EMPLOYMENT TRIBUNALS

Claimant:	Mr Karl Ruddock
Respondent 1:	Manchetts (Holdings) Ltd
Respondent 2:	Mr Sean Manchett
Respondent 3:	Mr Peter Alexander
Respondent 4:	Mrs Jeni Davy
Heard at:	Bury St Edmunds (in person)
On:	5, 6, 7, 8, 9 June 2023 12 and 13 June 2023 (in chambers)
Before:	Employment Judge Graham
Members:	Mrs L Gaywood and Mr R Allan

Representation

Claimant:	Mrs K Ruddock (Claimant's wife)
Respondent:	Mr I Wheaton of counsel

RESERVED JUDGMENT

The unanimous decision of the Employment Tribunal is that:

1. The complaint of constructive unfair dismissal fails and is dismissed.
2. The complaints of direct disability discrimination fail and are dismissed.
3. The complaints of indirect disability discrimination fail and are dismissed.
4. The complaints of discrimination arising from disability fails and are dismissed.
5. The complaints of failure to implement reasonable adjustments fail and are dismissed.
6. The complaints of harassment fail and are dismissed.

REASONS

Claim

1. By ET1 claim form dated 19 October 2021 the Claimant indicated that he was claiming constructive dismissal and disability discrimination. The ET1 named all four Respondents. The Claimant indicated that he would be seeking compensation for discrimination including for personal injury.

2. The Respondents' ET3 and Response were filed on 9 February 2022 denying the claims. An Amended Response was filed on 27 February 2022.

3. A preliminary hearing for case management took place by telephone on 5 July 2022 before Employment Judge Alliott. The legal issues to be decided by the Tribunal were agreed and case management directions were issued. At the time the Respondent conceded that the Claimant was disabled by virtue of chronic obstructive pulmonary disease (COPD) and that they had knowledge of the same. Disability was not conceded with respect to emphysema and/or dyslexia.

4. A further preliminary hearing for case management took place via CVP on 19 January 2023 and came before Employment Judge Mason. This was to consider:

   4.1 The Claimant's application for witness orders.
   4.2 The Claimant's application to add Respondents.
   4.3 The Claimant's application for further information / advanced disclosure.
   4.4 To consider how expert medical evidence was to be dealt with.
   4.5 To consider the Claimant's amendments to the list of issues.
   4.6 Any other case management orders.

5. By this time the Respondents had filed the Amended Response which also conceded disability with respect to COPD, emphysema and dyslexia. The Respondents did not object to the Claimant's application to amend the claim to include a claim for discrimination arising from disability (s.15 Equality Act 2010).

6. The Claimant had applied for witness orders in respect of Gemma Manchett (Transport Manager) and Sam Arnold, however these were not pursued after the Respondents' solicitor advised that Ms Manchett would attend the final hearing. The Claimant had applied to add both Ms Manchett and Mr Arnold as Respondents, however this was not pursued.

7. Orders for disclosure were made in respect of documents on the Respondents' SMB system between 1 April 2021 and the termination of the Claimant's employment. The application for print outs of all jobs carried out between April and September 2021 was not pursued on the basis that the Respondents accepted the job sheets provided by the Claimant were accurate. Orders for specific disclosure were made with respect to two jobs carried out on 22 August 2021.

8. The Claimant provided a Psychiatric Report by Dr Satinder Sahota. The Respondents did not seek their own report and did not wish to obtain a joint report. The Claimant agreed to take steps to try and ensure Dr Sahota attended the final hearing.

List of issues

9. The list of issues recorded by Employment Judge Mason is set out below using the numbering with the case management summary of 19 January 2023.

The Claimant's employer

1. *What legal entity was the Claimant's employer? The Claimant says that his employer as per his contract of employment is the first Respondent, Manchetts (Holdings) Ltd. The Respondent says that his employer was Manchetts Limited.*

Time limits / limitation issues

2. *Were all of the Claimant's complaints presented within the time limits set out in the Equality Act 2010? Dealing with this issue may involve consideration of subsidiary issues including: Whether there was an act and/or conduct extending over a period and/or a series of similar acts or failures; whether time should be extended on a just and equitable basis.*

Constructive unfair dismissal/wrongful dismissal

3. *The Claimant relies on the implied term of mutual trust and confidence.*

4. *Was the Respondent in fundamental breach of the contract i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant?*

5. *The conduct the Claimant relies on as breaching the trust and confidence term is:*

    5.1 A failure to provide support and pastoral care for the Claimant.

    5.2 A failure to provide a reasonable return to work plan based on the findings of the OH report.

    5.3 A failure to ensure that jobs sent to the Claimant were appropriate to his disabilities.

    5.4 A failure to accept or implement any changes to the return to work agreement requested by the Claimant.

    5.5 A delay in arranging welfare meetings as detailed in the return to work plan issued.

    5.6 A refusal to consider the Claimant's pay when all other drivers were having pay review meetings.

    5.7 The third Respondent's insistence that the Claimant had unreasonably refused suitable alternative employment.

    5.8 A failure to ensure that jobs sent to the Claimant were appropriate for his licence and the legal limitations of the truck he was driving

5.9 The insistence in writing that the Claimant self-report having heart-issues to the DVSA, despite him already having offered Consultant's reports proving the health of his heart.

If so, did the Claimant affirm the contract of employment before resigning.

6. *If not, did the Claimant resign in response to the Respondent's conduct (to put it another way was it a reason for the Claimant's resignation – it need not be the reason for the resignation). If the Claimant was dismissed he will necessarily have been wrongfully dismissed because he resigned without notice.*

7. *If the Claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996?*

8. *In addition, issues relating to Polkey, contribution and compliance of the Acas Code may arise.*

Disability

9. *The Respondent accepts that the Claimant was disabled at all material times by reason of chronic obstructive pulmonary disease (COPD), emphysema and dyslexia and that it had knowledge of the same.*

EQA, section 13: direct discrimination because of disability

10. *Did the Respondent subject the Claimant to the following treatment?*

10.1 Requiring the Claimant to change from a 15 tonne recovery truck to a 7.5 ton recovery truck on his return from furlough on or about 1 April 2021.

10.2 Refusing to discuss a pay rise with the Claimant when all other drivers were having meetings concerning pay rises.

10.3 The third Respondent's determination that the Claimant's pay would "only be discussed once his reasonable adjustments were sorted out".

10.4 The second Respondent's requirement for the Claimant to self-report assumed heart issues, without medical proof, to DVSA.

10.5 The third and fourth Respondent's refusal to accept the Claimant's letters proving all cardiology tests were clear in order to add them to his staff file.

11. *Was that treatment "less favourable treatment", i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on the following hypothetical comparator, namely a colleague who holds a Class 2 licence but does not have COPD and emphysema.*

EQA, section 19: indirect disability discrimination

13. *Did the Respondent have the following PCPs:*

    13.1 A requirement for all recovery drivers to attend all jobs considered suitable for Class 2 recovery drivers and for the Claimant to return to these full duties within three months of his return to work.

    13.2 A requirement to attend a number of specific jobs that the Claimant considers were unsuitable given his disability. The Claimant will serve a list of 8 such jobs on the Respondent.

    13.3 A requirement to attend a number of specific jobs that the Claimant considers were unsuitable given the legal restrictions of the truck he was ordered to drive. The Claimant will serve a list of 175 such jobs, and another 31 other possible infractions, on the Respondent.

    13.4 A requirement to attend a specific job which the Claimant considers was unsuitable given the Operating Licence in place on the vehicle he was required to drive. The Claimant will serve notice of the example of the job on the Respondent.

14. *Did the Respondent apply the PCP(s) to the Claimant at any relevant time?*

15. *Did the Respondent apply (or would the Respondent have applied) the PCP(s) to persons with whom the Claimant does not share the characteristic, e.g. non-disabled individuals"?*

16. *Did the PCP(s) put the Claimant at one or more particular disadvantages when*
    compared with persons with whom the Claimant does not share the characteristic?

17. *Did the PCP(s) put the Claimant at that disadvantage at any relevant time?*

18. *If so, has the Respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim?*

EQA, section 15: discrimination "arising from" disability

19. *Did physical limitations arise in consequence of the Claimant's disability?*

20. *Did the Respondent treat the Claimant unfavourably (as per the direct and indirect discrimination claims above).*

21. *If so, did the Respondent treat the Claimant unfavourably because of the thing(s) arising in consequence of his disabilities?*

22. *If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim (namely the provision of vehicle recovery services)?*

Reasonable adjustments: EQA, sections 20 & 21

23. *Did the Respondent not know and could it not reasonably have been expected to know the Claimant was a disabled person?*

24. *Did the Respondent have the following PCP(s):*

    24.1 As per the indirect discrimination claim.

    24.2 On 3 August 2021 the third Respondent advising the Claimant that by the end of September 2021 the Claimant would be expected to perform recovery of larger vehicles, tow trailers and caravans, and use the spec lift to recover more than one vehicle contrary to OH advice and the legal limits of his driving licence.

25. *Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?*

26. *If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?*

27. *If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant; however it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:*

    27.1 The provision of lightweight equipment, for example an electric jack.
    27.2 Not sending the Claimant to recovery jobs where wheels were not turning freely.
    27.3 Not sending the Claimant to recovery jobs involving police accidents.
    27.4 Not sending he Claimant to recovery jobs that involved the recovery of trailers.
    27.5 Not requiring the Claimant to lift more than 15kg.

28. *If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?*

EQA, section 26: harassment related to disability

29. Did the Respondent engage in conduct as follows?

    29.1 Insisting that the Claimant drove a 7.5 ton recovery truck rather than his usual 15 ton recovery truck on his return to work?

    29.2 It is the Claimant's case that the motives for doing so included creating an excuse for offering him a lower level of pay than other Class 2 qualified drivers, to pressurise the Claimant as he would need to argue with controllers in order not to break the licencing terms of the vehicle and in order to make him more vulnerable to roadside checks by DVSA when forced to carry overweight vehicles.

    29.3 Requiring the Claimant to transport wood for the second Respondent's brother's building site thereby making the Claimant more

vulnerable to roadside checks by DVSA for carrying cargo outside the operating licence for the 7.5 ton truck.

29.4 Insisting that the Claimant return to full duties within three months.

29.5 The third Respondent sending a letter on 3 August 2021 stating that by the end of September 2021 the Claimant would be expected to perform recovery of larger vehicles, tow trailers and caravans, and use the spec lift to recover more than one vehicle.

29.6 Failing to ensure that the Claimant was not required to attend jobs which would exceed the weight limit of the truck.

29.7 Increasing the amount of inappropriate jobs the Claimant was given.

29.8 Sending the Claimant to a police reported multi-car accident that was outside his return to work agreement.

29.9 The actions and behaviours of the third and fourth Respondent during the meeting of 3 August 2021 as follows:-

29.9.1 The third Respondent's comments that the Claimant had caused the first Respondent to lose money on specific jobs, claiming the Claimant had often asked for help from colleagues.

29.9.2 The third Respondent's comments that the Claimant had failed to maintain his equipment in the correct manner – namely that the Claimant had allowed his battery pack to fully discharge without recharging it.

29.9.3 The third Respondent's claims that controllers were having difficulty finding enough work for the Claimant due to his health restrictions.

29.9.4 The third Respondent's constant referral to the return to work agreement as written by the third Respondent and the fourth Respondent in March 2021, without any reference to the Claimant's written objections, or the Claimant's legal standing as a Class 2 driver.

29.9.5 The third Respondent's claims that the Claimant had refused appropriate work sent by the controllers.

29.9.6 The third Respondent's claims that the Claimant had caused the first Respondent to lose money by being unable to complete some jobs.

29.9.7 The third Respondent's claims that the Claimant had refused to consider suitable alternative employment, claiming he did not want to retrain.

29.9.8 The fourth Respondent's inaccurate minuting of the meeting.

29.10 The fourth Respondent's claims in a letter dated 3 September 2021 that the first Respondent had ensured that the Claimant had not:

29.10.1 Lifted more than 15kg.

29.10.2 Walked more than 100 yards.

29.10.3 Been required to recover multiple vehicles.

29.10.4 Been sent to recover RTCs off road.

29.10.5 Had the ability to take breaks as needed.

29.10.6 Had additional support from colleagues listed as a buddy support, additional pastoral meetings with the third and fourth Respondents to review adjustments, and additional assistance from controllers and on the roadside.

10. *29.11 If so was that conduct unwanted?*

11. *29.12 If so, did it relate to the protected characteristic of disability?*

12. *29.13 Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*

Remedy

30 If the Claimant succeeds, in whole, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded.

31 The Claimant intends to present a claim for personal injury caused by the alleged discriminatory conduct.

Preliminary issues

Application for witness order

10. On 5 May 2022 the Respondents applied for an Order that Ms Manchett not be required to give evidence as she was now pregnant and was concerned that any stress might cause her to suffer a miscarriage. A GP letter was provided which asked that Ms Manchett be excused. The Respondent asked for permission for two of their witnesses (Mr Manchett and Mr Alexander) to amend their statements to include some of the evidence from Ms Manchett that they could attest to. The Claimant objected and relied upon material from the NHS online which suggested that miscarriages were not caused by stress and that Ms Manchett should be required to attend the hearing.

11. On the first morning of the hearing the Tribunal was not provided with Ms Manchett's witness statement and the Claimant complained that Ms Manchett had not been called despite the promise from the Respondents' solicitor in January 2023 that she would do so.

12. Counsel for the Respondents said that Ms Manchett had not been pregnant when that promise was given and that they did not intend to call her. The Claimant challenged this and confirmed that he would make an application for a witness order. The Tribunal explained that if Ms Manchett was ordered to attend then, given the guidance in the Equal Treatment Bench Book (pages 171-172) consideration may need to be given to postponing the hearing until some time after she had given birth. The Tribunal also pointed out that if Ms Manchett was ordered to attend, the Claimant would not be able to cross examine her as she would be his witness. The Claimant said he understood this and still wished to do so. The Tribunal asked that the application be made in writing later that day which would be considered the following morning. The Claimant was guided by the Tribunal to address the relevance of the proposed witness evidence with respect to the list of issues when making the application. This was on the basis of the guidance in ***Dada v Metal Box Co Ltd*** **1974 ICR 559**. The application was not pursued.

Application to amend witness statements

13. On the second day of the hearing the Tribunal heard the Respondents' application to amend the witness statements of Mr Manchett and Mr Alexander to incorporate some of the wording from Ms Manchett's statement concerning legal requirements connected to the First Respondent's business. After hearing submissions from both parties, the Tribunal granted the application on the basis that it was in furtherance of the overriding objective and there was little or no prejudice to the Claimant who had been provided with the statement of Ms Manchett some six weeks earlier. There was nothing new in the evidence, it was simply being provided by two different witnesses and confined only to comments about the legal requirements. Neither witness sought to include evidence from Ms Manchett which they could not attest to.

14. The Tribunal was subsequently provided with a witness statement from Ms Manchett, however as she had not attended in person the Tribunal only placed limited weight on her evidence.

Psychiatric Report

15. Mrs Ruddock also sought to rely on the Psychiatric Report by Dr Satinder Sahota. Mrs Ruddock said that this related to the personal injury caused to the Claimant by the Respondents. As this went to remedy and not the legal issues to be determined the Tribunal said that it would "park" the issue of the report until the remedy stage should the Claimant succeed on any or all of his complaints.

Procedure

16. The panel was provided with an agreed bundle of 750 pages and considered those documents to which it was referred by the parties. References to page numbers are references to that bundle of documents.

17. In the course of the hearing the Tribunal heard oral evidence from the Claimant and his wife Mrs Ruddock. The witness statement of Mrs Ruddock was considered although she agreed that much of it was hearsay as it was based upon things that the Claimant had told her rather than things she had witnessed herself. Mrs Ruddock attended a meeting between her husband and the Respondent in August 2020 and this evidence was not hearsay, nor were her observations on the Claimant's perceived stress and health towards the end of his employment.

18. For the Respondents the Tribunal heard oral evidence from Sean Manchett (2nd Respondent, owner and director), Peter Alexander (3rd Respondent) and Jeni Davy (4th Respondent, HR Manager).

19. Breaks were taken after every 50 minutes of witness evidence.

20. During the cross examination of the Claimant the Tribunal permitted Mrs Ruddock to read out Mr Manchetts' letter dated 19 August 2021 **[bundle page 253]** to the Claimant in segments. This was a long letter and reading it out helped to mitigate against the Claimant's dyslexia. The Respondent did not object to this, and the Tribunal was grateful to Mrs Ruddock for her assistance.

Disability

21. The Claimant was diagnosed chronic obstructive pulmonary disease ("COPD") at some point before 2018. A fit note dated 25 January 2018 appears in the hearing bundle at **bundle page 106** and confirmed that the Claimant was suffering from COPD. The Respondent says that it was unaware that the Claimant had COPD until early 2020. We find that the Respondent had knowledge that the Claimant suffered with the disability from the date of the fit note of 25 January 2018. Even if we are wrong on that, the Respondent concedes that it had knowledge of COPD from February 2020 which was in advance of the facts giving rise to this claim.

22. The Claimant also suffers from dyslexia and emphysema. The Claimant was not diagnosed with dyslexia until these proceedings began, however he believed for many years that he had the condition but without diagnosis. The Claimant had made reference to having dyslexia on a number of occasions during his employment with the Respondent, specifically when discussing undertaking courses and whether he wished to work in the control room. The Claimant said that he had once told the Respondent "*you wouldn't want me working in there"* or words to that effect.

23. None of the issues to be decided specifically concern the Claimant's dyslexia, however the Tribunal finds that the First, Second and Third Respondent were on notice of this condition for a number of years and in advance of April 2021 when the Claimant returned to work. Mrs Davy did not join the Respondent until 2020, but the Tribunal finds that that she would have been aware of the Claimant's dyslexia from at least early 2021 save that it was not formally diagnosed until during the course of these proceedings.

24. The Claimant was not diagnosed with emphysema until after his resignation.

25. The Claimant's wife, Mrs Ruddock, has provided the Claimant with support with written correspondence in order to help overcome the difficulties associated with dyslexia. This has included drafting correspondence to the Respondents on behalf of her husband. As a result Mrs Ruddock probably became more involved in the Claimant's employment relationship than would usually be the case.

26. The Respondents concede that all three conditions meet the definition of a disability within the meaning of s. 6 Equality Act 2010.

Clarification of the list of issues

27. At the start of the hearing Mrs Ruddock indicated that the Claimant was relying on 200 breaches of contract for his constructive dismissal claim. This was a change to the list of issues that had been agreed. On further enquiry it was clarified that these were further examples of issue 5.8 concerning "*A failure to ensure that jobs sent to the Claimant were appropriate for his licence and the legal limitations of the truck he was driving."* It appeared that the Claimant and Mrs Ruddock had reviewed the Respondents' disclosure and identified further jobs the Claimant had been sent to where he says that his 7.5 tonne truck was potentially overloaded. As these 200 examples were not all known to the Claimant at the material time they could not have been in his mind at the time of his resignation. Nevertheless the Tribunal noted the allegation that there were other potential examples.

28. From the start of the hearing it also become clear that issue 5.8 was being pursued differently than had been recorded in the list of issues. It was confirmed by the Claimant and Mrs Ruddock that was he arguing that the Respondent had moved him to a smaller 7.5 tonne truck which would be easier to overload and that this in turn caused him stress due to the fear of being stopped by the Police (or other authorities) and this exacerbated his COPD condition. The Claimant said that the First Respondent had been overloading drivers for years. No formal application to amend the claim was made, however given that the relevant documents appeared in the bundle and the Respondents were able to address the allegations, specifically Mr Alexander and Mr Manchett, the complaint was considered in that context. No additional disclosure was required in order to deal with the clarification of the complaint.

29. It was also clarified that the issue at paragraph 29.3 regarding the transportation of wood also included transportation of bags of cement and railings which should have been described as building materials. This clarification did not require an amendment of the claim.

30. Finally, by reference to the issue at 13.4 concerning the lack of an appropriate Operating Licence, during the hearing the Claimant conceded that the vehicle did have an Operating Licence for the job in question, however he maintained that it had not been displayed in the vehicle.

Findings of fact

31. From the information and evidence before the Tribunal it made the following findings of fact. We made our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgment all of the evidence which we heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the issues to be decided.

32. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against any contemporaneous documents. We have not referred to every document we read or were directed or taken to in the findings below, but that does not mean they were not considered.

33. The Claimant commenced employment with Manchetts Limited in February 2008. At the time of his resignation on 31 August 2021 the Claimant was employed by the business as a Relay Recovery Driver. The Claimant is a former Union shop steward convenor and is clearly well able to speak out to defend himself at work.

34. The First Respondent is a vehicle recovery business which operates in the East Anglia region and provides support to large breakdown organisations to recover vehicles. This service operates 365 days a year, 24 hours a day. This work also involves attending Road Traffic Collisions ("RTCs") at the request of the Police. An RTC may involve one or more vehicles and can be either major or minor depending upon the circumstances. If there is an RTC involving a vehicle driven slowly then it may not automatically follow that the car was immobile afterwards (a minor RTC). A faster collision would increase the chance that the car or cars involved could be immobile as a result of any damage (a major RTC). An immobile vehicle would require greater exertion to move it than a mobile vehicle including using skates.

35. The First Respondent also has contracts with Cambridgeshire, Norfolk and Suffolk police for vehicle recovery. A Police job may involve an RTC or it may involve a seizure under s. 165A Road Traffic Act 1988 (for example due to lack of insurance). Even in the event of a seizure it is possible (but not certain) that the vehicle may be immobile if the car keys are not available.

36. The First Respondent has a number of sites including one at Ingham. The Respondent operates a fleet of vehicles including but not limited to 7.5 tonne trucks, and 15 tonne trucks. The description of the truck does not mean that the truck is that weight, rather it is the maximum load that it can carry. The reference to a 7.5 tonne truck denotes a smaller sized truck weighing in the region of 5.9 tonnes itself with a maximum weight of 7.5 tonnes. Accordingly the maximum load that truck could carry would be in the region of 1.6 tonnes. Whereas this is a very simple summary however it is sufficient for the purposes of the legal issues arising in this matter.

37. There are different licence requirements depending upon the size of the recovery vehicle being driven. The Tribunal understands that there are three different categories of driving licence. The first category allows vehicles to be driven which weigh up to 7.5 tonnes, the second is up to 38 tonnes (a Class 2 licence) and the third is up to 44 tonnes (a Class 1 licence). The Claimant has held a Class 2 driving licence since January 2014 and could operate vehicles up to 38 tonnes. Prior to obtaining his Class 2 licence the Claimant drove vehicles up to 7.5 tonnes. Once the Claimant obtained that licence he typically drove 15 tonne vehicles, however it was a matter of the First Respondent's discretion which vehicle drivers would be allocated, subject to their licence limits.

38. The process of recovering a vehicle follows a standard process. Generally the First Respondent is contacted online by an organisation requesting the recovery (for example a breakdown organisation or the Police) and they provide basic details of the job, including the make and model of the vehicle involved and the nature of the breakdown. This information is sent online into the Respondents' Apex Recovery Management Software ("RMS"). RMS is operated by the First Respondent's staff who are known as controllers who work with the First Respondent's control room which operates as an open plan call centre. Some jobs are received manually by telephone which are then entered in Apex RMS.

39. Apex RMS then calculates the vehicle's kerbside weight (KSW) and the gross vehicle weight (GVW). In very basic terms, the KSW includes the weight of the vehicle with fluids and fuel, whereas the GVW includes the KSW plus the driver, passengers and anything loaded into it. The KSW is the lowest that the vehicle is likely to weigh, whereas the GVW is the maximum.

40. There is a dispute between the parties as to which calculation of weight should be used when allocating a job to a recovery driver as this will determine which type of truck should be sent (for example a 7.5 tonne truck as opposed to a 15 tonne truck). The Claimant argues that the GVW should be used, whereas the Respondents' practice is generally to use the KSW and to send a truck which appears appropriate for that weight. It is unnecessary for this Tribunal to determine which weight should be used save to note that the weight of a vehicle to be recovered will not be known until a recovery driver arrives on scene to assess the situation, and even then the precise weight may not be known. It appears that as a matter of logic that the KSW is a good starting point as it can be realistically assumed that the vehicle to be recovered will unlikely weigh **less** than the KSW. The GVW is in simple terms no more than a **maximum** weight. It therefore follows that it would not necessarily be good business sense to send the largest recovery truck to every job in case the vehicle to be recovered weighs the GVW.

41. Agreement is made between the customer organization (or Police) and the First Respondent's controllers. This is generally done online via Apex RMS. This agreement includes the cost of the job. As the parties do not generally speak at this stage there is only very general information available to the First Respondent when it allocates a job to a driver. There is potential for jobs to come in via telephone, however this does not appear to be routine.

42. Once a job is agreed the First Respondent's controllers then send this information to the recovery driver who, in the view of the controller, appears to be the nearest and most appropriate. The reference to appropriate includes the type of truck that driver is operating. This information is sent to an electronic device (a PDA) with the recovery driver who may either be parked up waiting for a job or they may be driving back from another job. If the recovery driver is driving then they will clearly not be able to review the full details of the job on the device until such time as they park or reach that new job. The recovery driver then accepts the job and makes their way to the scene, and Apex RMS is updated with the ETA. This data is used to score the First Respondent's compliance with Key Performance Indicators.

43. The First Respondent's controllers have been described as the heart of the job whereas the recovery drivers are referred to as the eyes and ears on the ground as they will not know precisely what work is required until they arrive on scene and they can take photographs and provide details for the controller to feed back to the client or customer and additional or alternative support can be requested, such as a heavier truck.

44. The First Respondent's recovery vehicles carry various pieces of equipment including jacks, skates, snatch blocks, winches and spec lifts. Skates are a piece of equipment on wheels which can be placed under a car which is not moving freely, the skates then allow the vehicle to be moved or pushed. Snatch blocks are heavy duty pulleys used to lift vehicles. Spec lifts are parts of a recovery vehicle which are permanently attached and are used to transport the vehicle to be recovered. The First Respondent's 7.5 tonne trucks do not have spec lifts whereas the 15 tonne trucks do. With the exception of the spec lift, the two trucks carry the same equipment.

45. At the material time the First Respondent employed over 100 staff in various roles. Of that 100 staff there were in the region of at least 40 drivers covering in the region of between 90 and 200 jobs a day. The relay recovery drivers generally worked 13 hour shifts using a shift pattern of four days on and four days off. As the First Respondent operates 24 hours a day 365 days a year this could involve daytime working, evenings and overnight.

46. The Tribunal heard evidence about the requirement for those who drive lorries, buses or coaches, to undertake a Certificate in Professional Competence ("CPC"). Drivers must undertake in the region of 35 hours of training every five years in order to retain their CPC.

47. By the time of his resignation in August 2021 the Claimant had worked for the First Respondent for over 13 years and had been managed solely by Mr Alexander throughout that time. It was clear to the Tribunal that the Claimant took his role seriously, and he was a committed member of staff who obviously enjoyed his work. Following his sickness absence (which will be dealt with in more detail below) and following lockdown, it was clear that the Claimant was keen to return to work.

48. Similarly it was clear to the Tribunal that the Claimant was highly respected and valued by the Respondents and we heard evidence from the Third Respondent about how well the Claimant performed when managing and calming situations he had been called to, including for the Police. There

was no suggestion that the Claimant had underperformed or been anything other than a reliable and hard working member of staff.

49. The Claimant went on sick leave from 27 February 2020 after suffering from a severe chest infection and he subsequently experienced a serious exacerbation of his COPD condition. Whereas the Claimant was declared fit to return to work from 26 March 2020 he was unable to do so as he had been advised to shield from 21 March 2020 as he was deemed to be extremely clinically vulnerable. The Claimant was furloughed under the Coronavirus Job Retention Scheme until his return to work on 1 April 2021.

50. On or around 6 March 2020 the Claimant attended a COPD appointment where concerns were raised about his heart rate. As a result his medication was changed to reduce the strain on his heart.

Welfare meeting - 21 August 2020

51. The Claimant attended a welfare meeting with Mr Alexander on 21 August 2020 to discuss his continued absence. The Claimant's wife was in attendance as they were also due to attend hospital for an appointment concerning the Claimant's heart.

52. The notes of the meeting appear at **bundle page 128**. The relevant aspects of this meeting are that the Claimant explained that physical exertion was difficult, and that he was having tests on his heart following concerns about his heart rate. Mr Alexander noted that the Claimant had said that he had a *"crazy heart rate"* and we accept that words to that effect were likely used. It was agreed to refer the Claimant to Occupational Health for advice. In his evidence the Claimant said that Mr Alexander informed him that *"We have never got rid of anyone because of a disability and we are not starting now. We will find you a role"* or words to that effect. We find that those comments were made and they demonstrate that the Respondents' aim was to support the Claimant's return to work and to retain him.

53. On 2 October 2020 the Claimant took part in a telephone call with Mrs Davy to discuss the Occupational Health referral. The note records that the Claimant advised that he was now on statins and his heart was ok, and that he started Pulmonary Rehabilitation treatment at the end of September 2020. The file note also records that the Claimant had expressed concerns that upon his return to work he may not be able to fulfil all his role and that he would not be able to sweep debris from the road or to jack cars.

54. The note records that the Claimant did not feel able to fulfil an office role due to dyslexia. In these proceedings the Claimant has repeatedly asserted that he never refused alternative roles, but he had felt that he would not be able to perform them nor train for them due to his dyslexia. The Tribunal accepts that evidence, save that it is not necessary in these proceedings to determine whether that belief was reasonable and the Tribunal was not provided with any medical evidence pertaining to the Claimant's dyslexia.

Occupational health report – 12 October 2020

55. The Claimant attended a telephone Occupational Health referral on 12 October 2020. The subsequent report appears at **bundle page 145**. The relevant advice is as follows:

    55.1 The Claimant's cardiac tests were normal.
    55.2 There had been a sustained improvement in the Claimant's respiratory health.
    55.3 The Claimant could only lift weight up to 15 kgs and only walk up to 100 yards.
    55.4 The Claimant would not be able to lift heavy objects such as car parts, wheels, or exerting effort when using car jacks.
    55.5 Consideration should be given to amended duties.

56. The recommendations were that whilst the Claimant could undertake general breakdowns and deliveries, he should not undertake general police work involving road traffic collisions, major accidents or undertake wheel changes. The report recorded that the Claimant stated that he did feel that he would be able to train for HGV/LGV technician work, and that he would not require a phased return to work. The report stated that the Claimant had a long-term chronic condition that could potentially deteriorate further.

Welfare meeting - 21 October 2020

57. On 21 October 2020 the Claimant attended a welfare meeting with Mr Alexander and Mrs Davy to discuss the Occupational Health report. During this meeting the Claimant made the Respondents aware that he would never be able to fulfil the role requirements completely as COPD was a progressive disease. Mr Alexander identified potential adjustments for the Claimant including fixed hour shifts and also transferring the Claimant to a smaller vehicle. No formal adjustments were made as Mr Alexander said that he would need some time to investigate the adjustments.

58. On 9 December 2020 the Claimant took part in a medical appointment with a cardiologist. The report indicated that the Claimant's [cardiology] symptoms were much improved and that he was able to walk up to 2 miles or so a day. The Claimant has clarified to us that this was not 2 miles in one walk but up to 2 miles of walking per day.

Welfare meeting – 15 December 2020

59. A further meeting took place on 15 December 2020. It was during this meeting that the Claimant was informed that he would be moved to a fixed hour shift (7am – 8pm) still on a four day on four day off basis rather than working on a night shift. Mr Alexander's evidence was that this would have been better for the Claimant as it would avoid working evenings or nights when there is less support available and we accept that evidence.

60. The Claimant was also told that he would be moved to a smaller 7.5 tonne truck. This was on the basis that this would be easier to drive than the larger truck and it would limit the potential for him to be asked by the controllers to attend more difficult jobs with heavier vehicles if he was in a larger truck.

61. The Tribunal received considerable oral and written evidence about the difference between the 7.5 and the 15 tonne trucks, and we were also helpfully provided with numerous photographs showing the differences between them. The Claimant maintained that there was no difference between the trucks, there was no advantage to allocating him a smaller truck and that it was done intentionally to cause him stress by overloading him to force him to resign.

62. The Respondents deny this and says that the smaller truck was easier to manoeuvre especially in housing estates and car parks as it is shorter, it has one less step to climb to access the cab and that a driver may come in and out of the cab numerous times a day. This could potentially reduce a small amount of exertion per day. The Respondents also said that the smaller truck had been allocated to the Claimant to make it less likely that he would be flagged down by the Police to help with major RTCs for which he would not be able to assist due to his health limitations, and it would also minimise the risk of controllers sending him to inappropriate jobs. The Claimant strongly argues against the Respondent's reasoning and says that due to power steering the exertion was the same and that he had never been stopped by the Police to offer assistance even when he drove the larger truck. The Tribunal heard the evidence of Mr Manchett on the differences between driving the two vehicles, in particular that it would be easier to do a three point turn in the smaller truck without having to keep going forward and turning, and that it could "spin on a sixpence" to use his language. We accept that evidence that as a matter of logic it would have required less exertion to drive a smaller vehicle. We also understand that the Claimant was not the only one of the Respondent's drivers to drive a 7.5 tonne truck.

63. It is fair to say that the Claimant was not keen to use the smaller truck, however he admitted that it was open to the First Respondent to allocate vehicles as it saw fit. In the notes of later meetings with the Claimant he expressed that he would be of more use or commercial benefit to the First Respondent if he worked in a larger vehicle. The Claimant has accepted that there was nothing inherent in the 7.5 tonne vehicle which he said caused him a disadvantage compared to the 15 tonne truck.

64. A phased return was agreed whereby the Claimant would initially shadow another employee and then would work six short shifts. It was agreed that there would be regular reviews with the line manager with a full review to take place after three months, however this was delayed as the Claimant did not return to work until 21 April 2021.

Welfare meeting of 24 March 2021 and return to work plan

65. A further meeting took place on 24 March 2021, attended by the Claimant, Mr Alexander and Mrs Davy. The notes appear at **bundle page 192**. A letter was sent to the Claimant on the same date confirming the discussions **[bundle pages 194-196]**. The final arrangements for the Claimant's adjustments upon his return to work were discussed including the change of shift pattern, the move to the 7.5 tonne truck, and the phased return. The Tribunal notes that Mr Alexander recorded that regular communication would be key to the Claimant's transition back to work, and there would be regular reviews, the first at the end of June and the second in early

September and further amendments or recommendations could be implemented during this period.

66. The Tribunal has carefully considered the contents of the letter to the Claimant which summarised the discussions and has been referred to as the return to work plan or return to work agreement. Within that letter Mr Alexander stated that the adjustments to the working pattern and the vehicle were temporary as both parties would like the Claimant to return to his normal position and that it was envisaged that following a further Occupational Health consultation and dependent upon results, they would look at doing this later in the year.

67. The remainder of the letter listed the types of work the Claimant would perform during his phased return, and this too has become a matter of contention between the parties. The letter stated that these duties would include:

    67.1 Bodyshop movements and vehicle recoveries where all the wheels on the casualty vehicle move.
    67.2 Connecting brother straps and winching equipment to casualty vehicles
    67.3 Motorbike recoveries
    67.4 RTCs on the road.

68. The letter also recorded that after 2 months (in June) the Respondent would look to include recoveries of vehicles that may not roll, and RTCs off road. It was again recorded that by September, and dependent upon the results of a further Occupational Health referral, it was envisaged that the Claimant would be able to return to his normal truck and working pattern and able to undertake the recovery of larger vehicles, tow trailers and caravans, and use the spec lift to recover more than one vehicle. This was to be ultimately guided by an additional Occupational Health examination and an additional review meeting.

69. The Claimant has said that some of these duties were outside of the recommended adjustments but he was waiting for further Occupational Health advice before addressing it as he felt that there was no point doing so before. It was not clear to the Tribunal why the Claimant formed this view and why he did not raise his concerns at the material time.

70. A number of issues flow from the letter summarising the discussion. Both the Claimant and Occupational Health had confirmed that his condition was either degenerative or potentially degenerative. It had already been made clear that the Claimant's condition was not going to improve, and as such a full return to his former duties was unrealistic and unlikely. The Tribunal appreciates that a return to his full duties was an odd statement to have made by the Respondents and would have caused someone in the Claimant's position some concern given what had already been discussed. However the Tribunal notes that Mr Alexander expressly stated that this would be dependent upon the results of further advice from Occupational Health. The Tribunal therefore finds that there was not a requirement that the Claimant should return to his former or full duties from September, there was no more than a hope that he could do so, and then only subject to further advice.

71. The Tribunal heard evidence from Mr Alexander on the issue of recovering motorbikes given that the weight would appear to have been more than the 15 kgs the Claimant could manage alone. Mr Alexander's evidence was that in his experience motorbike owners would usually assist in the lifting or moving as they were protective about their bikes. The Tribunal was not provided with any examples of jobs where the Claimant was required to move a motorbike on his own.

72. The Claimant argues that the letter *"was designed to provide the basis for dismissing me for not being able to return to full duties."* The Tribunal notes that there were subsequent references by the Respondents to a potential capability process, however that was only referred to as an option if there were no adjustments which could be made for the Claimant to enable him to perform his role safely, and further that it would only be considered after further advice from Occupational Health. The Tribunal therefore does not agree that this letter was written on the basis that the Claimant has described. At this time the Claimant had yet to return to work after a long absence where his COPD had deteriorated. It was not known how he would cope in his role upon his return, and as such the letter was written in that context. The Tribunal finds that it is highly unlikely that the Claimant was being set up to fail as he suggests.

73. The Claimant has also expressed concern about the reference to towing trailers and caravans as he says that his Class 2 licence would only permit him to tow up to 750 kgs. As it transpired, the Claimant was not required to tow either of these for the remainder of his employment.

74. The Claimant has argued in these proceedings that the reference to expanding the duties in two months (or in June) was not discussed or agreed in this meeting, and that the reference to it in subsequent letters, including from Mrs Davy are inaccurate. The Tribunal notes that the Claimant did not make this specific allegation at the time, and in any event it was clear from the letter that this would be dependent upon Occupational Health advice.

75. On 29 March 2021 Mr Alexander emailed two of the controllers to make them aware of the duties that the Claimant could undertake. The email recorded that adjustments were being made to help the Claimant's return and the aim was that he would eventually be back into a bigger truck and carry on where he left off. This was set out as follows:

    Expectations
    To perform the duties given by the control room
    1) *Bodyshop movements – vehicle recoveries for all clubs where all wheels on casualty vehicle roll*
    2) *To be able to connect brother straps and winching equipment to the chassis of the vehicle*
    3) *Attend road RTC's and clear away debris from the scene*
    4) *Motorbike recoveries*

76. The controllers were asked to make a log of any jobs that the Claimant could not do during the next two months before the Claimant's next review, and they were asked to keep management informed of any tasks the Claimant

struggled with if the task was within the expectations. The Tribunal finds that this demonstrates that Mr Alexander was trying to ascertain what difficulties the Claimant encountered in order to potentially provide additional support.

77. The Claimant has criticised the decision to only inform two of the nine controllers about his adjustments, however the Tribunal accepts Mr Alexander's explanation that these were the two daytime controllers who were on shift when the Claimant worked, the third, Amber Pudney, was on maternity leave at the time and the rest were evening controllers. Whereas the evening controllers may cover annual leave and sickness on the day shift, Mr Alexander was also present and was able to discuss verbally in the open plan control room what adjustments were in place. Moreover the Tribunal finds that the Claimant could inform the controllers if a job was unsuitable and he did so on occasion.

78. On 30 March 2021 the Claimant sent a reply to Mr Alexander's letter of 24 March 2021. A copy of the reply appears at **bundle page 204**. The purpose of the letter was to clarify what duties the Claimant felt that he could undertake. The Claimant reminded Mr Alexander that COPD was a progressive disease, that he would not get better, and that he would be unable to lift jacks and wheels. The Claimant said that he would only be able to assist with motorbike recoveries if the rider or another person was present to help him load and unload the motorbike as he was not able to handle the weight of the damaged motorbike alone. The Claimant said:

> *"While I will always try to complete work that is sent to me, I appreciate your support with informing the controllers of my limitations. As you are already aware, it can be very difficult to refuse work once it has been sent, especially once you are on scene and members have been waiting to go home."*

79. The Tribunal notes that Claimant did not challenge the accuracy of the return to work plan as set out in Mr Alexander's letter with respect to his allegations that it was never agreed to be discussed that he would take on additional duties in two months or by June 2021.

80. This email was sent to Mr Alexander and Ms Davy however both confirmed that they had missed it once it was received. No explanation has been provided as to why they did not see it. The Tribunal does not find that the email was deliberately ignored, however it was most unfortunate that neither saw it at the material time as some of the issues which are in dispute now could have been discussed and potentially resolved earlier.

81. The Claimant returned to work on 1 April 2021 and was met by Mr Aexander who welcomed him back. Mr Alexander also made a number of telephone calls to the Claimant after his first few weeks back at work. The Tribunal were referred to call logs from Mr Alexander to the Claimant **[bundle pages 218-219]** however it notes that these calls were rather brief and appeared to last under a minute each time.

Peugeot Boxer job – 7 April 2022

82. On 7 April 2022 the Claimant was sent to a job where it was believed he would need to jump start this vehicle. On arrival it transpired that the vehicle was suffering from having the wrong fuel in it rather than needing a jump start. As the car could not be moved it required skates to move it and the Claimant has confirmed that he was able to refuse the job when it was clear that the description was wrong. We note in his oral evidence the Claimant said that he should not have been sent the job as it caused him stress and made him feel inadequate having to watch someone else come and undertake the job. The Tribunal does not find it unreasonable to have sent the Claimant to the job on the basis of the information that was known when the job was booked. It was only upon the Claimant's arrival that it was clear that the fuel was polluted.

Land Rover Discovery job – 14 April 2021

83. The Claimant has complained that he was sent to this job where the KSW was 2185 kgs and the GVW was 2825 kgs. The Claimant argued that whichever weight was used this would have been an overloaded job. In his evidence Mr Alexander said that it could not be assumed that the controllers would have had the weight when allocating the job as sometimes jobs can be updated by clients. However with respect to this job the recovery was cancelled as the vehicle could not be found. As such we find that the Claimant was not required to overload his truck on this occasion.

Delivery of 16 April 2021

84. On 16 April 2021 the Claimant was allocated a job which involved delivering materials to Mr Manchett's brother whose business is part of the group of businesses to which the First Respondent belongs **[bundle page 200]**. The Claimant has argued that this involved delivering wood and that his truck did not have an Operator's Licence ("O licence") which he said would be legally required for such a job. During the hearing the Claimant elaborated that the delivery was more than wood and included bags of cement and other building materials.

85. The Claimant said that this job caused him stress as he believed that the truck did not have the licence, and further he was stressed or worried because he did not know how the materials would be unloaded until he arrived at the delivery destination. In his oral evidence the Claimant confirmed that he was informed on his way there that a fork lift truck was on site to offload the materials.

86. The Respondents have argued that the First Respondent has a national operating licence which permits its drivers to carry anything falling within the remit of that licence. The Tribunal understands that an O licence for recovery jobs is only required for transporting goods in return for payment or where required by a hire and reward insurance policy. The Respondents obtained an operating licence which includes hire and reward cover with the effect that it can undertake recovery jobs and carrying good for remuneration. The Respondents have argued both that the O licence would not have been required for this job as it was a business to business transaction within the same group and not for remuneration, and in any event it had a national O licence.

87. The Respondents could not confirm if it was displayed in the truck on the specific date in question but it would have been incumbent upon the Claimant to have done a walkaround of the truck before each job and raised the issue with the First Respondent. The Respondents said that this would have been clear to the Claimant either from his CPC course or his 13 years' experience of working for the First Respondent. The Claimant conceded that the truck may have had an O licence but he denied that it was his responsibility to have raised this with the Respondents, and further denied that the CPC course elements he had undertaken would have obligated him to raise the O licence with the Respondents. The Tribunal heard from the Respondents that even if the truck did not have the O licence displayed it would have 28 days to rectify the situation.

88. As regards the Claimant's assertions that he felt stressed not knowing how the materials would be unloaded, the Respondents argued that the Claimant was not required to unload the truck, he was delivering to a business where there were staff and equipment available, and that he was made aware that a forklift vehicle was available before he arrived. The Tribunal accepts the Respondents' evidence and finds that the Claimant would not reasonably have been under the impression that he was required to unload the materials himself.

89. On 29 April 2021 Mrs Davy messaged the Claimant to check how things were going. The Claimant replied that he was still a bit stressed out but he was being found cars that he could pick up and that it was great to be back. Mrs Davy replied "*Do you want to have a chat about it? Happy to, Even if it's just a rant lol You never know I may be able to help. Let me know I'm happy to assist in any way. Glad your* [sic] *back."* The Claimant thanked Ms Davy and said he would see what the next week brought as no two days were the same. The Tribunal finds that this is evidence that Mrs Davy was keen to provide the Claimant with pastoral support.

90. The Claimant says that he contacted Mrs Davy in June 2021 to express concern about the jobs he was being given and that she told him that she could not help him. Mrs Davy denies receiving any such call from the Claimant. The Tribunal was provided with no evidence to support the allegation and it does not appear to have been followed up by the Claimant either at the material time or later. We cannot find that the incident happened due to the lack of corroborating evidence.

Motorbike job of 29 April 2021

91. Mr Alexander was cross examined on the decision to allocate the Claimant a motorbike job on this date. The Claimant's criticism was that a second driver had not been allocated to help him with this job. The Tribunal notes that this was a garage to garage job whereby someone would have been on site at the pick up and delivery to move it, therefore it was not outside of his return to work agreement.

Mercedes Benz job – 5 July 2021

92. On 5 July 2021 the Claimant was sent to tow a vehicle where its KSW was 1.995 tonnes which would have made his vehicle overloaded. This was accepted by Mr Alexander in his evidence.

Jaguar job - 12 July 2021

93. On 12 July 2021 the Claimant was sent to tow a vehicle where its KSW was 1.775 tonnes which would have made his vehicle overloaded. This was accepted by Mr Alexander in his evidence.

94. The Tribunal noted the evidence of Mr Alexander that he was disappointed that potentially overloaded jobs had been allocated to the Claimant, however he expressed disappointment that the Claimant had not raised this as an issue at the time. The Tribunal accepts that evidence. If, as the Claimant is now suggesting, that he was sent to jobs which would have made his truck overloaded then it was incumbent upon him as the driver to have raised it at the time.

Recovery of Audi – 22 July 2021

95. The Claimant was allocated a seizure job by Mr Alexander on this date in a shopping car park. At the time of allocating the job Mr Alexander was advised that there was only one vehicle involved. Whilst en route Mr Alexander notified the Claimant that he now understood that there was a second car involved therefore it may be a RTC and that he had instructed another driver to attend and to deal with the second car. The Claimant was asked to assess the situation and to report back. On arrival the Claimant found two cars blocking the road with Police on site who wanted the road cleared. The Claimant winched one damaged vehicle onto his truck and drove the other onto a verge before putting granules on the road to soak up the oil spill caused by the collision. The Claimant encountered breathing difficulties and sat on a grass verge to recover and the Police offered to call him an ambulance which he declined. A colleague attended to collect the other vehicle. The Claimant did not mention the difficulties he encountered to the Respondent at the time and only raised this during a welfare meeting on 3 August 2021 (below).

96. The Tribunal does not find that the Respondents forced the Claimant to work outside of his return to work agreement or plan with respect to this job. At the time of allocating the job it had been described to Mr Alexander that this only involved one car. Given the location Mr Alexander reasonably assumed that there would have been low impact and as such the vehicle would be free rolling. It was only as the Claimant was on his way that it became clear that a second vehicle was involved. It was only when the Claimant arrived on scene that he discovered that the wheels did not move. The Claimant was not required to complete the job himself, which he did do, however we do not criticise the Respondents for this as it would have been incumbent upon the Claimant to say that he could not do it, but he did not do so.

97. The Claimant has argued in these proceedings that had he refused to undertake a Police job he would have been sacked or forced out, and that it would be difficult to refuse any jobs and this would involve an argument with controllers who would always be supported by Mr Manchett and the

Transport Managers (Mr Alexander and Ms Manchett). The Tribunal finds no evidence to support that assertion. There were occasions when the Claimant was able to decline jobs which were unsuitable, and there is no evidence that this was held against him by any of the Respondents. The Tribunal was provided with examples where the Claimant was able to do so, including a Police job on 18 May 2021 involving a Ford S Max where the Claimant declined to undertake the job due to the weight restrictions **[bundle page 648]**. We note that in the Claimant's subsequent letter of 5 August 2021 **[bundle page 233]** he confirmed that he had been able to reject jobs which were unsuitable due to his disability or because the job was too heavy for the vehicle he had been asked to drive. We also note that in a subsequent letter on 13 August 2021 the Claimant said that 99% of the jobs he was sent to were suitable **[bundle page 247]**.

98. The Tribunal notes that the KSW for this Audi vehicle was 2.3 tonnes **[bundle page 581]**. Given that the Claimant's truck was 5.9 tonnes and could carry a maximum weight of 7.5 tonnes, the truck would have been overloaded by in the region of 0.7 tonnes. In his evidence Mr Alexander conceded that he was again disappointed that a small number of jobs allocated to the Claimant would have made his truck overweight.

99. The Tribunal has considered the Claimant's allegation that he was deliberately being asked to undertake overloaded jobs in order to cause him stress by exacerbating his COPD and to force him to resign. We have heard evidence from the Respondents about their compliance with relevant legal requirements. We note the evidence in Ms Manchett's witness statement that the First Respondent's vehicles have never been stopped by the Vehicle and Operators Services Agency ("VOSA") for roadside checks. Ms Manchett did not attend as a witness but similar evidence was also given by Mr Manchett which we accept.

100. The Tribunal also heard evidence as to the First Respondent's accreditations, quality assurance and compliance. Mr Manchett said in his witness statement that the First Respondent holds PAS:2018 which is the accreditation for safe working of vehicle breakdown and recovery operations. The First Respondent is also subject to a three day annual audit as well as six monthly audits with an external auditor to ensure compliance with industry requirements and the PAS requirement. Given the First Respondent's contracts with the various Police forces it is also subject to audits by those bodies. In addition the First Respondent is a contractor for the National Highways Agency for Suffolk and Cambridgeshire and as such is required to have the NHSS 17 and 17B accreditation which the Tribunal was told is carried out as part of the PAS 43: 2018 audit. Mr Alexander also gave similar oral evidence to the Tribunal.

101. The Tribunal has found no evidence of a deliberate policy or practice by the Respondents of requiring drivers to undertake overloaded jobs in breach of legal or licence requirements. The Tribunal also notes the contents of Mr Manchett's letter to the Claimant on 19 August 2021 which will be dealt with below, where he makes it clear that there are no grey areas and drivers are expected to comply with their licence requirements.

102. The Tribunal notes that had the Claimant been sent on overloaded jobs and stopped by the authorities (either the Police or VOSA) then both

the Claimant and the First Respondent could have been prosecuted. It is therefore highly implausible that the Respondents would have deliberately acted in such a manner which would have impacted the business simply to try to force the Claimant to leave.

103. Whereas Mr Alexander conceded in his oral evidence that the Claimant had been sent to some jobs which would have made his truck overloaded, we do not find that there was a deliberate practice of doing so. In any event the Tribunal was not provided any evidence that the Respondents were aware that stress could aggravate the Claimant's COPD.

104. We find that it would have been incumbent upon the Claimant as the driver of that truck to object to undertaking the job, and we note that he did so on occasion. The Respondent's counsel has provided a useful analogy of the driver being "a captain of his own ship" and we accept that comparison. Had the Claimant been required to undertake a job which was unlawful we find that it was incumbent upon him to have rejected it.

Recovery of Jaguar – 30 July 2021

105. The Claimant was asked to attend a job where the car had been described as restricted power. On arrival the Claimant found that the car was completely dead. The Claimant spoke to Ms Pudney in the control room and was given technical advice from Cameron within the Respondent's control room, as well as from Jaguar direct, however this did not assist. A colleague, John Grady, was asked to attend but they were unable to jump start the car using their jump packs. There is a dispute between the parties as the Claimant says that Mr Grady's jump pack was discharged and that his then discharged quickly, whereas Mr Alexander says that the Claimant should have been able to jump start the vehicle had his jump pack been fully charged and he was disappointed that in his view the Claimant had not charged his jump pack. The Claimant was allocated Mr Grady's job and a third colleague, Lewis, arrived to collect the Jaguar.

106. The Tribunal notes that the KSW for this vehicle was 1.775 tonnes **[bundle page 598]**. Had the Claimant towed this van then his truck would have been overloaded by 0.175 tonnes, however as the Claimant took over a job from Mr Grady this issue did not arise.

Recovery of VW Golf – 30 July 2021

107. The Claimant was asked to recover a VW Golf from the A14 but on arrival it was apparent that it had lost a wheel. The Claimant was unable to handle the incident alone and a colleague, Adrian Stalker, was sent to assist. Mr Stalker used his jack to lift the car and both of them put skates under the car and loaded it to the truck and took it to the Respondent's depot. Upon arrival Mr Stalker helped the Claimant to unload the car and another colleague, Sam Mason, put the skates back on the Claimant's truck.

108. The Tribunal notes that the KSW of this vehicle was 1.266 tonnes **[bundle page 599]**, therefore within the limits of the weight that the Claimant's truck could carry.

109. The Tribunal notes that the Claimant has argued that one of the reasonable adjustments he should have been provided with is a lighter jack. The Claimant says that the First Respondent's jack weighs approximately 40kgs which is too heavy for him to lift, and he suggested that Mr McNair bought his own jack which was in the region of 20kgs. However the Tribunal notes that a 20kg jack would still have been too heavy for the Claimant to have lifted, and even if a lighter jack could be sourced the Claimant had advised that he could not jack cars, and he had not been required to do so either. In the example of VW Golf above it was Mr Stalker who was sent to assist the Claimant and who jacked the car.

Review meeting – 3 August 2021

110. The review meeting between the Claimant, Mr Alexander and Mrs Davy was due to take place in July 2021 but did not take place until 3 August 2021, although the Tribunal understands that conversations took place in the interim between the Claimant and Mr Alexander. The brief delay was due to annual leave of both Mr Alexander and the Claimant. The Tribunal considers that this was only a very brief delay for understandable reasons and the Claimant suffered no prejudice as a result. The Claimant says that he was both keen and desperate for this meeting to go ahead on time however we were not provided with any contemporaneous correspondence from the Claimant chasing up this meeting or expressing those concerns.

111. The Tribunal heard from Mr Alexander that prior to this meeting he was not notified of any problems by the Controllers nor by the Claimant and he therefore went into that meeting under the impression that everything had been working well.

112. There is a dispute between the parties as to what was said at that meeting. We have been referred to the handwritten notes of Mrs Davy who confirmed that she made bullet points not verbatim notes **[bundle pages 229-231]**, we have also been referred to the summary of the meeting in a letter dated 3 August 2021 **[bundle pages 236-238]** prepared by Mr Alexander, and we have also been referred to the Claimant's letter dated 5 August 2021 **[bundle pages 232-234]** where he raised some issues about what was discussed. It is common ground that the Claimant had not received Mr Alexander's letter of 3 August by the time he sent his notes on 5 August. It is important to note that all of these documents were contemporaneous written documents.

113. The documents suggest differing accounts of that meeting, however there are a number of findings which the Tribunal is able to make having read those documents and having heard witness testimony. Whereas the Claimant may have attended that meeting in the hope that his pay review would be discussed there, there had been no indication from the Respondent that it would be, and it was only the Claimant's assumption that it would be on the basis that some other colleagues were having their reviews at that time. Mr Alexander did not refuse to discuss the pay review with the Claimant, he simply said that this was not what the meeting was for, and that it would be discussed separately.

114. The Tribunal heard that the pay reviews for staff had started and continued until September and that the Claimant was on the Respondent's

list for a pay review. We also heard evidence that the Claimant had been given a pay increase for the previous year whilst off sick. Whilst the Tribunal was not provided with any list, we see no reason to doubt Mr Alexander's evidence, nor any reason to conclude that the Claimant was to be excluded from pay reviews.

115. During this meeting the Tribunal finds that the Claimant brought a copy of a letter from his cardiologist which he says advised that his test was clear. The Claimant has argued that Mrs Davy and Mr Alexander refused to accept it, whereas their evidence is that they read and accepted the contents but did not refuse to accept the letter. Mrs Davy admitted in hindsight she could have taken a copy of it to keep on the Claimant's personnel file. The Tribunal accepts that evidence and finds that there was no refusal as alleged, that the two Respondents had accepted the contents but didn't retain a copy for themselves.

116. The Tribunal also finds that this meeting was the first time that the Claimant informed the Respondent of the incidents of 22 July 2021 and 30 July 2021. The Tribunal has already made findings above that the jobs did not appear to be unsuitable for the Claimant when allocated to him, and that the full picture only became clear once he arrived on scene.

117. The Tribunal notes that in the meeting the Claimant reminded the Respondent of his physical limitations (including inability to lift more than 15 kgs) however he also stated that 90% of the work was going well and he had been found jobs that he could do. The Tribunal accepts that evidence as the Claimant made similar comments in written correspondence subsequently.

118. The Tribunal also finds that the Claimant made the Respondent aware that he was encountering difficulties when attending Police jobs as it was unclear what the job would entail until he was on scene. The Tribunal understands this to mean that the Claimant would feel under pressure from the Police to clear the road of debris and to remove vehicles. As a result Mr Alexander advised the Claimant that he would only need to attend seizure jobs for the Police rather than other RTCs.

119. The Claimant has alleged that he was told by Mr Alexander at this meeting that he had lost the Respondent money on jobs. The Tribunal had reviewed the letter dated 3 August 2021 and it is appropriate to quote the relevant extract:

> *"Within the phased return it was suggested that an additional OH meeting may be advisable at this stage and based on the information you gave we now feel this is a crucial step in understanding what the next steps will be by way of adjustments. Based on the information/feedback given it is apparent that some jobs attended have not been cost effective, and have additionally resulted in agreed performance indicators agreed with clubs, not being fulfilled, as additional resource has been required in order for us to complete the job. Whilst this does happen at times, we do need to ensure the service we provide to our customers going forward is both within the contracted timelines of the clubs and time efficient within the control room."* **[bundle page 237]**.

120. In his witness statement Mr Alexander denies telling the Claimant that he had lost the First Respondent money. Mr Alexander stated:

> *"I did comment that due to the adjustments Manchetts had put in place, the control room were utilising resources and labour to ensure the Claimant was given work that fit with his return-to-work plan and that sometimes this could be managed in a more cost-effective way. However, I made clear that this was merely a commercial point and not something the Claimant should be concerned about."*

121. The Tribunal has reviewed these passages carefully and has also taken into consideration the contents of the Claimant's letter dated 5 August 2021 to Mr Alexander where he said that *"you intimated that my work was less cost-effective than other drivers."*

122. In his oral evidence Mr Alexander referred to checking his laptop and being concerned when he noticed that the invoicing team had not charged for a second person sent to assist the Claimant and that the Respondent had missed the opportunity to charge for this. Mr Alexander said that the Claimant had been helpful by pointing out scenarios where the First Respondent had not charged enough for jobs. The Tribunal understands that this was the VW Golf job of 30 July 2021 where Mr Stalker was sent out to assist. Mr Alexander was adamant that he had not blamed the Claimant for this.

123. The Tribunal finds that the references to cost effectiveness and key performance indicators were clumsily worded and could have been expressed differently given that the intention was to express to the Claimant the reasons for seeking further Occupational Health advice. The Tribunal finds that it was acceptable for the Respondent to set out the adjustments it had implemented and to form its own view as to their reasonableness and whether they are working as envisaged. Whereas the paragraph quoted could have been phrased more clearly, we do not find that it was reasonable for the Claimant to have formed the view that he was being criticised or that Mr Alexander was saying that the Respondent had lost money on jobs due to the Claimant's adjustments. Mr Alexander had said that the Respondent had missed the opportunity to charge for one job but this was due to the failure of someone to invoice for a second driver, it was not attributed in any way to the Claimant.

124. It was agreed at the meeting of 3 August 2021 that up to date Occupational Health advice would be obtained and that the Claimant would email after a block of four shifts confirming if there had been any problems or issues during the shifts.

125. In his letter Mr Alexander said that the Claimant had been transferred to a 7.5 tonne truck to eliminate him having to deal with heavy jacks and skates and exacerbating his condition. The Claimant challenges this reasoning and argues that both vehicles carry the same equipment (save that the 15 tonne truck also has a spec lift). Whereas both vehicles carry the same equipment, the Tribunal finds that the Claimant was not required to use them and that they are present for other drivers to use. The reason

for allocating the Claimant the smaller vehicle was to reduce the amount of physical exertion and to reduce the risk of being allocated or asked to undertake more complex jobs.

126. In his letter Mr Alexander repeated the contents of his letter of 24 March 2021 where he set out the tasks which the Claimant would perform and the tasks that they had hoped he would be able to perform after two months or by June 2021. These are not repeated here. The letter stated that this would be ultimately guided by an Occupational Health examination and an additional review meeting.

127. The Tribunal notes that within his letter of 5 August 2021 the Claimant commented that he felt that he would have been more useful to the Respondent if he drove the larger class 2 truck as he could deal with larger vans if they were rolling. The Claimant said that:

> *"I would like to express my disappointment at our meeting today. I feel that I have worked very hard since my return from furlough. I have only turned down those jobs that were obviously not suitable - either due to my disability or because the job is for a vehicle too heavy for the track you have asked me to drive."*

128. The Claimant also said *"It was your opinion at our last meeting that you have plenty of work available for me despite the limits of the Reasonable Adjustment agreement. My experience of the past 4 months is that you are totally correct – I have usually been working up to my driving time limits as there is plenty of work that I am able to manage."* The Claimant also expressed concern that he would be paid less than he was previously as he had been moved from a larger truck (requiring a Class 2 licence) to a smaller 7.5 tonne truck. Both parties have agreed that no reduction in salary was applied.

Respondent's letter of 11 August 2021

129. The Tribunal was referred to the letter from Mr Alexander of 11 August 2021 responding to the Claimant's letter of 5 August 2021. The Tribunal considers that this letter provided much greater clarity as to the adjustments being made for the Claimant and the duties he would be expected to the undertake.

130. The Tribunal noted that Mr Alexander said that he would provide a colleague to accompany the Claimant on shift for a day to help identify what other adjustments could be implemented to help support the Claimant. The Tribunal found this to be a very supportive measure as it would have provided a far greater insight into any difficulties the Claimant may have faced at work and could have guided the First Respondent on additional adjustments that may have been required.

131. Mr Alexander also set out the adjustments which had been made for the Claimant:

131.1 Work adjusted to set hours of 7am – 8pm on a 4 on 4 off rota
131.2 Continue to work from a 7.5 tonne truck
131.3 Duties to include:

131.3.1 Bodyshop movement/ vehicle recoveries where all wheels on the casualty vehicle move
131.3.2 Connecting brother straps and winching equipment for the above casualty vehicles
131.3.3 Undertake motorbike recoveries
131.3.4 RTCs on road (limited to s. 165A recoveries)

132. The letter recorded that the Claimant would not be required to carry out the following duties until there was further medical guidance:

132.1 Recovery of larger vehicles
132.2 Towing trailers and caravans
132.3 Using the spec lift to recover more than one vehicle
132.4 Attending RTCs on and off road where the vehicle does not roll

133. The Tribunal finds that this would likely have clarified any misunderstandings from Mr Alexander's previous letter as to what duties the Claimant would be expected to perform and those he would not. The Tribunal notes that the letter recorded that alternative roles had been discussed however the Claimant did not wish to be considered for office based roles as he did not wish to undertake retraining and he did not wish to be considered for a controller position. The Claimant has asserted in these proceedings that he had not refused alternative positions, but he had said that he could not perform them because of his disabilities. The Tribunal accepts the Claimant's evidence in that regard. We do not find that the Claimant was ever accused of unreasonably refusing suitable employment.

134. The Claimant was advised that if the Respondents were unable to implement adjustments for him to complete his role and duties, or if it was unable to deploy him to another available role, then it may be left with no option but to consider a capability hearing, however Occupational Health advice would be obtained first.

135. Mr Alexander advised the Claimant that his pay was being reviewed in line with the process taking place in the business but that the meeting had not been a pay review meeting which was why it was not addressed.

Claimant's letter of 13 August 2021

136. The Tribunal was also referred to further correspondence from the Claimant to the Respondents of 13 August 2021. It is helpful for the Tribunal to summarise some of the key points. Much of the Claimant's letter showed that the return to work arrangements were working as he said that 99% of the jobs he had been sent to were suitable and he had no issue with them, and that he had not lifted more than15kgs. The Claimant said that he had been assured by the Respondent that there was more than enough work for him to complete regarding deliveries and rolling vehicles only, and that the Respondent had been proved right. The Claimant agreed that the choice of truck is down to the Respondent, he felt he could be more flexible to the commercial needs of the Respondent in a larger vehicle. The Claimant also said that he could move motorbikes but only with assistance.

137. However, the Claimant said that his licence did not allow him to do towing or spec lifts and that a Class 1 licence is required to tow anything

more than 750kgs which he said had been referred to as a grey area by management. The Claimant said that the plan to expand his workload was written without his agreement and ignored the Occupational Health advice of November 2020, and there was no point in him responding to the plan until he had further Occupational Health advice.

138. The Claimant says he felt that the Respondent was waiting to see what truck he would be driving before it decided what rate of pay he would be offered. The Claimant said that the reference to work to be done after two months had not been discussed or agreed with him, and he again denied that his jump pack had been discharged and that it was his colleague's.

139. The Claimant also addressed alternative roles in his letter. The Claimant said that office based roles would be unsuitable due to his dyslexia, as would the role of controller. The Claimant indicated that the role of HGV fitter would involve heavy lifting and qualifications which he was unable to take due to his dyslexia, but he would be happy to look at any other driving role. The Claimant also summarised in detail the three incidents of 22 July and 30 July 2021 and highlighted a number of occasions where his colleagues had been helpful to him. The Claimant stated "*I have not been refusing jobs when I have been asked to assess it. If I am capable of undertaking the job, or to improve the situation I have done so."*

Sean Manchett's letter of 19 August 2021

140. Mr Manchett responded to the Claimant's letter on 19 August 2021. This was because Mrs Davy and Mr Alexander were away. Mr Manchett took advice from the First Respondent's external HR advisors Nat West Mentor who drafted the response to the Claimant **[bundle pages 246-252].** Much of the letter is not contentious between the parties, and Mr Manchett reiterated that suitable work was being found for the Claimant however the Respondent does not always know the full picture for each job until the driver arrives on scene and that occasionally he may be allocated jobs which turn out to be unsuitable upon arrival. Similarly Mr Manchett explained that jobs which appear routine, such as seizures, may have unforeseen factors, for example missing car keys which means that the car cannot be driven.

141. The Tribunal notes that Mr Manchett expressly stated that there was no "grey area" of the work the Claimant was able to undertake and specifically *"Regardless of your health, you should only ever be undertaking work that you are legally able to do so under your licence category."* We also note that Mr Manchett told the Claimant that he would be invited to a pay review and that there was no link between his pay and his health condition, and that whilst the Claimant was currently driving a 7.5 tonne truck as an agreed reasonable adjustment, this had no bearing on his pay.

142. There was also consideration of alternative roles for the Claimant, including parts delivery driver, however the suggestion was that it may not be suitable due to the need to lift heavy parts. There was also reference to a capability procedure as a last resort, however there was no suggestion in the letter that this was a foregone conclusion as further Occupational Health advice needed to be obtained and adjustments explored.

143. There are two areas of contention between the parties. Firstly Mr Manchett said that *"We understand that excessive bending and constricting of your diaphragm can also exacerbate your condition requiring you to take breaks to regain your breath. We knowledge that the symptoms will only likely worsen over time. We also understand that your condition can be exacerbated by cold weather."* The Claimant has taken issue with this statement as it is not information which they had provided to the Respondents.

144. Secondly Mr Manchett said that due to the link between COPD and cardiac disease, the Claimant (as a Class two license holder) was required to inform the DVLA by filling in form VOCH1. Mr Manchett said that this was on the basis that COPD sufferers have lower, oxygen saturation leading to increased cardiac output. The Claimant was asked to notify the business as soon as this has been completed.

Claimant's response of 19 August 2021

145. The Claimant emailed Mr Manchett later that evening to say that that he had spoken to the DVLA, and they confirmed that COPD is not a notifiable illness and there is no need for him to complete that form. The Claimant said he had also asked for this information from DVLA to be confirmed by a manager which he said they had.

146. The Claimant also took issue with the reference to cardiac output. The Claimant said that he had previously provided a copy of the outcome letter from his cardiologist during the meeting on 3 August 2021, which he says confirms that his heart was fully healthy. The Claimant said that he was disappointed at the inference that he would not take full responsibility for his health and how it could affect his licence. The Claimant said that he had been forthcoming at all times and was aware of how dangerous a truck could be in the hands of anyone not fit to drive it.

147. The Tribunal has noted the reasons why Mr Manchett directed the Claimant to contact the DVLA. Mr Manchett says that he has a duty of care to his recovery drivers, to other road users, and to his insurers as well to make sure that drivers are fit to drive their vehicles. The Claimant says that this was an attempt to have his licence removed and to force him out of his job. The Tribunal does not find that to be the case and we accept Mr Manchett's evidence in this regard.

148. We note that Mr Manchett had received advice from Nat West Mentor about an alleged or potential link between COPD and cardiac disease. It is not for this Tribunal to determine whether there is a link between the two, but the fact that Mr Manchett was given this advice from an external provider would seem to be at odds with the Claimant's allegation about the motivation of Mr Manchett to get the Claimant's licence revoked.

149. The direction from Mr Manchett to contact the DVLA was, in the view of the Tribunal, no more than a genuine concern of Mr Manchett that his drivers were medically fit and legally allowed to drive. By the Claimant's own evidence he agreed that a truck could be dangerous in the hands of anyone not fit to drive it. It was therefore entirely appropriate for Mr Manchett

to act as he did. Whereas the Claimant says that DVLA told him that COPD is not a notifiable condition, it was entirely reasonable for Mr Manchett to have sought clarification as he did. It is not necessary for the Tribunal to find whether the Claimant was required to notify the DVLA as a matter of law, rather our finding is that it was reasonable for Mr Manchett to have wanted clarity given his obligations to his drivers, to the other road users, and to his insurers.

150. The Tribunal notes that the Claimant acted swiftly and the matter was resolved the same evening after the Claimant had contacted the DVLA and checked the position with the adviser and then her line manager. Accordingly the Claimant would have known that his licence was not in jeopardy at that time.

Horsebox job – 21 August 2021

151. On 21 August 2021 the Claimant was sent to a job involving a horsebox in the middle of a field. The Tribunal understands that a car was also involved but the Claimant was not required to deal with that. This job was allocated by Ms Pudney. The Claimant has alleged that he was told to load the horsebox on to his truck however the horsebox was 4 inches too wide to fit. The Claimant alleges that he was sent to this job to deliberately cause him stress by having to engage in conflict with either the controller or the customer.

152. The Tribunal has been referred to the transcripts of the two calls between the Claimant and Ms Pudney **[bundle pages 298-299]**. In the call the Claimant was asked to take a look and see if he could get it on his vehicle to which the Claimant replied that he would go but he could not tow it, and that the wheels are usually wider than the bed on his truck but he would go and look. Ms Pudney thanked the Claimant and asked him to take a look and to take some photographs for her.

153. In a second call the Claimant is recorded as telling Ms Pudney that it was too wide to go on his bed to which Ms Pudney replied “no worries, I’ll swap it over.” The Tribunal notes that the Claimant said that the customers were getting stressed out over their car, to which Ms Pudney said that they would need to speak to the AA who had been dealing with it. There was no pressure applied by Ms Pudney to the Claimant in either of the transcripts.

154. The Claimant has alleged that there was another conversation with Ms Pudney on the radio where she was aggressive and applied pressure on him to take the job. These radio conversations are not recorded. Therefore there is no transcript for the Tribunal to review. The Tribunal notes that radio conversations are heard by all drivers, and it was the evidence of Mr Alexander that staff did not routinely use the radio to communicate because they could have been overheard by clients or passengers travelling in the cabin of the truck with the drivers. The Tribunal was not provided with evidence to support the Claimant’s allegation therefore the Tribunal cannot find from the evidence available that pressure was applied to the Claimant to undertake this job.

Incidents of 22 August 2021

155. The Claimant alleges the two final straws causing his resignation were the letter from Mr Manchett and secondly an incident on 22 August 2021. The Claimant alleges that on this date his colleague Mr McNair was working out of a 15 tonne truck and had been allocated a job to pick up a Renault Clio which is understood to be a lighter vehicle, yet the Claimant was working out of a 7.5 tonne truck and had been allocated a job involving a Volkswagen Campervan. The Claimant says that the vehicle weighed 3.5 tonnes and would have been the most overloaded job he had been given, and had it been allocated to Mr McNair then his truck could have accommodated it. The Tribunal has reviewed APEX CMS record for the job allocated to the Claimant **[bundle page 615]** and it appears that the Claimant has used the GVW rather than the KSW. The Tribunal notes that the KSW was recorded as "unknown" and therefore the vehicle could have weighed considerably less than 3.5 tonnes it would still very likely have been overweight for the Claimant's vehicle. There is no record before the Tribunal that the Claimant sought to challenge this job at the time.

156. In his witness statement the Claimant alleged that the Respondent has altered its computer records to show that Mr McNair was allocated a Renault Master on that date instead. This argument was not advanced during the hearing, therefore we make no findings in respect of it.

157. The Claimant went home early that day as he was unwell. The Claimant said he had only completed one job as the rest were too heavy for him to tow. The transcript of the telephone conversation shows that the Claimant was asked to complete a police job after he said he felt terrible and would be going home. The Claimant was able to decline that job and no pressure was applied to him to take it. Specifically the Claimant was told *"hey these things happen Karl it's not a problem buddy not a problem at all mate erm, I'll mark it up and I'll update."* **[bundle page 260].**

158. The Tribunal notes that the Claimant argues that the Respondents have "cherry picked" jobs and communications by relying on transcripts of recorded telephone conversations. The Claimant also alleges that the Respondents have been able to hide other conversations which took place over the radio as these are not recorded and cannot be transcribed. Whereas the Tribunal finds that it was open to the parties to use the radio to communicate and that they did so on occasion, the Tribunal accepts the evidence of Mr Alexander that this would not be the usual method of communication as it can be heard by all drivers as well as their passengers. No independent evidence has been provided to support the Claimant's allegations about him being forcefully told to take jobs over the radio.

159. On 25 August 2021 Mrs Davy emailed the Claimant in response to his email of 19 August 2021, concerning the requirement to inform DVLA of his medical condition. Mrs David indicated to the Claimant that the requirement was on the basis of advice that they have received from the external advisors and she pasted an extract from their advice which stated "*Furthermore, if their COPD symptoms place an increased pressure on their cardiovascular system this should be reported as 'any cardiac problems' are notifiable for a class two license holder."* Mrs Davy asked the Claimant to provide consent for a copy of his medical records to be released to the Respondent noting that the Claimant had previously offered to provide a copy of the same to them.

160. The Claimant has made reference to the use of the word "if" in Mrs Davy's letter whereas Mr Manchett advised the Claimant that he was "required" to notify the DVLA. The Tribunal notes the difference in terminology between the two, however it has already found that it was reasonable for Mr Manchett to have acted as he did. The use of the word "if" by Mrs Davy was merely explaining to the Claimant why this issue was being explored.

161. The Claimant went on sick leave from 25 August 2021 and did not return to work. A copy of a fit note within the hearing bundle shows that the Claimant was signed off as unfit due to COPD until 7 September 2021.

Resignation

162. The Claimant sent a letter of resignation on 31 August 2021 **[bundle page].** The entire contents of the letter are not repeated here however is it is sufficient to note that the Claimant said that the employment relationship had irretrievably broken down and he cited a lack of duty of care provided to him, a demeaning working environment by refusing to ensure that controllers supported the reasonable adjustments for him, and that increasing pressure had been placed on him to undertake jobs outside the scope of his adjustments. The Claimant referenced the meeting on 3 August 2021 where he said that Mr Alexander had told him they had lost money on several jobs, and he also referred to the requirement from Mr Manchett to contact DVLA about his COPD.

163. The Claimant also referenced the horsebox job of 22 August 2021 and said that he had been caused stress making him unfit to drive and he referred to weight loss and increased breathing problems. The Claimant said that the return to work plan had not been complied with and that the Respondent had put pressure on him to leave by insisting that he undertakes work that was not appropriate for his condition, and that by acting in that manner it had caused him extreme stress.

164. The Tribunal notes that the Claimant did not specifically raise the allegation he now makes that he was deliberately being forced to take overloaded jobs in order to make him more vulnerable to Police checks with the result that it caused him stress and aggravated his COPD.

165. The Tribunal notes that in his oral evidence the Claimant said that his resignation was due to (i) the letter from Sean Manchett of 19 August and (ii) allocating Mr McNair a Renault Clio job whereas the Claimant was sent to a campervan job. This is not how the reason for resignation was described in the resignation letter at that time.

166. On 2 September 2021 Mrs Davy wrote to the Claimant to ask if he had intended to resign and to ask if he would like to raise a grievance instead. The Claimant responded to Mrs Davy the same day to confirm that he had resigned with immediate effect.

167. On 3 September 2021 Mrs Davy wrote to the Claimant to acknowledge his resignation and responded to some of the concerns that the Claimant had raised. The Tribunal has reviewed the letter and will not

repeat the contents save to note that it did not contain any explicit or implicit criticisms of the Claimant, it listed the adjustments that the Respondents had made and the further steps it had planned to take including a further Occupational Health assessment and paying for a trainer to shadow the Claimant for a day. The Tribunal notes that the Claimant had not initiated a grievance process, therefore whilst it was unnecessary for Mrs Davy to have responded in such detail the Tribunal finds that it was open to the Respondents to address the Claimant's allegations in his resignation letter.

168. The Claimant has complained that the Respondents have accused him of unreasonably refusing suitable alternative employment. Having reviewed the letter from Mrs Davy it does not contain any such allegation either expressly or impliedly. The Claimant denies that he said that he did not wish to be considered for other roles, rather he says that he would not be able to undertake them or train for them due to his dyslexia. In his evidence the Claimant admitted that he previously said to Mr Alexander that *"you don't want me working in there*" by reference to the Control Room. In his witness statement at paragraph 161 the Claimant states *"I told him about my dyslexia as I didn't want to take on the job that required writing as I would be unable to carry out the requirements of the job*." The Tribunal finds it likely that the Claimant said that he did not want to undertake the other roles because of his dyslexia. In any event we do not find that Mrs Davy ever accused the Claimant of unreasonably refusing alternative employment.

169. The Tribunal was not referred to any further correspondence between the parties. The Claimant started a new role immediately after leaving his role. The Claimant said that Mrs Ruddock had applied for it for him. The Claimant filed his ET1 on 19 October 2021.

Submissions

170. The Tribunal received written submissions of 20 pages from the Respondents and 12 pages from the Claimant. These were read by the Tribunal and the parties also gave brief oral submissions which were also considered. The contents are not repeated here.

171. The Respondents referred us to the following authorities all of which were taken into consideration:

Shamoon v Chief Constable of the RUC [2003] IRLR 285
Hardys & Hansons plc v Lax [2005] IRLR 726
Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336
Land Registry v Grant [2011] IRLR 748
GMBU v Henderson [2015] 451
Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893.
Pnaiser v NHS England [2016] IRLR 170 EAT
City of York Council v Grosset [2018] ICR 1492 CA.

Law

Constructive unfair dismissal – sections 95 and 98 Employment Rights Act 1996

172. The applicable law is found in section 95(1)(c) of the Employment Rights Act 1996 which provides that "*for the purpose of this Part an employee is dismissed by his employer if .....the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".*

173. The leading case on constructive dismissal is ***Western Excavating (ECC) Ltd v Sharp 1978*** **ICR 221, CA**. The employer's conduct must give rise to a repudiatory breach of contract. In that case Lord Denning said "*If the employer is guilty of conduct which is a significant breach going to the root of the contract, then the employee is entitled to treat himself as discharged from further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

174. In ***Malik v Bank of Credit and Commerce International SA*** **1997 IRLR 462** the House of Lords affirmed the implied term of trust and confidence as follows: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".*

175. In ***Baldwin v Brighton and Hove City Council 2007*** **IRLR 232** the EAT had to consider whether for there to be a breach, the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view of the EAT was that the use of the word *"and"* by Lord Steyn in the passage quoted above, was an error of transcription and that the relevant test is satisfied if either of the requirements is met, so that it should be "*calculated or likely".*

176. In ***Kaur v Leeds Teaching Hospitals NHS Trust 2018*** **IRLR 833** the Court of Appeal listed five questions that should be sufficient for the Tribunal to ask itself to determine whether an employee was constructively dismissed:

1. What was the most recent act (or omission) on the part of the employer the employee says caused, or triggered, their resignation?

2. Has the employee affirmed the contract since that act?

3. If not, was that act (or omission) by itself a repudiatory breach of contract?

4. If not, was it nevertheless a part (applying the approach explained in ***Waltham Forest v Omilaju [2004]*** **EWCA Civ 1493**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign).

5. Did the employee resign in response (or partly in response) to that breach?

177. If there was a dismissal, the Tribunal must then consider whether the dismissal was for one of the potentially fair reasons set out in sections 98(1)(b) or 98(2) of the Employment Rights Act and whether the dismissal was fair or unfair under section 98(4).

178. Section 98(4) states that "*The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case".*

Discrimination

179. Section 39(2) of the Equality Act 2010 provides, amongst other things, that an employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment.

Burden of proof

180. Section 136 Equality Act 2010 provides:

> *"(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."*

181. There is a two-stage process. At the first stage, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. At the second stage, if the Claimant is able to raise a *prima facie* case of discrimination following an assessment of all the evidence, the burden will then shift to the Respondent to show a non-discriminatory reason for the difference in treatment.

182. Guidance to Tribunals on the burden of proof can be found in a number of cases including ***Igen v Wong*** **[2005] IRLR 258** which was approved in ***Madarassy v Normura International Plc*** **[2007] EWCA 33**.

183. In ***Igen*** the Court of Appeal cautioned tribunals "against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground" (paragraph 51). Similarly In ***Madarassy*** Mummery LJ cautioned:

"…The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination."

184. Mere unreasonable treatment by an employer "casts no light whatsoever" as to the question of whether an employee has been treated unfavourably - ***Strathclyde Regional Council v Zafar*** **[1998] IRLR 36**. This has also been followed by the Employment Appeal Tribunal in ***Law Society and others v Bahl*** **[2003] IRLR 640** where it was held that mere unreasonableness is not enough as it tells us nothing about the grounds for acting in that way. Unreasonable behaviour can go to the credibility of a witness who is trying to argue that their actions were not motivated by the characteristic in question. If there is unreasonable treatment then a Tribunal will more readily reject the employer's explanation for it than it would if the treatment had been reasonable. In any event, a Tribunal must also take into consideration all potentially relevant non-discriminatory factors which could realistically explain the conduct of the alleged discriminator.

Direct Discrimination

185. Section 13 Equality Act 2010 provides:

"Direct discrimination

(1) 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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

…"

186. There are two aspects to direct discrimination that must be considered by the Tribunal. The first is the alleged less favourable treatment, and the second is the reason for the treatment complained about with a causal link between the two.

187. As above, less favourable treatment does not mean unreasonable treatment, but it also does not mean detrimental treatment or unfavourable treatment or simply different treatment. There must be a comparison either actually or hypothetically that shows less favourable treatment. It is the treatment rather than the consequences of the treatment that are the subject of the comparison - ***Balgobin v Tower Hamlets London Borough Council*** **[1987] ICR 829.**

188. As regards what may amount to less favourable treatment, this does not require a Claimant to show that objectively they are less well off as a result of the conduct complained of. It may be sufficient for a Claimant to reasonably say that they would have preferred not to have been treated differently - ***Chief Constable of West Yorkshire Police v Khan*** **[2001] UKHL 48.**

189. It is insufficient for a Claimant to argue that the Respondent would have treated them less favourably in certain circumstances. The alleged less favourable treatment must actually have occurred in order for liability to arise - ***Baldwin v Brighton and Hove City Council*** **[2007] IRLR 232.**

190. Whether less favourable treatment is proven requires a comparison to a suitable comparator. The comparators do not need to be identical, however there is a general requirement that there be no material difference between the people being compared either actually or hypothetically.

191. Section 23 Equality Act 2010 provides:

"Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

(a) on a comparison for the purposes of section 13, the protected characteristic is disability;

(b)…"

192. In cases where there is no actual comparator it is permissible for a Tribunal to concentrate on asking why a Claimant was treated in the way he was. A Tribunal may ask the question was the Claimant treated in this way it because of the proscribed grounds? Where it was on the basis of the proscribed grounds then there will need to be an examination of the facts of the case. Where it is for some other reason then the application will fail - ***Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland)*** **[2003] IRLR 285.** It may therefore be appropriate for the Tribunal to ask what is known as the "reason why" question, essentially did the Claimant receive less favourable treatment than others because of the protected characteristic?

193. For direct disability discrimination to occur, the less favourable treatment must be "because of" disability rather than something related to it. However whilst the protected characteristic needs to be a cause of the less favourable treatment it "*does not need to be the only or even the main cause"* - paragraph 3.11 of the Equality Human Rights Commission Employment Statutory Code of Practice ("the EHRC Code"). Therefore where there is more than one reason put forward for why the Respondent treated the Claimant how they allegedly did, the discriminatory reason need

not be the sole or even principal reason for the actions - it only needs to have had "a significant influence on the outcome" - ***Owen & Briggs v James*** **[1982] IRLR 502 (CA).** It follows that there must be some evidence that the Respondent knew of the disability – ***Patel v Lloyds Pharmacy Ltd*** **UKEAT/0418/12**.

194. The Tribunal will need to consider the reason why the Claimant was treated less favourably – ***Nagarajan v London Regional Transport and others*** **[1999] IRLR 572**. Generally motivation of the alleged discriminator is irrelevant to a direct discrimination claim. However in ***R v The Governing Body of JFS and the Admissions Appeal Panel*** **[2009] UKSC 15** it was confirmed that where it is self-evident that discrimination is taking place because there is reference made to the protected characteristic, it is not necessary to analyse the motives of the discriminator as they are irrelevant. However where discrimination is not immediately apparent, it is necessary to analyse the motivation (both conscious and unconscious) of the alleged discriminator but only for determining whether the characteristic played any part in the alleged discriminatory behaviour.

195. There is no justification defence for a direct disability discrimination claim. Unintentional direct discrimination done with or without good intention is therefore just as unlawful as intentional direct discrimination, - ***Khan v Royal Mail Group*** **[2014] EWCA Civ 1082** and ***Ahmed v Amnesty International*** **[2009] IRLR 884** which reaffirmed that a benign motive is irrelevant.

Discrimination arising from disability

196. Section 15 Equality Act 2010 provides:

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

197. The starting point is that the disability must have the consequence of causing something (the "something arising") and secondly the treatment alleged to have been unfavourable must have been because of that something arising - ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe*** **UKEAT/0397/14/RN)**. The ECHR Code states that the consequences of a disability:

> *"include anything which is the result, effect or outcome of a disabled person's disability and the consequences will*

be varied, and will depend on the individual effect upon a disabled person of their disability. Some consequences may be obvious, such as an inability to walk unaided or inability to use certain work equipment. Others may not be obvious, for example, having to follow a restricted diet." (paragraph 5.9)

198. As to what constitutes "unfavourable treatment", the Supreme Court in ***Williams v Trustees of Swansea University Pension and Assurance Scheme and anor*** **[2019] ICR 230** held that it is first necessary to identify the relevant treatment then consider whether it was unfavourable to the Claimant. The Court said only a relatively low threshold of disadvantage being needed. One could answer the question by asking whether the Claimant was in as good a position as others. A comparator is not required to show unfavourable treatment – paragraph 5.6 EHRC Code. Unfavourable treatment does not require a particularly high threshold of disadvantage, it can include creating a particular difficulty for someone or disadvantaging them in some way.

199. There must be a connection between the unfavourable treatment and the something arising from disability. It is insufficient for the disability itself to be relied upon, it must be the something arising in consequence of disability which is said to be the reason for or the cause of the alleged unfavourable treatment – ***Robinson v Department for Work and Pensions*** **[2020] EWCA Civ 859**. However, the something arising from disability only needs to be an effective cause of the unfavourable treatment - ***Hall v Chief Constable of West Yorkshire Police 2015*** **IRLR 893.** Any connection that is not an operative causal influence on the mind of the discriminator will not be sufficient to satisfy the test of causation.

200. Lack of knowledge that a known disability caused the "something" in response to which the employer subjected the employee to unfavourable treatment provides the employer with no defence – ***City of York Council v Grosset*** **[2018] ICR 1492 CA**.

201. Guidance for Tribunals as to the correct approach to claims of discrimination arising from disability can be found in ***Pnaiser v NHS England*** **[2016] IRLR 170:**

"(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have

at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or they did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises …

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act … the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

…

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

…

…

(i) As Langstaff P held in ***Weerasinghe****, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability.*

……..

Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to "something" that caused the unfavourable treatment."

202. Where a Claimant proves facts from which the Tribunal could conclude that there was discrimination arising from disability, the burden of proof will then shift to the Respondent to prove a non-discriminatory explanation, or to seek to justify the treatment as a proportionate means of achieving a legitimate aim. The burden of establishing this defence is on the Respondent.

203. The Tribunal must undertake a fair and detailed assessment of the Respondent's business needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary. What the Respondent does must be an appropriate means of achieving the legitimate aims and a reasonably necessary means of doing so.

204. In ***Homer v Chief Constable of West Yorkshire Police*** **[2012] UKSC 15** it was held that what is required is (i) a real need on the part of

the Respondent; (ii) what it did was appropriate (rationally connected) to achieving its objectives; and (iii) that it was no more than was necessary to that end.

205. In ***Hardy & Hansons plc v Lax*** **[2005] ICR 1565** it was held that it is for a tribunal to make its own judgment as to whether the practice complained of was reasonably justified, and that there is no range of reasonable responses tests. Rather the more serious the disparate impact, the more cogent must be the justification for it. A measure may be appropriate to achieving the aim but to go further than is reasonably necessary in order to do so may make it disproportionate.

206. It is also appropriate to ask whether a lesser measure could have achieved the employer's legitimate aim – ***Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice*** **[2017] UKSC 27.**

Indirect Discrimination

207. Section 19 Equality Act 2010 provides:

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

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

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

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

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

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

208. The practical effect of the burden of proof provisions under s. 136 Equality Act 2010 means that a Claimant will need to show:

208.1 *Prima facie* the existence of a provision, criterion or practice ("PCP"), and

208.2 That such PCP placed the Claimant's group sharing his protected characteristic at a disadvantage as compared to another group that does not share his protected characteristic, and

208.3 That the PCP was applied to the Claimant which resulted in him being subjected to that disadvantage.

PCPs

209. The case of **Lamb v the Business Academy Bexley UKEAT/0226/JOJ** provides guidance as to what may amount to a PCP. It was held that the phrase is to be construed broadly, having regard to the statute's purpose of eliminating discrimination. It is not necessary for a PCP to be a formal policy, nor is there a need that the employee was expressly ordered to comply - ***United First Partners Research v Carreras*** **[2018] EWCA Civ 323**.

210. A provision can include any contractual or non-contractual provision or policy as well as potentially a one off decision - ***Starmer v British Airways Plc*** **[2005] IRLR 862.** A criterion means any requirement, pre-requisite, standard, condition or measure applied whether desirable or unconditional. A practice means the employer's approach to a situation if it does happen or may happen in the future. All that is necessary is a general or habitual approach by the employer - ***Williams v Governing Body of Alderman Davies Church in Wales Primary School*** **[2020] IRLR 589.** In ***Nottingham City Transport Ltd v Harvey*** **UKEAT/0032/12** Langstaff J referred to "practice" as having an element of repetition.

211. This approach has been affirmed in ***Ishola v Transport for London*** **[2020] EWCA Civ 112** as the Court of Appeal held that the words "provision criterion or practice" suggest a state of affairs indicating how similar cases will be treated in the future. A one off act can amount to a practice if there is some indication that it would be repeated if similar circumstances arise in future.

Group disadvantage

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

213. In doing so, the Claimant does not need to prove why a PCP had the effect of disadvantaging the group they belong to, they just have to prove that the PCP had that effect. The Claimant also does not need to prove that all people belonging to the comparison pool are in fact disadvantaged. It is however for the Claimant to simply prove on balance that the group is particularly disadvantaged as a result of the PCP whether or not it actually affects all of that group - ***Essop and Naeem v Home Office (UK Border Agency) and Secretary of State for Justice*** **[2017] UKSC 27**.

Personal disadvantage

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

Causation

215. Both the group disadvantage and the personal disadvantage must be caused by the application of the PCP rather than because of any particular characteristic. In ***Essop and Naeem*** the court said at paragraph 25:

"Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot."

216. Therefore, if the Claimant is not affected by the PCP themselves, accordingly their claim will fail. These are primary facts which the Tribunal has to find before the burden of proof shifts to the Respondent - ***Project Management Institute v Latif*** **[2007] IRLR 579**.

Justification

217. The obligation is on the employer to show that the PCP complained of is a proportionate means of achieving a legitimate aim ("objective justification"). The law with respect to the justification defence is already set out above in connection with discrimination arising from disability.

Reasonable Adjustments

218. Section 20 Equality Act 2010 provides:

"Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

…

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

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

(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
(a) a feature arising from the design or construction of a building,
(b) a feature of an approach to, exit from or access to a building,
(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d) any other physical element or quality.

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

219. "Auxiliary Aids" are defined in the ECHR Code as "*something which provides support or assistance to a disabled person. It can include provision of a specialist piece of equipment such as an adapted keyboard or text to speech software. Auxiliary aids include auxiliary services; for example, provision of a sign language interpreter or a support worker for a disabled worker."* (*Paragraph 6.13*)

220. Section 21 Equality Act 2010 provides:

"Failure to comply with duty

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

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has

contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

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

(1) the PCP applied by or on behalf of the employer;
(2) the identity of non-disabled comparators where appropriate; and
(3) the nature and extent of the substantial disadvantage suffered by the Claimant in comparison with those comparators.

222. Once these matters have been identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified.

Burden of proof

223. In ***Latif*** **[2007]** the EAT gave guidance as to how Tribunals should approach the burden of proof in failure to make reasonable adjustments claims. The burden of proof only shifts once the Claimant has established not only that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, in the absence of an explanation, that it has been breached. It was noted that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given its own particular circumstances.

224. Therefore, the burden is reversed only once a potential reasonable adjustment has been identified. It will not be in every case that the Claimant would have to provide the detailed adjustment that would have to be made before the burden shifted, but "*it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not"*. The proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, not even until the Tribunal hearing.

Knowledge of disability and knowledge of disadvantage

225. For the section 20 duty to apply, an employer must have actual or constructive knowledge both of the disability and of the disadvantage which is said to arise from it (para 20, Schedule 8 Equality Act 2010). We note that knowledge has not been an issue in this case.

PCPs

226. The relevant law as regards PCPs has been set out above.

Substantial disadvantage

227. For the duty to arise, the employee must also be placed at a "substantial disadvantage" in comparison with persons who are not disabled. Therefore, a comparative exercise demonstrating substantial

disadvantage is required. Substantial in this context means "more than minor or trivial" according to section 212(1) of the Act.

228. There is no requirement in the Equality Act for a strict causation test linking the disadvantage caused by the PCP to the Claimant's alleged disability. All that is necessary is that the Claimant prove facts from which a tribunal could infer that the PCP simply put the Claimant at either:

(i) a disadvantage compared to non-disabled people because they are a disabled person (rather than because of the disability); or

(ii) that because the Claimant was a disabled person, the PCP, whilst causing a disadvantage to everyone whether disabled or not, put the Claimant at a more severe disadvantage because they were a disabled person when compared to non-disabled people ***Sheikholeslami v University of Edinburgh*** **UKEATS/0014/17 [2018] IRLR 1090.**

229. It is necessary for a reason connected with the employee's disability to be the cause of the substantial disadvantage experienced - ***Hilaire v Luton Borough Council*** **[2022] EAT 166**. Whether an employee is placed at a substantial disadvantage depends on the actual facts, regardless of what the parties believe the facts to be.

Comparators

230. As set out in section 20(3), a comparative exercise is required, namely consideration of whether the PCP disadvantaged the Claimant more than trivially in comparison with others.

231. As indicated in ***Griffiths v Secretary of State for Work and Pensions*** **[2016] IRLR 216** the comparator is merely someone who was not disabled. They need not be in a like for like situation. This differs from the comparator in a direct or indirect discrimination claim (i.e. someone who shares the same circumstances as the disabled employee, but for the disability). It is only necessary to ask whether the PCP puts the disabled person at a substantial disadvantage when compared with a non-disabled person.

Adjustments

232. The next question is whether there were any reasonable steps which the Respondent could have taken to avoid the disadvantage which were not taken. It may be necessary in some cases for the employer to undertake a combination of steps.

233. When assessing whether a particular step would have been reasonable this involves considering whether there was a chance it would have helped overcome the substantial disadvantage, whether it was practicable to take it, the cost of taking it, the employer's resources and the resources and support available to it.

234. There must be a real prospect the step would have made a difference - ***First Group Plc v Paulley*** **[2017] UKSC 4.** However, this does not mean that a reasonable adjustment claim fails simply because, regardless of any adjustments, the same result would have occurred. The purpose of the Act

is to level the playing field and give disabled people a fair chance even if, ultimately, it would have made no difference to the end result.

235. Reasonable adjustments need only be job related and the scope of the duty does not cover adjustments to cater for an employee's personal needs ***Kenny v Hampshire Constabulary*** **[1999] IRLR 76.**

236. The question of whether a particular adjustment is reasonable is an objective test - ***Smith v Churchills Stairlifts Plc*** **[2006] ICR 524**. The Tribunal must examine the issue not just from the perspective of the Claimant but also consider wider implications including the operational objectives of the employer. Ultimately, it is the Employment Tribunal's view of what is reasonable that matters. In assessing what adjustments are reasonable, the focus must be on the practical result of the steps which the employer can take, not on the thought processes of the employer when considering what steps to take - ***Bank of Scotland v Ashton*** **[2011] ICR 632**.

237. In ***Romec v Rudham*** **[2007] All ER 206** the EAT held that if the adjustment sought would have had no prospect of removing the substantial disadvantage then it could not amount to a reasonable adjustment. However, if there was a real prospect of removing the disadvantage it may be reasonable. In ***Cumbria Probation Board v Collingwood*** **[2008] All ER 04** the EAT stated *"it is not a requirement in a reasonable adjustment case that the Claimant prove that the suggestion made will remove the substantial disadvantage."*

238. In ***Leeds Teaching Hospital NHS Trust v Foster*** **UKEAT/0552/10/JOJ** the EAT held that when considering whether an adjustment is reasonable it is sufficient for a Tribunal to find that there would be a prospect of the adjustment removing the disadvantage.

239. In **Noor v Foreign and Commonwealth Office** [2011] ICR 695 Richardson J stated "*Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective"*

240. The EHRC Code (chapter 6) contains guidance on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be considered in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

241. There is no objective justification defence available in respect of an employer's failure to make reasonable adjustments. The proposed adjustments are either reasonable or they are not.

Harassment

242. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010 which provides:

"Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

…

disability;

…

243. The Tribunal is required to reach conclusions on whether the conduct complained of was unwanted and, if so, whether it had the necessary purpose or effect and, if it did, whether it was related to disability. Unwanted conduct means the same as unwelcome or uninvited, and specifically unwanted by the Claimant – ***Thomas Sanderson Blinds Ltd v English*** **UKEAT/0316/10**.

244. It is clear that the requirement for the conduct to be "related to" disability needs a broader enquiry than whether conduct is "because of disability" like direct discrimination ***Bakkali v Greater Manchester Buses (South) Limited*** **UKEAT/0176/17**. Protection from such behaviour only arises if it is related in to the protected characteristic - ***Warby v Wunda Group Plc*** **UKEAT/0434/11/CEA**. In assessing whether it was related to disability, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it.

245. It can be appropriate to consider the motivation and thought processes of alleged harassers when considering whether their conduct amounts to harassment - ***Unite the Union v Nailard*** **[2018] IRLR 730**.

246. As to whether the conduct had the requisite effect, there are both subjective considerations – the Claimant's perception of the impact on him – but also objective considerations including whether it was reasonable for it to have the effect on this particular Claimant, the purpose of the remark, and all the surrounding context - ***Richmond Pharmacology Ltd v Dhaliwal*** **[2009] ICR 724**. Conduct which is trivial or transitory is unlikely to be sufficient.

247. Mr. Justice Underhill, as he then was, said in that case:

"A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard … whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …" (paragraph 15).

and

"…Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…" (paragraph 22).

248. In ***HM Land Registry v Grant*** **[2011] EWCA Civ 769**, Elias LJ said:

> *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."*

249. If something was said or done innocently by the Respondent that may be relevant to the question of reasonableness under section 26(4)(c).

250. As regards the words "violating and intimidating" these are strong words and will usually require evidence of a serious impact or marked effects. An "environment" can potentially be created by an isolated comment but the effects must be lasting. The identity of the person who made the comment, and whether it is heard by others can be relevant factors. Where there are several instances of alleged harassment, the Tribunal can take a cumulative approach in determining whether the

statutory test is met ***Driskel v Peninsula Business Services Ltd*** **[2000] IRLR 151**. In ***GMBU v Henderson*** **[2015] 451** Simler J said, "..*although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so."*

251. If it was not reasonable for the conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so - ***Pemberton v Inwood*** **[2018] ICR 1291**.

Time Limits under the Equality Act 2010

252. Section 123 Equality Act 2010 provides:

Time limits

(1) Subject to section140B 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 the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Conclusions and analysis

Claimant's employer

253. Issue 1. The Tribunal finds that the Claimant's employer was Manchetts Ltd as per the preamble to his contract of employment **[bundle page 96]**. Neither of the parties addressed this issue in their evidence or submissions.

Constructive unfair dismissal / wrongful dismissal

254. The Tribunal does not find that there was a failure to provide support and pastoral care for the Claimant [issue 5.1]. As set out in this judgment, there were numerous meetings with the Claimant following his sickness

absence to make arrangements for his return to work. Upon his return to work there were further meetings with the Claimant to discuss what support he would need. There were telephone calls with the Claimant from Mr Alexander, and the Tribunal noted the support offered from Mrs Davy by way of text message on 29 April 2021 **[bundle page 221]**. There had been one Occupational Health referral and a second was due to take place until the Claimant resigned. Other support was also planned which included a trainer being paid to sit with him for the day to see first hand the difficulties he experienced in his role. Again the Claimant's resignation meant that could not take place.

255. The Tribunal finds that there had been a reasonable return to work plan based upon the findings of the first Occupational Health report [issue 5.2]. It appeared to the Tribunal that the plan was a work in progress given that the Claimant was suffering from a degenerative condition and the Respondent was trying to ascertain which aspects of his role he could perform, which aspects required adjustments, and which aspects he could no longer deliver. It was clear that the Respondent was trying to inform itself of what difficulties the Claimant experienced, and it was therefore unfortunate that the Claimant's resignation occurred before the trainer was deployed to work with him for a day to identify where he encountered difficulties.

256. The Tribunal has not found evidence that the Claimant was required to undertake tasks outside of the recommended adjustments. The Tribunal agrees that some of the communication from Mr Alexander could have been clearer as to the aspects of the role that the Claimant would be performing. By way of example, some of the correspondence simply listed tasks such as "motorbike recoveries" (for example letter of 24 March 2021) whereas it would have been more helpful to have provided additional detail which confirmed that the Claimant would not have been expected to lift them himself or to perform the tasks alone (eg moving from garage to garage where other support would be provided). Similarly the email of 29 March 2021 to the controllers could also have provided more detail to make it clear what roles the Claimant could perform so that there was no confusion. As it transpired this confusion was clarified by 11 August 2021 where that letter set out in detail what the Claimant would be expected to do. Had this been provided to the same level of detail earlier then it would have been more clear.

257. The Tribunal does not find that there was a failure to send the Claimant to jobs appropriate to his disabilities [issue 5.3]. The Tribunal heard evidence that in many cases the true nature of the job is not known until a driver arrives on scene. The Tribunal accepts that the controllers will only know as much as they are told when contacted by a customer, and even then the information may change once a driver is allocated and on route. A dead battery in one case turned out to be a polluted fuel tank. In another case a minor RTC turned out to involve two cars which were made immobile. When there is a Police seizure job it is not known until the driver arrives whether the car is mobile and if keys are available. Much will depend upon the situation as the driver arrives on scene. The example of a motorbike was relied upon in evidence however it transpired that this was a garage to garage delivery therefore the Claimant was not required to lift it. In another case where there was a wheel change required, the Claimant

was only required to be on scene, he was not required to perform the change himself. In the example of the wood delivery, it has been established that a fork lift truck was used to unload the vehicle. The Tribunal accepts the evidence of the Respondents that in many cases the role of the driver is to be the eyes and ears of the business on scene and to report back on what further support may be needed, and this includes sending a larger truck. The Tribunal was not provided with evidence which would suggest that the Claimant was sent to jobs inappropriate for his disabilities.

258. The Tribunal does not find that there was a failure to accept to implement changes to the return to work agreement as requested by the Claimant [issue 5.4]. As indicated above, it was clear that this was a work in progress to be informed by further Occupational Health advice. Nevertheless the Claimant did repeatedly suggest he would be more useful to the business if he went back into his bigger truck however this had nothing whatsoever to do with his disabilities and by his own admission there was no difference between driving the 7.5 tonne and 15 tonne trucks. The Claimant did ask to change shift pattern however this was not put to the Respondents in cross examination, nevertheless the Tribunal notes that the reason the Claimant was put onto the day shift was to provide him with support which would not be available overnight. On 3 August 2021 Mr Alexander changed the agreement to remove the need for the Claimant to attend Police RTCs.

259. The Tribunal finds that there was a delay in arranging the welfare meeting of 3 August 2021 which was due to take place in July [issue 5.5]. The reason for the delay was due to the annual leave of the Claimant and of Mr Alexander. The Claimant did not dispute these reasons in his evidence and this reason was not put to Mr Alexander when he was being cross examined. This was a small delay, there is no evidence of any prejudice to the Claimant and there is no evidence that the Claimant raised the delay at the time. The Tribunal does not find that this amounts to a breach of the implied duty of mutual trust and confidence entitling the Claimant to have resigned without notice. Even if we are wrong on that we note that the Claimant likely affirmed the alleged breach as he did not resign until 31 August 2021 many weeks later. The Tribunal further notes that this was not one of the reasons relied upon by the Claimant either in his resignation letter or his oral evidence to the Tribunal as to the reasons for his resignation.

260. The Tribunal does not find that the Respondents refused to discuss the Claimant's pay when all other drivers were having pay review meetings [issue 5.6]. The meeting which the Claimant attended on 3 August 2021 was not a pay review meeting and when the issue of pay was raised by the Claimant we find that he was told that it would be discussed separately. There was no refusal on the part of the Respondents, and moreover not all of the pay reviews had taken place by this time. There is no reason to think that the Claimant would not have had his own review, however the meeting of 3 August 2021 had not been arranged for that purpose.

261. The Tribunal does not find that the Third Respondent ever insisted that the Claimant had unreasonably refused suitable alternative employment [issue 5.7]. No other roles were offered to the Claimant and the discussions between the parties was only ever with a view to identifying what other roles the Claimant may be interested in undertaking.

262. The most that can be found is that in the letter Mrs Davy prepared for Mr Alexander dated 11 August 2021, summarising the meeting earlier that day, Mrs Davy recorded that the Claimant did not wish to be considered for any office based roles as he did not want to undertake re-training and he did not wish to be considered for a controller position. We find that Mrs Davy accurately reflected the comments which the Claimant made as during cross examination the Claimant made similar comments that *"you wouldn't want me working in there"* in relation to the control room. The Claimant provided a response on 12 August 2021 setting out why he believed that other roles (save for a parts driver) were unsuitable due to his dyslexia, his problems using technology, or being unable to lift heavy items. We accept that these are the reasons the Claimant did not feel able to retrain, however we do not find that he expressed it in those explicit terms in the meeting and as such the letter prepared by Mrs Davy was accurate.

263. Even if we are wrong on that and the Claimant did say that he did not wish to retrain due to his dyslexia, we still do not find that Mrs Davy had accused the Claimant of unreasonably refusing suitable alternative employment. The comments of Mrs Davy fall well short of that even with a generous interpretation.

264. We do not find that this could have amounted to a breach of the implied term, but even if it did, the Claimant affirmed the contract as he did not resign until 31 August 2021.

265. The Tribunal has carefully considered the allegation that there was a failure to ensure that jobs sent to the Claimant were appropriate for his licence and the legal limitations for the truck he was driving [issue 5.8]. At the start of the hearing Mrs Ruddock informed us that 200 breaches were relied upon, however we are concerned with what was known to the Claimant at the time of his resignation and not what he says he has since deduced from the disclosure bundle many months after the events. We should also note that the weight of a vehicle cannot be known precisely unless it is actually weighed, and all that the KSW provides is the likely minimum weight and the GVW only provides the likely maximum weight.

266. The Tribunal of course notes that this alleged breach (or breaches) were not referred to by the Claimant in his resignation letter despite making explicit references to other allegations he says caused his resignation.

267. We have reviewed the jobs which the Claimant has referred us to which he says were overloaded. In a small number of cases we find that the Claimant has demonstrated to our satisfaction that those vehicles would have overloaded his 7.5 tonne truck had he removed them. This was admitted by Mr Alexander who expressed his disappointment and he confirmed that mistakes may happen on occasion.

268. However we do not find that the Claimant was required to move these vehicles in breach of his licence or the legal limits of the truck he was driving. The driver has been described as the eyes and ears of the business and that some jobs only become clear once a driver arrives on scene and assess for themselves what is involved. Once it became clear that a job was unsuitable it was incumbent upon the Claimant (or any other driver) to notify the Respondents that they would not be able to take it. We have been provided with evidence that the Claimant was able to reject jobs and we

therefore do not find that he was required to breach the law or his licence requirements. This was also made very clear in the letter from Mr Manchett of 19 August 2021. The Tribunal found the letter of Mr Manchett to be abundantly clear and that it reflected the true position.

269. We also note that on 3 August 2021 the Claimant said that 90% of the jobs he had been allocated were suitable, and on 13 August 2021 he said that 99% of the jobs had been suitable. We do not find that at the material time the Claimant believed that he was being asked to work in breach of his licence or the legal limits of the truck. Consequently we do not find that the Respondent breached his contract in this regard. However, again if we are wrong on that, then we find that the Claimant affirmed the contract by not resigning until 31 August 2021 given that the potentially overloaded jobs to which we were referred occurred in April to July 2021.

270. The Tribunal does not find that the requirement of him to contact DVLA about his heart issues amounted to a breach of the implied duty of mutual trust and confidence [issue 5.9]. The Claimant had informed Mr Alexander and Mrs Davy that his tests were clear and he had provided them with a copy of the cardiologists letter, however they did not take a copy. In their absence on 19 August 2021 Mr Manchett responded to the Claimant where gave the direction for the Claimant to inform the DLVA and to complete form VOCH1. As it transpired this was not required and the Claimant was notified the same evening by DVLA that this was the case.

271. The Tribunal has carefully considered the reasons Mr Manchett gave for issuing that direction. This was on the basis of advice he had received about an alleged link between COPD and cardiac disease, and because he felt that he had a duty of care to his drivers, other road users and to his insurers. Given that, the Tribunal accepts that reasoning. We do not find on the basis of ***Malik*** that this was calculated to destroy or seriously damage the relationship of confidence and trust between employer and employee. As regards whether it would likely have had that effect, we do not consider that it did. The Claimant says that the Respondents wanted to get his licence withdrawn. The Tribunal found that to be implausible as there was no corroborating evidence that this was their aim. The Claimant was clear why he had been asked to contact the DVLA, the reasons from Mr Manchett were sound save that it provided to be unnecessary, and it was something which was quickly resolved the same evening. At its very highest we would say that Mr Manchett had an abundance of caution, but given the work of the Respondents it was not an unreasonable request. Even if we are wrong on that, we note that the Claimant did not resign for a further twelve days, and as such we feel that he had affirmed any alleged breach.

272. We have, in the above, considered all of the questions we needed to consider in the ***Kaur*** case, and conclude that the Claimant was not constructively dismissed by the Claimant. Accordingly it is unnecessary for us to go on to consider either wrongful dismissal, fairness, the ACAS Code, ***Polkey***, or contributory fault.

Direct discrimination

273. We will first deal with the factual allegations which have not been established. We have not found that the Respondent refused to discuss a pay rise with the Claimant [issue 11.2] nor that it determined that his pay

would only be discussed once his reasonable adjustments had been sorted out [issue 11.3]. These have already been addressed above, and the Tribunal finds that these did not happen.

274. We also did not find that Mr Alexander and Mrs Davy refused to accept the Claimant's letters proving that the cardiology tests were clear [issue 11.5]. We find that the Claimant offered up one of the letters and Mrs Davy read it and accepted the contents. Mrs Davy could have taken a copy of the letter, and in hindsight accepts that she should have done so, but the Tribunal does not find that either individual refused to accept the letters as alleged.

275. If we are wrong on that we have gone on to consider whether the failure to take a copy of it might amount to less favourable treatment of the Claimant. In the circumstances we do not find that it did. We find that the contents of the letter were not disputed by either Mrs Davy or Mr Alexander and that they both accepted the contents.

276. We have therefore gone on to consider the direction of Mr Manchett that the Claimant should self report assumed heart issues (without medical proof) to DVSA. We assume that the reference to DVSA is intended to be DVLA [issue 11.4]. The issue for the Tribunal to determine is whether this amounts to less favourable treatment of the Claimant because of disability. We have considered the issue of a correct hypothetical comparator which we find would have been someone without the Claimant's disabilities but with previous heart issues that had since resolved. Nevertheless, we prefer to adopt the reason why test from ***Shamoon*** instead and simply ask ourselves what was the reason for the treatment in question? We remind ourselves that motive is irrelevant for this purpose, and that even benign motives or good intentions may still amount to direct discrimination which cannot be justified. We find that the reason for the treatment in question was the concern about the risks to the Claimant, to other road users, and the obligations to the Respondents' insurers if the Claimant was unfit to drive. Whereas we accept that the Claimant would have preferred not to have been asked to contact the DVLA, we do not find that it amounted to less favourable treatment in these specific circumstances. It was open to someone in the position of Mr Manchett to satisfy himself that his drivers were safe to be on the road.

277. We have considered the allegation about transferring the Claimant from a 15 tonne truck to a 7.5 tonne truck on his return from furlough [issue 11.1]. It is for the Tribunal to determine whether this amounted to less favourable treatment. We take into consideration that the Claimant previously drove the 7.5 tonne truck, that he was not the only driver to do so, and that the transfer to the smaller truck was due to the Claimant's COPD condition. We also note the Claimant's own evidence that there was no difference for him in driving the two vehicles and that he felt that he would have been more useful to the business in a bigger truck. The only difference the Claimant could find was the absence of a spec lift which he was not required to use in any event. We note that the Claimant's evidence that he was kept busy and that between 90-99% of the jobs allocated to him were appropriate. We have also accepted the Respondents' evidence, in particular that of Mr Manchett which was clear that a smaller truck would be easier to manoeuvre.

278. We have again adopted the reason why test in ***Shamoon***. We do not find that the transfer to the 7.5 tonne truck was of itself less favourable treatment as there was in many respects no difference between the two vehicles and no reduction in pay was applied.

279. However, the Claimant's allegation [issue 11.1] appeared to change during the hearing into a complaint that smaller trucks would be easier to overload and that this was devised by the Respondents as a means to cause him stress through fear of being stopped by the authorities and thus exacerbating his COPD. The Claimant did not make a complaint about this during his employment, this was not referred to in his resignation letter and nor does it appear as a specific allegation in his ET1 nor the two versions of the list of issues. Nevertheless the Tribunal has considered the allegation as the Respondents' witnesses were able to address it in their oral evidence.

280. The Tribunal has found no evidence of such treatment and further finds that it would be highly implausible as both the Claimant and the First Respondent (and possibly the Second and Third Respondents) would be at risk of prosecution if this was the case. The Claimant was sent to some jobs which he would have been unable to undertake due to the weight limits for a 7.5 tonne truck, however these appear to have been a few isolated jobs and the Claimant was not required to undertake them and had been given an assurance by Mr Manchett that he should not do so. We were not provided with any evidence that the reason why the Claimant was sent to these jobs was because of his disability and moreover he was able to decline jobs. Accordingly we do not find the allegation of less favourable treatment to be made out.

Indirect discrimination

281. We will first consider whether the Respondent had any of the PCPs which the Claimant alleges were applied.

282. The first alleged PCP [issue 13.1] is a requirement for all recovery drivers to attend all jobs considered suitable for Class 2 recovery drivers and for the Claimant to return to these full duties within three months of his return to work. The Tribunal does not find that this PCP was applied to the Claimant as there was a continuing dialogue with the Claimant upon his return to work in April 2021 as to what duties he could perform. There was clearly an anticipation in April that the Claimant may be able to return to his full duties within three months and this proved to be incorrect given the degenerative nature of the Claimant's condition. However this was no more than a desire and the PCP was not applied to the Claimant. The Respondent's expectations were clarified in Mr Alexander's letter of 11 August 2021. As such the alleged PCP was not applied to him.

283. The second alleged PCP [issue 13.2] is a requirement to attend a number of specific jobs that the Claimant considers were unsuitable given his disability. The Tribunal finds that this PCP was not applied. We accept the Respondent's submission that there was no requirement upon the part of the Claimant to carry out a job if, upon arrival on the scene, the job was inappropriate. The specifics of many jobs are not known until the driver arrives on scene, and in many cases the Claimant's input was to calm situations with members of the public pending the arrival of another vehicle

to carry out the heavy lifting. We have considered the job involving the horsebox and note that this was an unsuitable job but not because of the Claimant's disability but rather due to the size of the horsebox which was too big for the Claimant's trailer. We have also considered the job involving transporting wood/building materials and again find that a forklift was used to unload the items. We have also considered the job with the motorbike and again note that this was a garage to garage job and the Claimant was not required to lift it. We have considered the Police job involving the RTC which turned out to involve two immobile vehicles. We find that the Claimant was not required to undertake that role and that a second driver was assigned to assist. It was incumbent upon the Claimant to have informed the Respondents that he could not perform the job once it became clear what was involved, however he did not do so. We therefore find that this PCP was not applied.

284. The third alleged PCP [issue 13.3] is a requirement to attend a number of specific jobs that the Claimant considers were unsuitable given the legal restrictions of the truck he was ordered to drive. The Tribunal finds that the PCP was applied to the Claimant as we have made findings about a small number of jobs which the Claimant would not have been able to undertake given the weight limits of the 7.5 tonne truck. We also find that the PCP would have been applied to other persons with whom the Claimant does not share the protected characteristic (non-disabled individuals). However we do not find that the Claimant has demonstrated either Group or Personal disadvantage when compared with those individuals. This is because the requirement was only to attend the jobs not to undertake those jobs as he was able to reject jobs which were unsuitable for his truck. The Claimant's role upon arrival at the scene would have been the same as any other driver, and this was to act as the eyes and ears of the Respondent and to request support if he was unable to complete the job himself.

285. We note that this allegation changed during the hearing to one about deliberately overloading the Claimant to cause him stress which would exacerbate his COPD, however we again find that the Claimant should have rejected any jobs deemed unsuitable and that he was able to do so. Consequently even in the context of this more nuanced allegation we do not find that the Claimant was placed at a particular disadvantage by the PCP.

286. The fourth alleged PCP [issue 13.4] concerns a requirement to attend a specific job which the Claimant considers was unsuitable given the Operating Licence in place on the vehicle he was required to drive. This concerns the job on 16 April 2021 which involved transporting wood and building materials to Mr Robert Manchett's yard (a business within the same group as the First Respondent). The Tribunal finds that no such PCP was applied given that it was accepted by the Claimant in this hearing that the vehicle had the Operating Licence, and as such the job was suitable.

Discrimination arising from disability

287. The Tribunal is required to decide whether physical limitations arose in consequence of the Claimant's disability [issue 19]. We have found that they did. Specifically the Claimant was unable to lift more than 15kgs in weight and he was unable to walk more 100 yards in one go, although he had increased his walking to up to 2 miles by 9 December 2020 however this was throughout the course of a day.

288. We are then required to decide if any of the allegations with respect to the direct and indirect discrimination complaints amount to unfavourable treatment. We remind ourselves that the test for unfavourable treatment is not the same as the test for less favourable treatment. Here we are not undertaking a comparative exercise but are looking to see if the Claimant was treated unfavourably.

289. As regards the facts of the direct discrimination complaints, we have already found that the allegations within issues 11.2, 11.3 and 11.5 did not occur for the reasons as set out above. We do not find that transferring the Claimant to the 7.5 tonne amounts to less favourable treatment [issue 11.1]. The Claimant did not suffer any detriment or prejudice by the move and his pay remained the same. The Claimant also gave evidence that the trucks were generally the same save that the larger truck had a spec lift which he was not required to use.

290. We have considered the allegation about self reporting to the DVLA [issue 11.4] and whether this could amount to unfavourable treatment in the Claimant's particular circumstances. We are mindful that the threshold for finding unfavourable treatment is not particularly high on the basis of ***Williams***. We also note that at that the time of directing the Claimant to contact DVLA the Respondent had not removed him from duty or suspended him pending a decision from DVLA. We also note that the issue was resolved the same evening and the Claimant was informed that he did not need to self refer himself. In the circumstances we do not find that the Claimant was subjected to unfavourable treatment as alleged.

291. If we are wrong on that we have gone on to consider whether the alleged unfavourable treatment was because of something arising in consequence of the Claimant's disability. The something arising, as per the Claimant's case is that he cannot walk more than 100 yards or lift more than 15 kgs in weight. We do not therefore find that the treatment was because of either of those things said to be arising from disability. The direction was given because Mr Manchett (or his advisors) assumed a link between COPD and cardiac disease. This connection is strongly disputed by the Claimant. We are also mindful that it must be the something arising and not the disability itself which is said to be the cause of the unfavourable treatment – ***Robinson***. Having taken into account the guidance in ***Pnaiser*** we find no connection between the something arising and the alleged unfavourable treatment, rather we find it was due to advice Mr Manchett had received about a potential link between COPD and cardiac disease. Accordingly it cannot therefore be said that even if there was unfavourable treatment that it was on the basis of something arising from the Claimant's disability.

292. Again, even if we are wrong on both of those questions (the unfavourable treatment and the causal connection) we would still have found that Mr Manchett had a legitimate aim when he gave that direction and that this was to ensure the safety of his driver, other road users, and to meet his obligations to his insurers. We would also have found that the means adopted (the direction to refer himself to the DVLA) was proportionate as it involved a brief discussion over the telephone whereupon the issue was swiftly resolved the same day without the need to remove the Claimant from driving duties pending the outcome of the referral. To adopt the language in ***Homer*** we have found that there was a

real need on the part of the Respondent; (ii) what it did was appropriate (rationally connected) to achieving its objectives; and (iii) that it was no more than was necessary to that end. We have also considered ***Essop*** and not found that a lesser measure could have achieved the same aim as swiftly.

293. As regards the facts of the indirect discrimination complaints, the Tribunal has already found that the PCPs in issues 13.1, 13.2, and 13.4 were not applied to the Claimant. The Tribunal has already found that the PCP at issue 13.3 was applied to the Claimant and this is a requirement to attend a number of specific jobs that the Claimant considers were unsuitable given the legal restrictions of the truck he was ordered to drive.

294. Whereas we have found that this PCP was applied to the Claimant we do not find that it was applied to the extent alleged as we were only referred to a small number of jobs allocated to the Claimant which could have overloaded his truck had he completed them. We do not find that this amounted to unfavourable treatment as the Claimant was not required to undertake overloaded jobs but could refuse them. Even if we are wrong on that we do not find any connection between this and something arising from the Claimant's disability.

Failure to implement reasonable adjustments

295. The Tribunal has already found that the PCPs at issues 13.1, 13.2 and 13.4 were not applied to the Claimant. We do not need to consider these further. As regards the PCP at issue 24.2 the Claimant alleges that on 3 August 2021 the third Respondent advised him that by the end of September 2021 he would be expected to perform recovery of larger vehicles, tow trailers and caravans, and use the spec lift to recover more than one vehicle. The Claimant says that this was contrary to Occupational Health advice and the legal limits of his driving licence. We have found that this PCP was not applied to the Claimant. The letter stated that this would be subject to further Occupational Health advice. At this stage Mr Alexander was simply expressing a goal or an aspiration. It was also clarified in the letter dated 11 August 2021 that he would not be required to perform those functions until further medical guidance had been received **[bundle page 245]**. As such the PCP was not applied.

296. The Tribunal has already found the PCP at issue 13.3 was applied to the Claimant. This concerns the requirement to attend a number of specific jobs that the Claimant considers were unsuitable given the legal restrictions of the truck he was ordered to drive. We have already found that the PCP did not place the Claimant at a particular disadvantage for the purposes of the indirect discrimination complaint. We also do not find that it placed the Claimant at a substantial disadvantage for the reasonable adjustments complaint for the same reason. This is because the requirement was only to attend the jobs not to undertake those jobs as he was able to reject jobs which were unsuitable for his truck. The Claimant's role upon arrival at the scene would have been the same as any other driver, and this was to act as the eyes and ears of the Respondent and to request support if he was unable to complete the job himself. We do not find that this could realistically have placed the Claimant at a substantial disadvantage given that the Claimant was not required to complete those jobs.

297. However, if we are wrong on any of the PCPs which we have found that were not applied or did not cause a substantial disadvantage to the Claimant, we have considered it helpful to address the adjustments which the Claimant says ought to have been made. This may help to understand the Tribunal's reasoning above. The provision of a lightweight jack would not have assisted as the Claimant was not required to jack cars. As regards not sending the Claimant to jobs where cars' wheels were not turning freely, this does not take into consideration that sending the Claimant to the job did not create difficulties for him, it was the physical moving and lifting which were the issue. By sending the Claimant to jobs he could act as the eyes and the ears of the business, especially when it is not known until a driver arrives what condition the wheels or the vehicle are in. The same applies to Police jobs. The exact requirements of a job are not known until a driver is on scene. In any event Mr Alexander had agreed that the Claimant would only deal with Police seizures and not Police RTCs. The Claimant was not required to recover trailers nor to lift more than 15 kgs therefore these adjustments had already been implemented for him. The Tribunal has placed weight upon the Claimant's letter of 13 August 2021 where he said that he had not lifted more than 15 kgs.

Harassment

298. We do not find that requiring the Claimant to drive a 7.5 tonne truck amounts to unwanted conduct. This was part of the Claimant's job, he had previously driven one, and he accepted that the Respondents were entitled to require him to do so. We do not find that the Respondents' motives for doing so were in order to pay him less or to pressurise him [issues 29.10 and 29.11].

299. We do not find that requiring the Claimant to transport wood (or building materials) to the Second Respondent's brother on 16 April 2021 also amounted to unwanted conduct for the same reason that this was part of his job. We do not find that this was done with the intention to make him more vulnerable to roadside checks and we note that the Claimant has conceded that the truck did have an Operating Licence.

300. We do not find that the Respondents insisted that the Claimant return to full duties within three months [issue 29.12]. This was expressed as a goal, subject to Occupational Health advice, and it was not an insistence as described. Even if we are wrong on that, we do not consider that the expression of this goal or aspiration had the purpose or the effect of violating the Claimant's dignity, nor an intimidating, hostile, degrading, humiliating or offensive environment for him. The reference to being subject to further advice made it quite clear that this was not an insistence, therefore it would not have been reasonable for the conduct to have had the effect described. The same reasoning applies to issue 29.13 concerning the recovery of larger vehicles, tow trailers and caravans. This appears to be a duplication of issue 29.12 and in any event the Claimant was aware that this would be subject to further Occupational Health advice. It would not have been reasonable for this to have had the effect described.

301. As regards failing to ensure that the Claimant was not required to attend jobs which would exceed the weight limit of the truck, we do not find that this was unwanted conduct as the Claimant, like other drivers, was required to attend jobs and to act as the eyes and ears of the business.

Where they could lawfully undertake those jobs they were required to do so, however we have found that the Respondent did not require the Claimant to undertake jobs which would exceed the weight limit of his truck. If the Claimant did so it was of his own volition. We have found that the Claimant was asked to attend jobs which would have been too heavy for his vehicle however we do not find that this amounted to unwanted conduct as this was part of his role and the Claimant could still perform a number of important tasks, whether that was calming situations or calling for backup. Even if we are wrong on that, and even if this did amount to unwanted conduct, we do not find that it related to his protected characteristic (disability) and we do not find it had the purpose or effect of violating his dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The most that the Claimant had to do in such a situation would be to reject a job or to call for backup as he was able to do. By the Claimant's own admission he said that this had been the First Respondent's policy for years and with other drivers, therefore it cannot be said to have been related to his disability as alleged.

302. As regards increasing the amount of inappropriate jobs the Claimant was given, we do not find that this occurred. The Claimant was asked to attend some jobs that his truck would not have been able to undertake lawfully due to the weight, however this was confined to a small number of jobs and the Claimant did not demonstrate that there had been an increase in them. We do not find that this was unwanted conduct as it was part of the Claimant's role to attend these jobs and to be on scene as previously described, and to call for backup or to reject a job where appropriate.

303. As regards sending the Claimant to a Police reported multi-car accident on 22 July 2021 that was outside his return to work agreement, we have already found that it was not known that this involved two vehicles when the job was allocated to the Claimant. Given that it was part of the Claimant's role to attend and to report back, we do not find that this was unwanted conduct. Even if we are wrong on that, we do not find that it related to the Claimant's disability nor do we find that it was done with the purpose of the proscribed conduct. The purpose was initially to attend what was believed to be a minor RTC. We do not find that it could reasonably have had the alleged effect because a second driver was assigned and the Claimant would have been able to report back to say that the job was unsuitable for him, however he did not do so and did not report this to the Respondents at the time.

304. As regards the meeting of 3 August 2021, the Claimant makes a large number of complaints about this meeting. We will separate our conclusions between those things which have been proven to have occurred and those which have not, before assessing the former to ascertain if they amount to harassment.

305. We have already found that the Respondents did not comment that the Claimant had caused the first Respondent to lose money on specific jobs, claiming the Claimant had often asked for help from colleagues. We have also found that they did not say that the Claimant had caused the first Respondent to lose money by being unable to complete some jobs. We have also not found that the Respondents said that controllers were having difficulty finding enough work for the Claimant due to his health restrictions. We also have not found that the Respondents said that the Claimant had

refused appropriate work sent by the controllers or that he had refused to consider suitable alternative employment, claiming he did not want to retrain. The Claimant has not demonstrated that Mrs Davy's minuting of the meeting was inaccurate. Mrs Davy said that her letter was an amalgamation of previous discussions and we accepted that evidence.

306. As regards the alleged constant referral to the return to work agreement without any reference to the Claimant's written objections, or the Claimant's legal standing as a Class 2 driver, we do not find that this occurred. The Claimant's objections were taken into account and this was clear from the letter of 11 August 2021 where is set out that the Claimant would not be required to undertake Police RTCs.

307. We have found that Mr Alexander had commented that the Claimant had failed to maintain his equipment in the correct manner – namely that the Claimant had allowed his battery pack to fully discharge without recharging it. We also find that this conduct was unwanted as the Claimant strongly argued that it was untrue and that it was his colleague's pack which had done so. We do not need to decide which version is correct, rather we need to focus on whether this amounted to harassment. We cannot find that this conduct related to the Claimant's disability as it appears to be limited to frustration that the pack had not been fully charged, the Claimant's disability does not appear to have been relevant to this comment. We accept that the Claimant feels upset that he was criticised in circumstances where he says that he was not to blame, however we do not find that this was related to his disability. Even if we are wrong on that we do not find that the purpose was to harass the Claimant. As to whether the conduct had the effect of harassing the Claimant, we do not believe that it was reasonable for the conduct to have had that effect given the absence of any connection with his disability. In any event we would have found on the basis of ***Dhaliwal*** and ***Grant*** that the conduct would have been trivial and causing minor upset at most.

308. We will now consider the letter from Mrs Davy dated 3 September 2021. We have found that letter to have been an accurate summary of the adjustments made for the Claimant. However we find that the conduct was unwanted in so much as the Claimant had just resigned and had not brought a grievance despite being asked if he wished to do so. We also find that the conduct related to the Claimant's disability as it related to the adjustments the Respondents say that they made for him. We do not find that the purpose of this letter was to harass the Claimant. Rather we find that it was sent in order to address the allegations which the Claimant had made only days before when he resigned. The Claimant had alleged a lack of support and the letter sought to respond to that.

309. We have considered carefully whether the letter, either as a whole, or in respect to specific aspects of it, could have reasonably caused the Claimant to feel that it had violated his dignity or had created an intimidating, hostile, degrading, humiliating or offensive environment for him. On balance we do not feel that it would be reasonable for it to have had that effect. The contents of the letter are no more than a summary of the measures that had been implemented to provide support to the Claimant. We do not feel that someone would reasonably feel harassed by reading that letter which simply lists the adjustments which had been implemented. The Claimant may feel that not all of the adjustments had been made or that

they had not all been made at the appropriate time, however it does not automatically follow that this difference of opinion either violated his dignity or created the environment alleged. We find that whilst the letter was unwanted, there was nothing within it that would cause someone reasonably to feel harassed. Again, and on the basis of ***Dhaliwal*** and ***Grant,*** we would have found that the conduct was trivial and causing minor upset at most.

Time limits / limitation issues

310. In the end, it was not necessary to consider time limits in any detail given the findings and decisions made above. The complaint of constructive unfair dismissal was presented in time. Potentially, the issue of time limits in relation to the discrimination complaints may have been a matter of some consideration in relation to the earlier allegations. However, had the actual allegations been credible and accepted as alleged, the connectivity between the alleged incidents and the date of termination means that in all likelihood, they may been deemed to be continuing acts with the last act ending in time on 3 September 2021. As it was, the discrimination claims all failed and no further consideration is required.

311. It is the unanimous decision of the Tribunal that all of the Claimant's complaints are dismissed.

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Employment Judge **Graham**

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Date **10 July 2023**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 18 July 2023
GDJ
FOR EMPLOYMENT TRIBUNALS