCTV, we find that the claimant should have expected to be recorded at work, even when at a customer's premises. We were satisfied no reasonable employer would disregard CCTV in these circumstances. It enabled a more accurate finding about what had occurred.
91. We decided that Darren Franklin obtaining longer and clearer CCTV footage during the disciplinary process was reasonable. The claimant submits that it was unfair that he was not told in advance that it had been obtained. The claimant's case appears to be that introducing a clearer version mid process meant he was caught out, because it contradicted his version of events. It did put his credibility in doubt, but the decision to dismiss the claimant was not taken because of his credibility but because of his actions and his failure to appreciate the seriousness of them. The tribunal is satisfied that failing to send it in advance but letting the claimant view it in the hearing did not lead to a different outcome. The claimant was shown it on a large screen and given time to comment.
92. We have considered whether the claimant reasonably believed that there were circumstances of serious and imminent danger and the reason or principal reason for his dismissal was that the claimant had taken (or proposed to take)

appropriate steps to protect himself or other persons from such danger. The tribunal did not find it credible that the claimant thought there was serious and imminent danger of paint or chemicals spilling. We did not find his account convincing that there could have been paint in the bottom of the EFCs.

93. Even if the claimant did believe there were circumstances of serious and imminent danger, we decided that was not a reasonable belief. The CCTV showed that the EFCs contained rugs and curtain poles or blinds. The risk he took in standing near the FLT and the risk of the EFCs tipping on him was greater than the risk of spillage from the cartons. That was also confirmed by the FLT driver.
94. The claimant's claims for unfair dismissal and automatic dismissal on the grounds of health and safety accordingly fail.

Direct disability discrimination and discrimination arising from disability: Dismissal

95. The respondent accepts that the claimant was disabled by spinal fusion, left ankle weakness and by reason of his neck. The respondent admits that at all material times they knew that the claimant had a disability.
96. Although we have decided that the principal reason for the claimant's dismissal was misconduct we are required to consider whether the claimant's disability (or something arising from his disability) was a factor in the respondent's decision to dismiss the claimant.
97. We first considered if the claimant had proved facts from which the tribunal could conclude that he was dismissed because he had a disability. We find that he did not. He referred to a meeting in April 2023 which did not persuade the tribunal that the decision to terminate his employment was pre-determined. We did not find that the comments he alleges were made were related to his disability.
98. The claimant did not put forward any evidence, either during the disciplinary proceedings or in the tribunal, that the way he conducted himself on 23 October 2023 was because he was affected by sleep problems caused by disability related pain.
99. The claimant made a brief reference to his restricted working hours in the appeal but his allegation that this was a way of getting rid of him without disability discrimination was not substantiated or meaningfully pursued. He has not explained to the tribunal how his inability to work more than ten hours a day was linked in any way to dismissal.
100. Although we found that the burden of proof does not shift because we did not find any link with the April 2023 meeting, we went on to consider whether the respondent had proved that the dismissal was in no sense whatsoever because the claimant was disabled. We found this was the case because the claimant's

conduct on 23 October 2023 was so potentially dangerous and his failure to appreciate the seriousness is a very credible non discriminatory reason for the dismissal.

101. Having found that the reason for dismissal was not in any respect due to the claimant's disability his claim for dismissal on the grounds of direct discrimination and discrimination arising from disability fail.

Direct disability discrimination and discrimination arising from disability: other complaints

102. The claimant complains about the respondent providing him with a different vehicle to his "normal vehicle" on 10 July 2023 and the requirement for him to take his belongings with him, rather than leaving them in his "normal vehicle".
103. We decided not being assigned his normal vehicle on 10 July 2023 was not less favourable treatment because he accepted other drivers were also sometimes asked to drive other vehicles. The requirement to take belongings that a driver needs to drive the next day would apply to anyone. The claimant argued another driver could manage without taking anything and would be able to drive the next day. That is speculation by the claimant but even if that is the case we do not accept that the decision to provide him with a different vehicle on that one day was because of his disability.
104. We considered whether Kojo Wood requiring the claimant to take his belongings with him was unfavourable treatment arising in consequence of his disability. While we acknowledge that the claimant needed to wear his back brace due to his disability, we do not find that making a file note requiring him to take it with him was a criticism or unfavourable treatment. The claimant may have felt that it was not convenient. However, even if it was unfavourable treatment we consider it was a proportionate means of achieving the legitimate aim of ensuring some flexibility in the use of vehicles.
105. The claimant says that Kojo Wood criticised him for leaving his back brace in the cab. The claimant perceived it as a criticism. The situation arose because he could not drive the next day but the respondent did not make him drive and he did not lose any pay. The tribunal find that even though he perceived the file note as a criticism it was a reasonable and proportionate action by the respondent to ask him to take his back brace with him so that he could drive the next day if he could not use his usual truck.
106. Accordingly the claimant's claims for direct disability discrimination and discrimination arising from disability do not succeed.

Reasonable adjustments

107. The tribunal concluded that an adjustment to allocate the same truck to the claimant every day was not reasonable because the back brace was not very heavy and requiring the claimant to remove it was significantly less onerous than

the respondent having to ensure that the claimant always had the same truck. The tribunal noted that it was rare for the respondent to ask drivers to drive other vehicles. It was sometimes unavoidable, and the tribunal therefore accept that the respondent needed to maintain some flexibility when allocating trucks.

108. The tribunal decided that it was not reasonable to adjust the claimant's work so that he was always given a box trailer because the adjustment in place (help with pulling back the curtains when allocated a curtain sided trailer) effectively alleviated the disadvantage.

109. Accordingly, the claimant's claim of failing to make reasonable adjustments fails.

Limitation

110. Notwithstanding that the claims do not succeed we will address the issue of limitation. Anything that occurred before 31 October 2023 is outside the primary time limit.

111. The complaint relating to leaving his back brace in his truck dates from 10 July 2023 and is therefore outside the time limit. The complaint of being provided with curtain sided trailers is expressed as being from the period April to November 2023 in the list of issues. The date by which the claimant says the adjustment should have been made was presumably April 2023 onwards and time starts to run from then, meaning that claim is also out of time.

112. Although the claim relating to dismissal (which took place on 14 December 2023) was in time we found that the claim did not succeed and therefore the claimant cannot claim that there was discriminatory conduct extending back over the period before 31 October 2023.

Holiday pay

113. The claimant's contract provides that holiday pay for leavers during the holiday year will be calculated on the basis of the statutory entitlement. That is usually 5.6 weeks, or 28 days. The respondent calculated the claimant's holiday entitlement on the basis of 29 days to take into account of the extra bank holiday for the King's Coronation. The terms of his contract prevail and permit the calculation to be based on the statutory entitlement.

114. Accordingly we do not find that there has been an unlawful deduction of wages and the claimant's claim in respect of holiday pay fails.

Approved by:

Employment Judge S. Matthews

19 December 2025

Judgment sent to the parties on:

19 December 2025

For the Tribunal:

Notes

Judgments (apart from judgments under rule 51) 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.

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