Case no. 2300408/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS A SADLER**
MR G SHAW

BETWEEN:

Mr T Seymour

Claimant

AND

J & P Carr (Farms) Ltd

Respondent

ON: **13, 14 and 15 February 2017**
Appearances:
For the Claimant: **Mr R Walker, solicitor**
For the Respondent: **Mr P Maratos, consultant**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claims for all but failure to provide itemised pay statements, fail and are dismissed.

2. The claim for failure to provide itemised pay statements succeeds. No award is made.

3. The claim for a breach of the Working Time Regulations 1998 is dismissed upon withdrawal.

REASONS

1. This decision was delivered orally on 15 February 2017. The claimant requested written reasons.

2. By a claim form presented on 29 February 2016 the claimant Mr Trevor Seymour brought claims of unfair dismissal, disability discrimination, breach of the Working Time Regulations (WTR) and failure to provide pay slips. The claim for a breach of the WTR was withdrawn by the claimant at the outset of this hearing.

3. The claimant was employed by the respondent as a tractor driver and farm worker from February 1982 to 22 October 2016, when he resigned and claimed unfair dismissal. The respondent is a farming business and we were told in the ET3 that it employs 8 people.

The issues

4. The issues were identified at a Preliminary Hearing on 13 May 2016 before Employment Judge Sage, who said at that hearing that there was a considerable discussion about the issues and how the claims were put. Further Particulars were ordered at that hearing. We therefore spent time clarifying the issues with the parties at the outset of this hearing. The issues were identified as follows:

Unfair dismissal

5. This is a claim for constructive unfair dismissal. The claimant relies on a letter which he described as a "bullying disciplinary letter" and sham and bogus disciplinary proceedings. The claimant says this is a repudiatory breach entitling him to resign and treat himself as dismissed. The claimant also complains (Further and Better Particulars of 27 May 2016) that the respondent said he was resistant to training and this was a last straw event.

6. The respondent denies fundamental breach. It is therefore an issue for the tribunal as to whether there was a fundamental breach of the contract of employment. The term of the contract relied upon is the implied term of trust and confidence (Further and Better Particulars). The claimant also relies on the matters relied upon as disability harassment as going to the fundamental breach of contract.

7. Did the claimant resign in response to any proven breach?

8. Did the claimant affirm the breach?

9. If there was a dismissal, was the decision to dismiss a fair sanction and within the range of reasonable responses?

10. If the dismissal was unfair, what was the reason for dismissal? Was it a potentially fair reason under section 98. When we were about to start the evidence at 2pm after having clarified the issues in the morning and taken a break for reading, the respondent wished to introduce the issue that dismissal (if proven) was for some other substantial reason ("sosr"). The claimant opposed the application. We were handed a list of issues sent between the parties on Friday 10 February 2017. It included at point 6, some other substantial reason, ("sosr").

11. We decided unanimously that if we made a finding that the claimant was constructively dismissed we would be required to make a finding

as to what was the reason for dismissal and whether it was a potentially fair reason under section 98. We considered therefore that as it is also clear from the statements we had read by the time the application was made, that there was a difficult relationship between the parties, that we would allow the respondent to rely on sosr, but that we also gave leave to the claimant to ask supplementary questions on the issue as it has not been relied upon prior to 10 February 2016 and has not been dealt with in witness evidence.

12. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

Disability discrimination

13. The impairment relied upon is a back problem. The claimant has lumbar spinal stenosis. Disability was admitted by the respondent on 27 July 2016. Knowledge of disability is denied.

Disability harassment

14. Did the respondent engage in unwanted conduct as follows:

    a. By Mr Martin Carr joking when the claimant got down off the tractor and collapsed on the floor in pain. This is said to have taken place after the claimant's return to work in April 2015.

    b. By Mr Martin Carr informing another employee (Mr Bert Lower) that they wanted to dismiss the claimant as he could no longer work because of his disability and the inability to train. This is also said to have occurred after the claimant's return to work in 2015. The claimant says that Mr Martin Carr said to him on his first day back at work in April 2015 that a discussion would need to take place regarding the claimant's future because it was obvious that he could no longer do his job.

    c. By Mr Martin Carr humiliating the claimant in front of the Austrian trainers. The claimant said that the respondent swore and shouted at him in front of other members of staff and the trainer stating that the claimant had never liked new things and had an aversion to technology.

15. Was the conduct related to the claimant's disability?

16. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

17. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive

environment for the claimant?

18. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

Direct discrimination because of disability

19. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely:

    a. By failing to consider reasonable adjustments
    b. By failing to make proper enquiries as to the injury or at all.
    c. By failing to provide a safe system of work.
    d. The dismissal.
    e. Mr Martin Carr joking when the claimant fell off the tractor.

20. The respondent's case is that this is not direct discrimination.

21. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on hypothetical comparators.

22. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of his disability?

23. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Discrimination arising from disability

24. The allegation of unfavourable treatment as "something arising in consequence of the claimant's disability is put as the "entire working environment". No comparator is needed. The claimant relies on being told by Mr Martin Carr that if he could no longer do his job properly the respondent would need to discuss his future and he would need to go. The claimant also relies on being humiliated in front of "foreign trainers" as set out in the harassment claim.

25. Does the claimant prove that the respondent treated the claimant as above?

26. Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability? What arises from the claimant's disability is said to be that he could not sit or stand for long periods of time without being in considerable pain, sitting in the tractor for long periods caused his leg to go numb, the job required heavy lifting and physical work which he could not do.

27. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The legitimate aim is the smooth running of the farm operation.

Working Time Regulations

28. The claimant puts this issue as did he agree to waive his right not to work more than a 48 hour working week? This claim was withdrawn at the outset of the hearing.

Failure to provide an itemised pay statement

29. Did the respondent fail to provide the claimant with itemised pay statements as required by section 8 of the Employment Rights Act 1996?

30. It was admitted during submissions that the respondent failed to provide the claimant with itemised pay slips from 2006 onwards when they moved to payment direct to the claimant's bank account.

Failure to make reasonable adjustments

31. As ordered at the Preliminary Hearing the claimant set out particulars of his claim for the failure to make reasonable adjustments. The issues for the tribunal are:

32. Under section 20(3) Equality Act, did the respondent apply the following provision, criteria and/or practice ('the PCP') generally, namely (i) a requirement to sit and drive for long periods and to undertake excessive hours including an extra 16 hours per week (ii) to operate heavy machinery (iii) to lift heavy objects and (iv) to undertake excessively physical work.

33. Did the application of any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that he found it difficult to access and egress the machinery he was required to operate and on at least one occasion was incapable of doing this safely, falling to the ground. He could not perform the tasks set for him, or he took longer to do so and was put in considerable pain when doing so.

34. Under section 20(4) Equality Act, the physical feature relied upon is the height and size of the machinery the claimant had to operate. Did this place the claimant at a substantial disadvantage in comparison with persons who are not disabled in that he found it difficult to access and egress the machinery and was incapable of doing this safely and on at least one occasion fell to the ground. The claimant also relies on the weight and shape of the equipment he had to use and the disadvantage relied upon is that he could not perform the tasks set for him or that he

took longer to do so and was in pain.

35. Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required and they were identified in the Further Particulars as changes to shift patterns, machinery which the claimant could have operated safely and aids to assist the claimant in mounting and disembarking from the equipment, lifting aids, delegating some of his role to other members of staff or providing a buddy to assist during working hours.

36. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

37. The claimant added a claim for personal injury and was reminded by the tribunal that we have no jurisdiction as concerns a free standing personal injury claim and that this will only come for consideration in relation to remedy if the claimant succeeds and is entitled to an award for injury to feelings.

Time limits

38. The claim form was presented on 29 February 2016. Accordingly, and bearing in mind the effects of ACAS early conciliation, acts or omissions relied upon may potentially be out of time, so that the tribunal may not have jurisdiction.

39. If so, does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

40. Was any complaint presented within such other period as the tribunal considers just and equitable?

Witnesses and documents

41. The tribunal heard from the claimant.

42. For the respondent the tribunal heard from (i) Mr Martin Carr, a director of the respondent, (ii) Mr John Carr, a director of the respondent, (iii) Mr Kris Romney, and (vi) Mr Daniel Shaw from Burden Bros Agri Ltd, equipment suppliers to the respondent and (v) Mr Shaun Kent and (vi) Mr Clive Richards, from Pottinger UK, an equipment manufacturing company.

43. There were also for the respondent witness statements from Mr Karl Wintersteiger from Pottinger in Austria and from Mr Daron Ansell, shoot manager for the respondent. These witnesses did not attend and so we could only give very limited weight to those statements as it was

untested evidence.

44. There was a bundle of documents of 107 pages and a supplementary bundle of 61 pages.

45. The claimant resisted the introduction of the supplementary bundle which consisted of a private investigator's report and photographs of the claimant working on a building site. It was served just before this hearing was originally due to commence, on 21 November 2016.

46. The claimant told us that it was no longer in contention that the claimant had an operation on his back which was successful prior to the photographs being taken and he accepts that he is now able to do some light work. He said that he was working for his brother on an unpaid basis. The documents were not in dispute.

47. The documents are no longer in dispute and the claimant has had about three months to consider the documents since their disclosure. They may also assist us if remedy becomes relevant for consideration. It was our unanimous decision to admit the supplementary bundle.

The recording

48. Just before we commenced the evidence on day 1, the parties arranged for us to be played a recording of a meeting which took place on 22 October 2015 during which the claimant resigned from his employment. The recording lasted about 25 minutes. The claimant had been made aware prior to the meeting that it would be recorded. It was an agreed recording. The parties accepted that what we heard on the recording was said by each of them.

Findings of fact

49. The claimant started work for the respondent in February 1982 as a tractor driver/farm labourer. His normal hours of work were 39 per week plus 16 hours overtime. By the time of the material events in these proceedings the claimant had 33 years' service with the respondent.

50. The claimant was a highly valued employee and was very good at his job. The respondent is a family business and the claimant joined when Mr John Carr, a director, ran the business. From 2001 Mr John Carr's son Mr Martin Carr started to take over the running of the business and took over the day to day operations from about 2011 although Mr John Carr still retains an involvement including the bookkeeping. The claimant had known Mr Martin Carr since he was about 4 or 5 years old.

51. The working relationship between the parties was always good prior to 2015. Mr Carr junior and the claimant worked together over the years

and decades and got on well. Prior to the events giving rise to these proceedings they regarded each other as friends.

52. The claimant took 4-6 weeks off for a hernia operation in either 2012 or 2013 and the respondent paid him full sick pay during his time off.

53. By 2015 the respondent employed the claimant and Mr Bert Lower plus some seasonal staff when required. The seasonal staff at harvest time included Mr Martin Carr's nephew, Mr Nolan Kamali who at the time was aged about 16 or 17 years. Mr Lower joined in 2014 and the respondent was slowly training him up. He did not have the same skills and experience as the claimant in many areas such as drilling and spreading.

Pay slips

54. The claimant's evidence was that when he first joined the respondent he was paid weekly in cash in an envelope and the payslip information was provided with the envelope. Once the respondent moved to paying employees directly into his bank account in 2006 the claimant never received a payslip and that his wages were paid straight into his account every month with no itemisation of what he was receiving or any deductions made. He was simply told that it was the same every month. He received his P60 at the end of the financial year.

55. The respondent did not deny that since introducing electronic payments to the claimant's bank account in 2006, they did not provide itemised pay slips. This head of claim was therefore conceded in submissions.

The claimant's back condition

56. From about the early 1990's the claimant developed a back condition. It worsened over time and the claimant believes that it is an accumulation of the effects of his work over a long period. On or about 6 April 2015 after finishing a 13-hour day on the tractor he found he could not walk properly and was in pain. He went to hospital and was kept in overnight. He was treated with pain killers and was booked to have an MRI scan. He was off work due to this condition for about two weeks.

57. The claimant informed the respondent about his condition on 7 April 2015. He told Mr Martin Carr that his back condition was now so bad he had to go to hospital and was on crutches. He told Mr Carr that the doctors had told him he had done "significant damage" to his lower back and needed an operation to correct it.

58. On his return to work after 2 weeks he had another conversation with Mr Martin Carr telling him that his back condition required surgery. Mr Martin Carr said that he would need to discuss this with his father Mr John Carr. The claimant did not provide the respondent with a medical

certificate, the respondent did not require this in order to pay him sick pay. We find this was indicative of the relationship of trust between the parties.

59. The claimant's case is that on the day he returned to work Mr Carr said there would need to be a discussion about the claimant's future because it was "obvious he could no longer do the job". There was a conversation on the day of his return about the claimant's injury and how it would impact upon the job. The claimant told Mr Carr he might struggle with some things and be a bit slower but he would "crack on" or "soldier on". No specific tasks were discussed. We find that Mr Carr did not say to the claimant on the day of his return that they would have to discuss his future because it was obvious he could no longer do his job, because at this time it was not obvious, either to the claimant or to Mr Carr.

60. The claimant's operation could not take place for some time because his blood pressure was too high. The surgery did not take place until about 2 or 3 August 2016.

61. Following his return to work in April 2015 the claimant pressed on with his work. In his words he "soldiered on". He had a noticeable limp and we observed this in the tribunal. The claimant accepts that it is not the fact of sitting in the tractor that makes his leg go numb, but that his leg is numb "all the time". The claimant also accepted that if he had to lift heavy objects he would use a fork lift.

62. Mr Carr junior considered the following adjustments for the claimant (set out in paragraph 12 of his witness statement). In relation to each matter, the claimant told Mr Carr that he was "fine" and could do the tasks. In relation to the lifting of bags of grass seed, the claimant had the use of a JCB loadall and pallet forks. The claimant accepts that he was able to use a forklift to assist him with lifting anything heavy.

63. In May 2015 Mr Carr junior expressed concern to the claimant regarding the removal of gates and hurdles from the lambing shed in preparation for mucking out. Mr Carr offered the assistance of another member of staff. The claimant said he was fine to do this with the fork lift and needed no assistance.

64. On 26 May 2015 the claimant was asked to go fencing which involved lifting and positioning of strainer posts. The claimant told Mr Carr he was fine and was capable of doing the job.

65. On a delivery of chemicals for spraying, Mr Carr offered to lift and carry the chemicals for the claimant. Again he was met with the response that the claimant was fine to do this himself.

66. The claimant was asked about his case that the height and size of machinery caused him difficulty. He explained that with the larger

tractors there would be more steps to go up. It was put to him that if he was having difficulty he would have gone to see Mr Carr senior or junior to explain that he was having difficulty. The claimant's reply was "*It wasn't insurmountable".* He said he could do the tasks, it just took him longer.

67. The claimant was asked by the tribunal what the respondent could have done for him. The claimant said that they could have made it easier for him by not asking him to do so many hours. Sixteen hours' overtime was built in to his weekly work for pay purposes on an average basis so that the claimant could be paid the same amount into his bank account every month. The respondent's evidence, which was not challenged by the claimant, was that the overtime was voluntary. We therefore find that the overtime was voluntary. Mr Carr junior said that the claimant was always keen to do more rather than less hours.

68. The claimant was also asked by the tribunal whether for example the respondent could have arranged for the tractor to be fitted with an orthopaedic seat. The claimant said that the seat in the tractor was good, he was not sure that it was possible to get an orthopaedic seat, it was an air controlled suspension seat and that sitting in the tractor seat did not exacerbate his condition. He said that there was nothing the respondent could have done in regards to the seat and that driving the tractor took up 70-75% of his time. The claimant also said that sitting in the tractor cab did not cause his leg to become numb, because his leg was numb "all the time", twenty-four hours a day.

69. The claimant's evidence was that his working relationship with Mr Carr junior had been very good but that Mr Carr's attitude changed after the claimant was taken to hospital in April 2015. The claimant's view was that Mr Martin Carr wanted him to leave and was planning to get rid of him.

70. The claimant admits that he has "a slight issue" with technology in tractors and that Mr Carr junior was keen on new technology. The claimant also admitted that he is "a little technophobic" (statement paragraph 14).

<u>The fall from the tractor</u>

71. In April 2015 not long after he returned to work the claimant fell getting out of the tractor because his leg was numb. The claimant said that Mr Martin Carr said "*so that's what happens with your back then?*" and that he smirked, tittered and walked away leaving the claimant lying on the ground. Mr Carr's evidence was that he was not far away in the yard and he saw the claimant fall and went to offer to assist him, but the claimant declined the offer of help, saying that he was "fine".

72. Mr Carr said that the claimant made it clear that he did not want any assistance and Mr Carr therefore attempted to make light of the

situation as the claimant got back to his feet unaided. Both men then returned to their work. Mr Carr cannot remember the words that he used to make light of the situation. We find that he said the words relied upon by the claimant which was "so that's what happens with your back then?" more as a statement of fact than anything else.

73. Mr Carr felt uncomfortable seeing the claimant, a long standing friend and colleague, on the ground declining help. He did not know what to do. He felt nervous even to touch the claimant. This was a spinal condition he did not know whether he was even allowed to touch the claimant because it was an employer/employee relationship and the claimant had declined any assistance. The claimant said he felt humiliated. The claimant returned to his feet unaided.

74. The claimant said that around the same time as the above incident, Mr Martin Carr informed the claimant's colleague Mr Bert Lower, that he wanted to dismiss the claimant and that as soon as he did he would be able to introduce new machinery to the farm, which he thought the claimant was against. Mr Carr junior denies this. The claimant does not suggest that he heard this conversation. It is that which he says was reported to him second hand by Mr Lower. We heard live evidence from Mr Carr junior who denied this assertion and we heard no evidence from Mr Lower. Therefore on a balance of probabilities and based on the evidence we heard, we find that Mr Carr did not say to Mr Lower that he wanted to get rid of the claimant.

75. The claimant's evidence was that he is not a "total technophobe" but that he struggles with new things. With proper training he says that he is happy to accept new things in his job. The claimant has never owned a personal computer. He needs intensive training in matters involving technology.

76. In about 2011 the claimant was sent by the respondent on a two day course to learn how to use a sprayer for the farm. He passed this training course successfully.

77. In August 2015 the respondent purchased a new tractor to replace the 12 year old tractor that the claimant had been using. The new tractor came with advanced control methods and a different gearbox configuration. It had some of the most advanced technology in the industry and it was easy to move through the gears as it had no heavy clunky gear levers common to other tractors on the farm. The claimant said that he had no problems whatsoever with the new tractor and he enjoyed driving it.

78. When the claimant was working on seed drilling Mr Carr junior remained on hand to help the claimant recalibrate the equipment to be ready for the next field. Mr Carr did this because the claimant found this a difficult task. Mr Carr would be available when they needed to change drill sites and fields. Otherwise he said he would be "out back"

weighing the seed. We find that Mr Carr was on hand if he was needed and he was prepared to invest the time in helping the claimant with recalibration when they needed to change seed type or sites.

79. Mr Carr noticed that the claimant's behaviour changed somewhat after his return from sick leave in April 2015. However the claimant refused to accept help from Mr Carr when offered. Mr Carr considered that the safest work for the claimant was sitting in the tractor and therefore this remained the claimant's main work activity. It made up about 75% of his work. Mr Carr rightly considered tractor driving to be lightest duty for the claimant.

80. In September 2015 the respondent purchased a new Seed drill from an Austrian company called Pottinger Landtechnik. This was to replace the respondent's old model purchased in the 1990's which was no longer in good working order and often broke down. The total price of the drill was in the region of £31,000 (page 72). It was a long term investment for the respondent's business.

The incident in the field

81. In about September or October 2015 at about 6pm the claimant had been working in the tractor all day and he called Mr Martin Carr to say that he could not carry on. The claimant says that it was 6pm so he knew he could have just gone home, because overtime was voluntary and not compulsory. Mr Carr was happy for the claimant to go home, he asked him to hold on for 15 minutes so that Mr Bert Lower could come out to replace him without the tractor making unnecessary journeys from the field to the farmyard. The claimant agreed to this.

82. The issue was handled sympathetically and quite properly by both parties.

The weekend of 3 and 4 October 2015

83. The farm has water tanks from which sprayer equipment is filled for the purpose of spraying the fields. The tanks have small capacity. The sprayer required three tanks of water and the frustration for the claimant was the amount of time it took to fill the tanks with water before he could start spraying.

84. The claimant thought that the respondent should have invested in a more efficient system. On the weekend of 3 and 4 October the claimant became angry about this and swore at Mr Carr saying "Fucking get it sorted". Mr Carr agreed that it was frustrating but he did not like being sworn at.

The training on 7 October 2015

85. The new seed drill was delivered by Pottinger who were to set it up and

train the respondent's tractor drivers. Three employees of Pottinger attended, namely Mr Clive Richards and Mr Shaun Kent from Pottinger UK and Mr Karl Wintersteiger from the Austrian branch of the company. Mr Wintersteiger was flown in at Mr Martin Carr's request because he wanted to make sure that all their questions could be fully dealt with. Everyone attended on 7 October 2015 to install the equipment and to provide training to the respondent's employees.

86. Mr Wintersteiger trained the claimant and Mr Carr junior in the cab of the tractor. He gave a demonstration of the technology which took about 20 minutes. This was not enough for the claimant to grasp the new procedures. Mr Wintersteiger was sitting in the tractor seat giving the demonstration so there was no opportunity for hands on learning by the claimant or Mr Carr.

87. From the claimant's point of view the trainer moved on too quickly to the next item before making sure that he had understood the previous one. He said he was then embarrassed and humiliated by Mr Carr because he asserted that the claimant could not use the equipment properly.

88. The statement we saw from Mr Wintersteiger said that there was a conversation between the claimant and Mr Carr but he did not really understand it as it was not in his first language and it was spoken quickly. This account did not therefore assist us.

89. The claimant said that Mr Martin Carr asked him on each occasion if he "got it" and the claimant said he had not. The claimant said Mr Carr waved his arms in the air and huffed "*He hasn't got it"* and sniggered on each occasion.

90. Mr Carr accepts that he brought the demonstration session to an end and he and the claimant descended from the tractor and went in front of it. Mr Carr brought the demonstration to an end because Mr Wintersteiger had shown them the buttons to press a few times and Mr Carr considered that it would be better to do some further training with the claimant when they were actually working and putting it into practice. Mr Carr also wanted to prepare some screen shots and give the claimant some practical and more detailed on the job training. It is our finding that Mr Carr intended to give the claimant further training. It was in Mr Carr's interests for the claimant to be in the best possible position to operate the new equipment effectively.

91. When Mr Carr and the claimant descended from the tractor the Pottinger employees were behind the tractor about five or six metres away from Mr Carr and the claimant. Although we heard from four witnesses, two from Pottinger and two from the supplier company Burden Bros, none of them actually heard the conversation between Mr Carr and the claimant.

92. The claimant gave Mr Carr three options which were (i) to sack him there and then and he would take him to an employment tribunal, (ii) to make him redundant and pay him off or (iii) to give him work on the farm that did not involve technology which he said he would be more than capable of doing. The claimant was angry and swore at Mr Carr using the F word a number of times during this conversation. Mr Carr was shocked by what he described as the claimant's "rant" and Mr Carr considered it embarrassing in front of the employees from Pottinger and Burden Bros.

93. Mr Carr took the view that the claimant's behaviour in front of the visitors, needed to be addressed. The claimant's use of bad language was becoming more frequent. Mr Carr discussed it with his father and they decided that they needed to do something about it. They wanted to deal with it according to the right process so they decided to have a formal meeting with the claimant. They had never conducted a disciplinary process before. Mr Carr junior took some advice from the National Farmers' Union (NFU) and considered the ACAS guidance.

94. Both Mr Carr senior and Mr Carr junior took the view that the claimant had become increasingly grumpy and that he had become more inclined to become angry and to swear at them. They wanted to do something about this so that they could move on. Mr Carr junior said that he expected the outcome of any disciplinary process to be no more than a verbal warning. It was a first instance and they just wanted the swearing to stop so that they could move on.

95. Mr Carr senior and junior accept that swearing goes on in a farming environment, but it is more usually a case of swearing at a piece of equipment that will not work properly or swearing at sheep. They did not condone individuals swearing at each other.

96. On 8 October 2015 Mr Martin Carr sent the claimant a letter inviting him to an investigatory meeting for disciplinary purposes. The respondent had never previously conducted a disciplinary process. The letter was at page 84-85 of the bundle. The meeting was to take place at the Farm Office on 22 October 2015.

> *Dear Trevor*
> *I am writing to tell you that you are required to attend an investigative meeting into the events over the weekend of 3 – 4 October 2015 and 7 October 2015. This hearing will be held at Balsdean Farmhouse, the Farm Office on 22/10/15 at 16:30.*
> *The meeting will discuss the events of these two dates in relation to the inappropriate language used towards Martin Carr, and to the attitude shown towards the Pottinger employees and their products.*
> *The purpose of this meeting is to establish the facts surrounding these two events by hearing from the two people party to the conversations, namely yourself and Martin Carr.*
> *The disciplinary hearing will be with John or David Carr and Martin Carr on 16/10/2015 following the investigative meeting and again will be held at Balsdean Farmhouse, the Farm Office. At this interview issues relating to the performance of your employment will be discussed, and in particular:*

1. Your use of inappropriate and rude language aimed at a director of the company.
(a) This language was used specifically around the sprayer fill up tanks over the weekend of 3-4th October. The verbal attack was forceful and very loud.
(b) This language is also used on 07/10/15 in the fields known as Bullock Hill around the drill and tractor on our training day.
2. Your decision to not to try to learn the new controls for the machinery bought onto the farm.
(a) The company took pains to ensure that adequate staff from both Pottinger (the manufacturers of the new drill) and Burden Bros (the suppliers of the new drill and tractor) were on site on 07/10/15 to ensure that the training was clear and adequate, and that any questions could be answered.
(b) It is also the company's opinion that you caused embarrassment to the company and its directors by your attitude and language on that day.

During the hearing, you will be given the opportunity to explain your actions. If your explanation is not satisfactory, disciplinary action may be taken against you, in accordance with the ACAS guidelines on disciplinary policy.
You are entitled, if you wish, to be accompanied by another work colleague a trade union representative/official. That person can either act as your representative or merely attend to provide you with support or assistance. Please confirm to me at least one working day before the meetings whether you wish to be accompanied, and if so, please provide me with details of your chosen companion.
If you wish to present any evidence that either meeting you should ensure that either copies or originals are provided to Martin Carr at the farm office no later than 1 working day before the meeting. If you wish to call any witnesses, please notify Martin Carr who you intend to call at least 1 working day before the hearing.
You should take all reasonable steps to attend the disciplinary hearing. Failure to attend without good reason could result in the hearing being held, and the decision being taken, in your absence. However, if you failed to attend through circumstances completely outside your control and which are currently unforeseeable, the company will then arrange another meeting. Thereafter, if you failed to attend for second time, the meeting will be held, and a decision may be taken regarding the matter in your absence.
If you are not clear about anything that is said or happens at the hearing or feel you have not had the opportunity to put your case fully, you should say so at the time.
The disciplinary hearing will be chaired by John or David Carr, and the meetings will be recorded in order to provide accurate notes of the meetings.
In accordance with the ACAS disciplinary guidelines, you will have a right to appeal against any disciplinary action taken. Further details will be provided when we write to you to confirm the outcome of the hearing.
If there is anything which you wish to discuss in the meantime, please contact Martin or John Carr by telephone or letter.
Yours sincerely
Martin Carr

97. The claimant says that the disciplinary letter "misstated" what had happened in the fields that day. The claimant accuses Mr Carr of "lying" at that hearing.

<u>The 22 October 2015 meeting</u>

98. We heard a recording of the meeting which took place on 22 October

2015. The persons present at the meeting were Mr John Carr, Mr Martin Carr and the claimant. Mr Martin Carr led the meeting from the respondent's side.

99. Mr Carr junior said that there were two matters to be dealt with the first concerning the weekend of 3 and 4 October 2015 and the sprayer equipment when the respondent said that the claimant used inappropriate language. The claimant completely disagreed that his language was inappropriate. He said he was never rude but spoke one swearword saying "fucking well sort it out". Mr Carr accepted that the equipment was frustratingly slow. He said that as a business they had decided not to spend money on it. Mr Carr said that the claimant was repeatedly using the F word. The claimant said he was making it up.

100. On the allegation that the claimant made a decision not to try to learn the new controls for the machinery brought onto the farm, the claimant completely denied this and reminded Mr Carr that he had been on a two-day course for the sprayer. In relation to the training on 7 October 2015 he said that he was only given about 10 minutes training and yet it had taken four people all morning to set up at the equipment. The claimant thought it was ridiculous. Mr Carr thought it was ridiculous that the claimant did not ask any questions of the trainer. The claimant said he did ask questions.

101. Mr Carr and the claimant went on to have a discussion about the training provided by the Austrian trainer. Mr Carr acknowledged that the claimant had asked the trainer to go over things a second time and they then all got out of the cab of the tractor. Mr Carr denied throwing his hands up in the air in frustration at the claimant.

102. Mr John Carr acknowledged the claimant as their number one tractor driver. The claimant said he had never refused to learn anything, he had previously been on the two-day course but this training had been insufficient. Mr Carr senior said it was the same for him "*stretching the brainbox*" and it had to be written down before he could "get it".

103. During the meeting the claimant asked Mr Carr junior if he remembered what he had said to him when the claimant returned from sick leave in April 2015. Mr Carr did not remember and the claimant said, "*you said I am going to have to arrange a meeting because you are no longer capable of doing the work*". Mr Carr denied this.

104. Mr Carr junior accepted that the claimant had always said that if he brought in a tractor with autosteering, the claimant would leave and Mr Carr said he had therefore not bought any tractor equipped with auto steer. Mr Carr junior wanted to introduce auto steer because he had heard that it improved efficiency by 20% to 25% but he said he would "not go there" before the claimant retired. The claimant replied "*I don't believe you Martin. The trust is broken down. I have known you since you were four or five. If this meeting is at an end do you want me to wait 10 minutes for a*

discipline?"

105. Mr John Carr said that they would prefer to discuss what the claimant wanted and whether he wanted his job to carry on and whether he wanted to learn. The claimant said that it was not about learning, it was "Martin's attitude" and he thought Mr Carr junior was working on getting rid of him because he wanted to bring in auto-drive earlier.

106. Mr Carr junior said he kept trying to finish a sentence and out of deference to the quality of work that the claimant did in a day, he would not introduce auto steer until the claimant had retired. He said "*that is absolutely 100% where I stand*". He said he had never had a tractor driver who could get the work done like the claimant.

107. The claimant replied "*You haven't got me now. My term of employment ends now, I am finished. I don't trust you like I trust John, he's square with me, I am at the age where I won't get another job, I don't trust you, you lie, that is a complete lie so far as I am concerned and I finish tonight*." By these words the claimant resigned from his employment. Mr Carr junior just replied "*OK"*.

108. Mr Carr said he was surprised by the claimant's resignation and we find, having heard the recording, that he was. The tone used by both parties had been calm and the resignation was unexpected. Mr Carr sounded surprised when he said "OK".

109. After the claimant had expressed his resignation, the parties said goodbye to one another and the claimant said he would be back 10am to pick up his tools and belongings. He said "*you can follow me round to make sure I don't steal anything*". The claimant then said to Mr Carr senior "*I have always trusted you, sorry John, I hate to say this but he is a nasty piece of work*". After the claimant had left the meeting Mr Carr junior was heard swearing. The claimant accepts that he did not hear Mr Carr junior swearing until he heard the recording in about November 2016. Mr Carr's swearing therefore played no part in the claimant's decision to resign. We find, having heard it, that it was not said "jubilantly" by Mr Carr as the claimant suggested.

110. It was put to Mr Carr junior in cross examination that the claimant was a thorn in his side and he was glad that he had gone. Mr Carr denied that the claimant was a thorn in his side saying he was the "*best bloke I've ever had*" who had just walked out. Mr Carr was devastated by the loss of the claimant.

<u>Post resignation</u>

111. On 23 October 2015 Mr Martin Carr wrote to the claimant (page 86) as follows:

> *Dear Trevor*

I am writing further to the investigative meeting and proposed disciplinary hearing of 22/10/15 at the Farm Office. A voice recording of this meeting is held at the Farm Office.
During the investigative meeting you elected to remove yourself from our employ. This letter hereby confirms your decision to no longer work for J&P Carr (Farms) Ltd.
We will see that any outstanding monies will be paid to you and in addition we will pay you for any holiday entitlement that you have accrued but not taken during this fiscal year.
If you disagree with anything contained in this letter please do contact us at this office.
Yours sincerely
Martin Carr

Knowledge of disability

112. We accepted Mr Martin Carr's evidence that he did not know that the claimant was a disabled person in that he did not know that the condition met the test under section 6 of the Equality Act 2010. We have considered whether under Schedule 8 of the Equality Act, (paragraph 20) the respondent could reasonably have been expected to know.

113. The respondent knew that the claimant had a back condition that had been going on for some time. It became serious in April 2015 requiring hospitalisation. They knew that the claimant required surgery. Apart from a conversation with the claimant on his return to work in April 2015, they made no enquiries as to the nature of this condition and requested no medical information, whether from the claimant's GP or from his hospital consultant as to how this condition might affect him or his ability to work. We find that based on the information they had to hand, the respondent ought reasonably to have known that the claimant was disabled.

The law

114. The applicable law in relation to constructive dismissal 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 h is 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*"

115. 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."

116. 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".*

117. 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".

118. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that 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.

119. Discrimination arising from disability is found in section 15 Equality Act 2010:

(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,

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.

120. Section 23 of the Equality Act deals with comparators and states in subsection (1) that on a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances related to each case.

121. Section 26 of the Equality Act provides that:

(1) A person (A) harasses another person (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.

122. Section 136 of the Equality Act deals with the burden of proof and provides that 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.

123. The duty to make reasonable adjustments is found under section 20 Equality Act 2010. The duty comprises three requirements and in this case the relevant requirements in this case are the first and second which appear in section 20(3) and (4):

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

(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.

124. On knowledge of disability the claimant relied on the decision of the Court of Appeal ***Gallop v Newport City Council 2014 IRLR 211***, that it essential for a reasonable employer to consider whether an employee is disabled, and form their own judgment. Ordinarily an employer will be able to rely on suitable expert advice, but this does not displace their own duty to consider whether the employee is disabled, and it is impermissible for that employer simply to rubber stamp a proffered opinion.

125. The claimant also relied upon the case of ***Cox v Essex County Fire and Rescue Service EAT/0162/13*** per Birtles J in which the EAT upheld the tribunal's decision, on a reasonable adjustments claim, that the employer had been entitled on the facts to find that the employer had neither actual nor constructive knowledge that the employee was disabled. The case was pre Equality Act 2010 and was considered by the Employment Tribunal at London East under the Disability Discrimination Act 1995 and concerned a mental rather than a physical impairment. The EAT said in that case in relation to the statutory test, that the tribunal were justified, as the judges of fact, to find that the respondent had asked all the right questions. They upheld the tribunal's decision. Employers are expected to take reasonable steps to find out whether the employee's condition amounts to a disability

126. In ***Secretary of State for the Department of Work and Pensions v Alam 2010 IRLR 283*** the EAT held that the correct statutory construction (on a reasonable adjustments case under the DDA) involved asking two questions: (1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in [the relevant legislation]? If the answer to that question is: 'no' then there

is a second question, namely, (2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in [the relevant legislation]

127. Under Schedule 8 of the Equality Act 2010, paragraph 20, an employer is not subject to a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement of section 20.

Time limit

128. Section 123 of the Equality Act 2010 provides that

> *(1) Subject to section 140A and 140B, 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.*

129. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant.

130. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner* 2003 IRLR 96.** This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably.

131. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

132. In ***British Coal Corporation v Keeble 1997 IRLR 336*** the EAT said that in considering the discretion to extend time:

It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Pay slips

133. The right to an itemised pay statement (payslip) is set out in section 8 of the Employment Rights Act 1996:

An employee has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement. The statement shall contain particulars of—(a) the gross amount of the wages or salary, (b) the amounts of any variable, and (subject to section 9) any fixed, deductions from that gross amount and the purposes for which they are made, (c) the net amount of wages or salary payable, and (d) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.

134. The provisions as to remedy are set out in section 12(4) of the ERA:

(4) Where on a reference in the case of which subsection (3) applies the tribunal further finds that any unnotified deductions have been made (from the pay of the employee during the period of thirteen weeks immediately preceding the date of the application for the reference (whether or not the deductions were made in breach of the contract of employment), the tribunal may order the employer to pay the employee a sum not exceeding the aggregate of the unnotified deductions so made.

Conclusions

Constructive unfair dismissal

135. We have considered whether in sending the disciplinary invitation letter of 8 October 2015, described by the claimant as “bullying”, “sham” and “bogus” and in saying that the claimant was “resistant to training” the respondent acted in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties.

136. It is not a breach of contract for an employer to instigate a disciplinary process if they are of the view that there may be misconduct. The respondent was unhappy at the claimant swearing and being angry at work and they wanted this to stop. They also wanted his commitment to embrace the technological advances. Setting up a process to consider this is not a breach of the implied term of trust and confidence. The letter was not a “bullying” letter. The claimant simply did not agree with the content of the letter and in any event it was a matter for discussion on the

22 October 2015. The letter of 8 October was not an outcome letter which made findings. It set out the matters which the respondent wished to investigate and discuss.

137. The claimant was asked in the meeting by Mr John Carr what he wanted to do. He had just had a 100% assurance that Mr Martin Carr would not introduce auto steer until the claimant had retired. He did not wait to see what the outcome of the meeting would be, or answer the question about what he wanted to do. He based his actions on an incorrect and ill-founded assumption that the respondent was planning to dismiss him. The respondent's view was that the process would warrant no more than a first stage verbal warning but they did not reach a decision or outcome stage because the claimant left the meeting.

138. The claimant also says that the respondent accused him of being resistant to training and this was relied upon as a last straw. This was a matter for investigation and consideration at the meeting on 22 October 2015, it was an allegation and not a finding.

139. It was not best practice for the respondent to combine the investigatory and hearing stages. We find that this was a reflection of their complete lack of experience in HR matters rather than the respondent acting in a manner calculated or likely to seriously damage trust and confidence.

140. This is not an ordinary unfair dismissal claim where matters of fair procedure would fall for more detailed consideration.

141. We find that the respondent had no interest in acting in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with their most valued employee. The claimant's resignation meant that they then had no tractor driver and immediately with a business which employed 2 employees, they had just lost 50% of their staff. Mr Lower did not have the skills to step into the claimant's shoes as he was still in training. We fully accepted Mr Carr junior's evidence that in his view the "best bloke he'd ever had", had just walked out. This was not in the interests of the business. Mr Carr was devastated at the claimant's decision.

142. Constructive dismissal is a high test and we find that the claimant has not met this test and he was not constructively dismissed as there was no fundamental breach of the claimant's contract of employment.

143. We therefore find that there was no dismissal and the claim for constructive unfair dismissal fails.

<u>Disability harassment</u>

144. We have considered whether the respondent engaged in the unwanted conduct relied upon. There are three acts of disability harassment relied upon.

145. The first is that in about April 2015 Mr Martin Carr joking when the claimant got down off the tractor and collapsed on the floor in pain. We find that Mr Carr, on his own admission, made light of the situation. Mr Carr said "*so that's what happens with your back then?*" We find that Mr Carr did not say this with the purpose of violating the claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It was an awkward situation for Mr Carr and it was a clumsy comment. We find that it was not said sarcastically or mockingly. Nevertheless the claimant perceived it as humiliating and we find that it had that effect for the claimant. It is humiliating for anyone to fall on the floor let alone with someone observing and making any sort of comment.

146. There is no doubt in our minds that the comment was related to the claimant's disability. We have gone on to consider the elements of section 26(4) in relation to the effect on the claimant in section 26(1)(b). We have found that it did have that effect in the claimant's perception. He perceived himself as being humiliated.

147. We find that the claimant would already have felt humiliated in any event by falling on the ground in the sight of his employer. Mr Carr offered help which was declined. Mr Carr made an awkward but not an ill-intentioned comment. We find that taking account of all the other circumstances of this incident, it was not reasonable for Mr Carr's comment of "*so that's what happens with your back then?*" to have the effect relied upon by the claimant. We find that it does not meet the definition of disability harassment in section 26.

148. We have found above that Mr Carr did not inform Mr Lower that he wanted to dismiss him because of his disability or because of his "inability to train". We have also found above that Mr Carr did not say that there would need to be a discussion about the claimant's future because it was obvious he could no longer do his job. We find as a fact that the acts of harassment relied upon at point (b) did not take place.

149. The claimant also relies upon being humiliated in front of the Austrian trainers. Anything said by Mr Carr to the claimant on 7 October 2015 relating to the training and demonstration had nothing to do with the claimant's back condition and disability. It related to the claimant's admitted technophobia. The claimant said Mr Carr said "*he just doesn't get it*". Even if this was said, it was not related to the claimant's disability and was not an act of disability harassment.

150. The claim for disability harassment therefore fails. Even if we are wrong about the interpretation of section 26(4) in relation to the comment "*so that's what happens with your back then?*", we find that this head of claim is out of time in any event. We have found that the other two alleged acts of harassment relied upon did not take place (point (b)) and was not disability related (point (c)). There is therefore no continuing act from April

to October 2015 for the claimant to rely upon.

151. Point (a) is said to have taken place in about mid-April 2015 and the claim was presented on 29 February 2016. The primary time limit expired in mid July 2015 and is therefore seven months out of time. The EC Rules do not operate to extend time on these facts and dates. The claimant relied upon a continuing act and did not pursue a just and equitable argument. We had no evidence as to the reason for any delay. We have no basis upon which to make a finding that it is just and equitable to extend time by seven months and had we been required to decide the time point, in the alternative, we find that the act of harassment under point (a) was out of time in any event and we have no jurisdiction to consider it.

Direct discrimination because of disability

152. We have considered whether the respondent subjected the claimant to the following treatment because he was disabled with a back condition.

a. By failing to consider reasonable adjustments
b. By failing to make proper enquiries as to the injury or at all.
c. By failing to provide a safe system of work.
d. The dismissal.
e. Mr Martin Carr joking when the claimant fell off the tractor.

153. We find it a very unusual way to put a direct discrimination claim by relying on a failure to make reasonable adjustments. Point (a) on reasonable adjustments therefore stands or falls with the reasonable adjustments claim. It appears therefore that under section 23 the claimant's case is that had he not been disabled, they would have made reasonable adjustments and the reason they did not was because his condition amounted to a disability.

154. The claimant contends that because he was disabled, they failed to make proper enquiries as to his injury. Again under section 23 this would require us to find that had a hypothetical employee had an injury that did not amount to a disability, the respondent would have made proper enquiries about it and they did not do so because the claimant was disabled. The respondent did not appreciate that the claimant was a disabled person and they made some limited enquiries on this return simply because he was injured. This was not an act of direct disability discrimination.

155. The claimant contends that the respondent failed to provide a safe system of work because he is disabled and he was treated less favourably than a hypothetical employee. This requires a finding that the respondent would have provided a safe system of work for non-disabled employee but did not do so for the claimant because he was disabled. The claimant was not specific as to exactly what this unsafe system of work amounted to. Both parties acknowledged that farming is an inherently dangerous

business and can be physically demanding. We are unable to find that the respondent provided a specifically unsafe system of work because the claimant was disabled and that they would have provided a safe system of work to a non-disabled employee. We find there was no less favourable treatment.

156. We have found that there was no dismissal (point (d) above).

157. On Mr Carr's response to the claimant falling out of the tractor, we find that he would have responded in the same way to a non-disabled employee falling from the tractor and refusing help. It is an awkward and difficult situation and we have found that Mr Carr responded somewhat clumsily but not in a discriminatory fashion. We find that he would have treated a non-disabled employee in the same circumstances in the same way and there was therefore no less favourable treatment.

158. The claim for direct discrimination fails and is dismissed.

Discrimination arising from disability

159. We have considered whether the respondent treated the claimant unfavourably because of his inability to sit or stand for long periods without being in considerable pain, sitting in the tractor causing his leg to go numb and that because of his disability he could not do heavy lifting and physical work.

160. The claimant relied on being told by Mr Martin Carr that if he could no longer do his job properly the respondent would need to discuss his future and he would need to go. We have made a finding of fact that this was not said by Mr Martin Carr.

161. The claimant also relies on being humiliated in front of "foreign trainers" as set out in the harassment claim. Our finding is that this is completely unrelated to the claimant's disability or anything arising from his disability and was related to the claimant's admitted technophobia.

162. The claimant also relies somewhat generically on the "entire working environment" being discrimination arising from disability. It was hard to follow this line of argument. In submissions we were told that the claimant relied upon a difficulty in climbing steps and that he had difficulty in getting into the "vast" farm machinery. The claimant's case is that this was unfavourable treatment because of his inability to sit or stand for long periods, sitting in the tractor causing his leg to go numb and that he could not do heavy lifting and physical work.

163. The claimant's own evidence was that sitting in the tractor did not "cause" his leg to go numb, because this was the state of his leg all the time, 24 hours a day.

164. We find that the claimant was able to get in and out of the tractor because he did so and worked from April until October 2015.

165. We find that the respondent did not create an entire working environment that was unfavourable to the claimant because of the matters arising from his disability.

166. As this head of claim fails on its facts we have not found it necessary to consider knowledge of disability under section 15.

Failure to make reasonable adjustments

167. As ordered at the Preliminary Hearing the claimant set out particulars of his claim for the failure to make reasonable adjustments. The PCP's relied upon were, (i) a requirement to sit and drive for long periods and to undertake excessive hours including an extra 16 hours per week (ii) to operate heavy machinery (iii) to lift heavy objects and (iv) to undertake excessively physical work.

168. We find that the claimant was required to sit and drive for long periods. Around 70-75% of his work was sitting driving a tractor. The respondent applied this PCP.

169. We find that the respondent did not apply a PCP of excessive hours. Our finding above is that overtime was voluntary and that the pay was averaged to take account of the varying hours and demands in seasonal farming work. It was open to the claimant to say that he did not wish to undertake this overtime because of the discomfort caused by the hours of work. At no time did the claimant do so. We find that this was because the overtime was voluntary.

170. The claimant was required to operate heavy machinery and lift heavy objects and we find that this PCP was applied and he was required as part of farm working to undertake physical work. The physical work was not "excessive" given the context and nature of farming work.

171. We have gone on to consider under section 20(3) whether the application of any of these PCP's placed the claimant at a substantial disadvantage in comparison with persons who are not disabled. The substantial disadvantage relied upon was that he found it difficult to access and egress the machinery and on at least one occasion was incapable of doing this safely, falling to the ground.

172. The claimant also relies upon a substantial disadvantage of not being able to perform the tasks set for him, or taking longer to do so and was put in considerable pain when doing so.

173. There are therefore two substantial disadvantages relied upon, firstly the ability to "access and egress" the machinery and secondly not being able to perform tasks, taking longer and being in pain. In terms of how long it

took the claimant to complete tasks, we heard no evidence of the respondent putting any time requirements on the claimant for him to complete his tasks. We find that even if the claimant took longer to complete his tasks, the respondent made allowances for this, particularly as he was their best tractor driver by far. We find that the respondent made any adjustment that they needed to make in this respect.

174. We find that the claimant's disability put him at a substantial disadvantage in that his back condition made it more difficult for him to mount or dismount the machinery (put by the claimant as access and egress). Our understanding from page 74 of the bundle is that the steps are integral to the vehicle. No adjustment was suggested to us that would have made the access to or exit from the tractor any easier. We find that the reasonable adjustment is to have someone on hand or easily contactable who could come and assist the claimant with getting up to or down from the driving cab if required.

175. We have found above that Mr Carr junior was prepared to be on hand during the sowing season to help recalibrate. He was otherwise around on the site. The claimant also worked with Mr Lower and other seasonal staff. We find that with a phonecall or text, as happened on the day when the claimant had to be relieved from duty by Mr Lower, this help was available and any adjustment needed, had the claimant wished to avail himself of it, was made.

176. We have found above that the respondent ought reasonably to have had knowledge of disability for the purposes of Schedule 8 Equality Act 2010.

177. We find that there was no adjustment necessary to remove any disadvantage from the claimant in relation to sitting in the tractor. The claimant accepted that the seat was good, with air controlled suspension and he said it was comfortable. It was not sitting in the tractor that caused the numbness in his leg as this was a continual situation.

178. In relation to heavy lifting and physical work the claimant said he used the fork lift and he declined other assistance. We find that the provision of the fork lift was a sufficient step taken by the respondent to avoid any disadvantage to the claimant with heavy lifting.

179. In terms of heavy machinery, the claimant's difficulty was technological rather than physical. The claimant admitted that he enjoyed driving the new tractor purchased by the respondent in August 2015 as it was easy to move through the gearbox and he had no difficulty with it whatsoever. The respondent made this adjustment with the purchase of the new tractor.

180. Even if there was a failure to make a reasonable adjustment prior to August 2015, the adjustment was made by that time and any failure had been addressed. The claim is out of time in respect of a failure which was

addressed in August 2015. We have dealt with the time point in relation to the harassment claim above.

181. The claimant also relies on section 20(4) that there was a physical feature which put him at a substantial disadvantage which was the height and size of the machinery he had to operate. We have found above that the claimant's difficulties with operating the machinery was technological rather than physical and that he found the tractor seat comfortable and the new tractor gave him no problems whatsoever. We repeat our findings on the access to and exit from the tractor in relation to this physical feature and find that any necessary adjustment was made by having other persons either present or contactable to come to the assistance of the claimant should he make such a request.

182. The claim for failure to make reasonable adjustments therefore fails and is dismissed.

Written particulars of employment

183. Under section 12(3) ERA we make a declaration that since 2006 the respondent has failed to give the claimant any pay statement in accordance with section 8 ERA.

184. The remedy under section 12(4) is the award of a sum not exceeding the aggregate of the unnotified deductions during the period of 13 weeks immediately preceding the presentation of the ET1. The claimant's last day of employment was the 22 October 2016 and his pay day was in the last week of October. He therefore had no unnotified deductions in the 13 week period prior to 29 February 2016 and no financial remedy can be awarded to the claimant under section 12.

185. The claimant's submission is that the date of application for the reference is the 22 October 2015 and we should count 13 weeks back from 22 October 2015.

186. The respondent's submission was that the date of the reference is the date of the ET1 which is 29 February 2016.

187. We considered section 11 of Employment Rights Act 1996 which gives an employee the right to require a reference to be made to the Employment Tribunal if the employer does not comply with section 8. The reference is a reference to an Employment Tribunal. Section 12(4) refers to the period of 13 weeks immediately preceding that reference to the Employment Tribunal and that thirteen week period commences on Monday 30 November 2015. The parties were in agreement that the claimant was last paid at the end of October 2015. There is therefore no period in respect of which we could make an award of any unnotified deductions.

_____

Employment Judge Elliott
Date: 15 February 2017