EMPLOYMENT TRIBUNALS

Claimant: Adrian John Rayfield

Respondent: S J Bargh Ltd

HELD AT: Manchester **ON:** 4 and 5 October 2017
10 November 2017
(in Chambers)

BEFORE: Employment Judge Aspden
Mrs M A Bell
Mr B J McCaughey

REPRESENTATION:

Claimant: Mr T Rushton, Counsel
Respondent: Mr C Bourne, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed contrary to the Employment Rights Act 1996.

2. Contrary to section 39(2) of the Equality Act 2010 the respondent discriminated against the claimant by dismissing him, that being discrimination within section 15 of the Act.

3. The claimant's complaints that his dismissal also, or alternatively, constituted disability discrimination within section 13 and/or section 21 of the Equality Act 2010 are not made out and are dismissed.

REASONS

Claims and Issues

1. The claims and issues were discussed with the parties at a preliminary hearing which took place on 26 June 2017 before Employment Judge Ross. The claimant's claims were as follows:

(a) That the respondent had unfairly dismissed him;

(b) That by dismissing him the respondent had discriminated against him contrary to section 39(2) of the Equality Act 2010. The claimant's case was that his dismissal constituted –

(i) direct disability discrimination within section 13 of the Equality Act 2010;

(ii) discrimination arising from disability within section 15 of the Equality Act 2010; and/or

(iii) discrimination contrary to section 21 of the Equality Act 2010, the respondent having failed to comply with a duty to make reasonable adjustments in relation to him. The claimant's case was that the respondent had a practice of dismissing employees who had lost their HGV licence and that this practice put him at a substantial disadvantage in comparison with persons who are not disabled. The respondent denied they had such a practice.

2. The respondent agreed that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 at the relevant time, the claimant's impairment being Type 1 Diabetes, and that the claimant had been dismissed by the respondent.

3. Mr Bourne, for the respondent, also conceded during the course of the hearing that the claimant's dismissal had been unfair, on the basis that the respondent had not, before deciding to dismiss the claimant, discussed the proposed dismissal with the claimant.

4. The issues for the Tribunal to determine were as follows.

Unfair Dismissal

5. Was the reason, or the principal reason, for dismissal one falling within s98(2) of the Employment Rights Act 1996 or some other substantial reason as would justify the dismissal of an employee holding the position the Claimant held?

The respondent's case was that the claimant was dismissed for a reason within section 98(2)(d) of the Employment Rights Act 1996 ie he could not continue to work in the position which he held without contravention of a duty or restriction imposed by or under an enactment, given that he did not have an HGV licence.

6. If so, in the circumstances did the Respondent act reasonably or unreasonably in treating this reason as a sufficient reason for dismissing the Claimant, taking into account its size and administrative resources and having regard to equity and the substantial merits of the case?

7. By conceding that the claimant had been unfairly dismissed the respondent effectively admitted that it acted unreasonably in dismissing the claimant. It remained necessary for us to reach our own conclusions as to the reason for dismissal and the

extent of the unreasonableness, however, given that these are issues that have an impact on remedy.

Discrimination arising from disability: Equality Act 2010 s15

8. What was the reason, or what were the reasons, for the claimant's dismissal?

9. Was the reason for dismissal, or one of the reasons for dismissal (if there were more than one), something arising in consequence of the claimant's disability?

10. If so, was the dismissal of the claimant a proportionate means of achieving a legitimate aim?

The respondent's case, as put by Mr Bourne, was that its aim was "the efficient and effective management of the respondent's resources in circumstances where the respondent was already facing difficult financial circumstances".

Duty to make reasonable adjustments

11. Did the Respondent have the provision, criterion or practice alleged by the claimant, namely a practice of dismissing employees who had lost their HGV licence?

12. If so, did that PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

13. If so, did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage caused by the PCP?

Direct discrimination

14. In dismissing the Claimant, did the Respondent treat the Claimant less favourably than it treated, or would have treated, others in comparable circumstances?

15. If the Respondent treated the Claimant less favourably, was this because of disability?

Remedy

16. We explained to the parties that if we found in favour of the claimant we would go on to consider and determine the following issues relevant to remedy based on the evidence heard at this hearing, but that any other issues relevant to remedy would be considered and determined only after a separate remedy hearing:

a. What is the chance that the Claimant would have been fairly dismissed in any event had a different procedure been followed?

b. Did either party unreasonably fail to follow the Acas Code of Practice on discipline and grievances? If so, is it just and equitable to increase or reduce the award and, if so, by how much?

c. Did the Claimant cause or contribute to his dismissal? If so, to what extent should compensation be reduced?

17. We have made certain findings as to the reasonableness of the claimant's decision not to appeal the decision to dismiss him. Beyond that, we wish to give the parties the opportunity, at the remedy hearing, to make further submissions in light of our conclusions below before we finally determine these issues.

Evidence and Facts

18. For the respondent we heard evidence from Mr Anthony Finlayson-Green, the company's Group Managing Director, who gave evidence by Skype, and also from Mr Ian McKay, the respondent's Head of Operations, who gave evidence in person. For the claimant we heard evidence from Mr Rayfield himself.

19. The claimant had also asked a former work colleague, Mr Richard Ronson, to give evidence in support of his case. A witness statement signed by Mr Ronson was sent to the respondent's representative ahead of the hearing. However, on the day before the hearing was due to begin the claimant's representative emailed the Tribunal, at 4.05pm, to say that Mr Ronson's employer was unable to release him from his duties to enable him to attend the Tribunal hearing. On behalf of the claimant, an application was made for permission for Mr Ronson to give evidence by means of electronic communication, specifically Skype. We considered that application at the beginning of the Tribunal hearing. There being no objection from the respondent to the witness giving evidence in this way, we allowed the application on condition that appropriate facilities were made available by the parties that would enable those present at the hearing to see and hear Mr Ronson.

20. We directed that Mr Ronson's evidence would be heard at 10.00am on the second day of the hearing and that the parties should arrive at the Tribunal no later than 9.30am to ensure that an appropriate Skype connection had been made so that evidence could commence promptly at 10.00am. However, the claimant's witness was not ready to give evidence by Skype at 10.00am. The only reason given was that the witness was "stuck in traffic" but that he hoped to be available by 10.30am. Mr Rushton for the claimant sought an adjournment for 30 minutes until 10.30am. Although this application was opposed by Mr Bourne for the respondent, we agreed to that short postponement on the basis that little prejudice would be suffered. When the hearing recommenced at 10.30am we were told that, although a Skype connection had been made, the witness was in fact at a service station in a public area and intending to give evidence via Skype over his phone. Mr Rushton said the witness was "looking for a quiet corner" from which to give evidence but had not been able to find a private room. It was clear that there was background noise from the members of the public. We accepted Mr Bourne's submission that this was not an appropriate form in which somebody could give evidence at an Employment Tribunal hearing. In the circumstances we directed that we were not prepared to hear evidence from this witness by Skype. Mr Bourne confirmed he had no objection to the Tribunal receiving the signed statement of the witness and considering it, but wished to make submissions about the weight to be attached to that evidence. Accordingly, we did consider that written statement. However, we decided little weight should be attached to it given that the respondent had not had an opportunity to cross-examine the witness.

21. Our primary findings of fact follow.

22. The claimant was employed by the respondent with effect from 7 October 2013 until he was dismissed by letter dated 13 January 2017. The claimant was, at the time of his dismissal, a disabled person by reason of having been diagnosed as suffering from Type 1 Diabetes. The respondent knew that he was so disabled.

23. At the date of dismissal the claimant was employed as a category 1 HGV reload driver. Prior to October 2013 the claimant had been employed by the respondent as a driver on another occasion. The respondent operated a fleet of around 350 vehicles and the evidence of the respondent, including that of Mr Finlayson-Green and Mr McKay and the documentary evidence at pages 110-120 show, and we find, that the respondent had a frequent turnover of HGV drivers.

24. On 2 January 2017 the claimant became unwell while driving an HGV. He was admitted to hospital where he stayed for three days and was diagnosed with Type 1 Diabetes. On the advice of those treating him the claimant surrendered his HGV driving licence. As a consequence, he could no longer legally drive HGVs for at least three months. The claimant reported his absence, and the reason for it, to the respondent.

25. By 1 letter dated 6 January 2017 the DVLA notified the claimant that he would be able to apply to have his licence restored in due course but that restoration of his licence would only be considered when certain requirements were met. Those requirements were set out in the letter (pages 74-75 of the bundle). They included that “there must be adequate control of the condition with regular blood glucose (sugar) monitoring at least twice daily and at times relevant to driving (no more than two hours before the start of the first journey and every two hours while driving even on non driving days). Three continuous months of blood glucose (sugar) readings must be available stored on a memory meter(s). They will be required during our medical enquiries”. The effect of this, the parties agreed, was that it would be at least three months before the claimant could have his licence restored.

26. On 6 January 2017 the claimant attended a meeting with Mr McKay. Mr Ronson was also present at that meeting. The meeting took place in Mr McKay’s office. The claimant explained to Mr McKay that he understood he would be unable to drive an HGV for at least three months. A discussion ensued between the claimant and Mr McKay about the possibility of the claimant doing other work for the respondent in the meantime. Mr McKay suggested that the claimant could do some work for the respondent helping out in the yard and doing some other work for the company. Mr McKay spoke to Gill Brown, payroll administrator, following that meeting and she emailed Mr McKay to confirm what they had discussed.

27. There was a dispute on the evidence between the parties as to what precisely was promised by Mr McKay during the course of this conversation. Mr McKay’s evidence was that he told the claimant during this meeting that the number of hours the claimant could work would be limited to 39 without any overtime. However, the claimant said that he was not told that he would not be able to work overtime during that meeting and that Mr McKay only told him that there would be no overtime available later on. On this issue we prefer the evidence of the claimant. We say this, in particular, because the claimant's evidence is supported by the emails that

appeared at page 72 of the bundle. That email chain starts with the email from Gill Brown referred to above, which recorded what she had discussed with Mr McKay. That email set out, amongst other things, the rates of pay that the claimant would receive for this alternative work. That email states:

> "From Monday 9 January he [the Claimant] will start clocking in and will be paid at the warehouse rate of £7.71 per hour for the first 39 hours he works. For any hours above the 39 will be paid £11.57 per hour…The situation will be reviewed mid January."

Mr McKay replied to that email:

> "Confirmed, and it will be reviewed on Friday 13th, Mel can you do a change of circumstances letter".

There then followed an email from Mr Finlayson-Green to Mr McKay which stated:

> "Dear All, Adrian's hours should be a maximum of 39 hours. There will be no need to apply any overtime rate."

28. If, as Mr McKay now claims, he had made it clear to the claimant during their initial discussion on 6 January that he would not be able to work beyond 39 hours, it is surprising that he confirmed the terms set out in the email from Gill Brown. The email chain strongly suggests that it was only later in the day that Mr Finlayson-Green intervened to say that the claimant's hours should be limited to 39 per week and that no overtime would be payable. This accords with the claimant's version of events, which was that Mr McKay only told him subsequently that Mr Finlayson-Green had said there would be no overtime to work. In response to that comment the claimant stated that he would be "better off going on the sick." There is no dispute that the claimant made that comment and his version of events that he made the statement immediately after being told that his hours would be limited to 39 hours per week is entirely plausible.

29. We were referred by the respondent to a note, a copy of which appears at page 70 of the bundle. Mr McKay claimed in his evidence in chief that this was his note of the discussion he had had with the claimant. However, Mr McKay did not say when he prepared this note – whether it was immediately after the first conversation with the claimant on 6 January or later on. Furthermore, he did not say whether the note was prepared in one sitting. Indeed we observe that the note itself records the rate of £7.71 being payable for 39 hours and records an overtime rate of £11.57. No explanation was given by Mr McKay as to why he would make a note of an overtime rate when no overtime could be worked by the claimant. The reference being relied on by the respondent states: "Only 39 hours ref AFG". We take that to be a reference to Mr Finlayson-Green. In all the circumstances we think that note is more consistent with the claimant's version of events that he was initially told he could work overtime and only later told that, on Mr Finlayson-Green's instructions, that overtime would not be available.

30. We also record that we found Mr McKay's evidence on a number of other points to be evasive and unreliable, a matter to which we shall return later in this judgment.

31. We accept that the claimant left that meeting with Mr McKay on 6 January believing that he would be able to work overtime hours, which would enable him to boost his earnings and go some way towards bridging the gap between what he earned as a driver and what he was now able to earn on alternative duties, but .

32. There was also a dispute between the parties as to whether or not Mr McKay led the claimant to believe that he would be able to perform this alternative work until he was able to get his HGV licence back. Whilst we accept that the claimant may have hoped that was the case, it seems inherently unlikely that Mr McKay would make such a promise when he could not be sure at that stage for how long the claimant would be unable to perform his driving duties. Mr McKay's evidence, which we accept, was that the availability of alternative work fluctuated, depending on whether cover was needed for other people's holidays, amongst other things. We accept that it would be surprising if, in those circumstances, Mr McKay had made a guarantee that other work would be available. Far more likely, it seems to us, is that Mr McKay told the claimant that the situation would be reviewed mid January, which is reflected in the email from the payroll administrator, Gill Brown, to Mr McKay later that day and Mr McKay's response, as outlined above.

33. As agreed, Mr Rayfield attended work on 9 January 2017 for work in the yard. He undertook training that day on yard duties, including learning how to drive a shunter vehicle.

34. On 10 January 2017 the claimant set off to work in his car (which he was still able to drive). On the journey he hit a pothole and so had to stop. At the time he felt unwell and he decided to take the day off sick. He phoned in sick and did not continue his journey to work.

35. That day Mr McKay had two meetings with Mr Finlayson-Green to review Mr Rayfield's position. These meetings took place after the claimant had phoned in sick but before the claimant had visited his GP, about which we say more below. The discussions between Mr McKay and Mr Finlayson-Green resulted in them deciding to terminate the claimant's employment.

36. In his evidence in chief Mr McKay gave the very clear impression that the decision to dismiss the claimant was a joint decision reached by him and Mr Finlayson-Green together. This was equally clear from the evidence in chief of Mr Finlayson-Green. However, during cross-examination Mr Finlayson-Green sought to distance himself from the decision to dismiss the claimant. Despite asserting that his witness statement was true, he claimed that it had been Mr McKay alone who had made that decision. Mr McKay gave his evidence after hearing Mr Finlayson-Green's evidence. He confirmed that his witness statement was true yet on cross-examination he also claimed that Mr Finlayson-Green had not himself been one of the decision makers. We have no hesitation in concluding that the evidence of Mr Finlayson-Green and Mr McKay on this matter is unreliable. It clearly contradicts their evidence in chief, evidence which both of them confirmed was true. Mr Finlayson-Green's attempt to distance himself from the dismissal decision was, in our view, a self-serving attempt to deflect suggestions that it would have been inappropriate for him to hear a subsequent appeal against dismissal. Mr McKay's attempt to resile from his evidence in chief came after he himself had heard Mr Finlayson-Green's evidence in cross-examination on this point. It appears to us that

he changed his evidence so as not to contradict Mr Finlayson-Green. After careful consideration, it is our view that Mr Finlayson-Green and Mr McKay sought to mislead the Tribunal on this point. This causes us to question other elements of their evidence.

37. Mr Finlayson-Green and Mr McKay jointly decided to dismiss the claimant.

38. During the discussions that led to the decision to dismiss, Mr Finlayson-Green and Mr McKay talked about the fact that Mr Rayfield was prevented under DVLA rules from carrying out his substantive role as an HGV driver for a minimum three month period. Mr Finlayson-Green is himself diabetic and has a relative who is also a diabetic. Based on his own experience and his knowledge of his relative's experience, Mr Finlayson-Green thought that it could take much longer than three months for Mr Rayfield's blood sugar levels to stabilise.

39. At the time the respondent was under some financial and commercial pressure, having not long previously lost a significant amount of work. Mr Finlayson-Green and Mr McKay therefore considered it important that they filled Mr Rayfield's duties on the rota so that they could continue to meet all their customer delivery and collection requirements to avoid the risk of losing further work. They told us they considered temporary short-term cover to be an imperfect solution for a variety of reasons including financial (agency cover being relatively costly) and that they thought it might be difficult to persuade people to take up a post temporarily.

40. Mr McKay's evidence was that it was clear to them that no other alternative work would be available for the claimant. We do not accept that Mr McKay and Mr Finlayson-Green genuinely believed this to be the case. On cross-examination Mr McKay himself acknowledged that the availability of alternative work fluctuated and could come and go. He had only just agreed to set the claimant on doing alternative jobs, which had begun the day before and was expected to continue for a fortnight according to Mr McKay's own evidence. However, Mr McKay now sought to claim that just a day later he had managed to conclude that there would be no further work available notwithstanding that he had previously said that the situation would be reviewed. It was clear from the fact that he had intended to review the situation that Mr McKay thought there remained a prospect that other work would become available. This was also clear from his own evidence that work might be available on a fluctuating basis in the yard. The only thing that had changed since the claimant's discussion with Mr McKay on 6 January was that the claimant had phoned in sick on 10 January.

41. The claimant's contract entitled him to eight weeks' sick pay at £278.25 per week. Although neither Mr Finlayson-Green nor Mr McKay said in their evidence in chief that, they took into account that the claimant would be entitled to sick pay when deciding to dismiss, on cross examination Mr McKay suggested that it would have been considered. We must say that Mr McKay was evasive in his responses to questions on this issue, as he was in relation to a number of issues. We find that it is highly unlikely Mr McKay and Mr Finlayson-Green did not have in mind, when dismissing him, that the company would be obliged to pay the claimant sick pay under the terms of his contract if the claimant's employment was not terminated and he remained on sick leave.

42. Mr McKay and Mr Finlayson-Green together dictated a letter to be sent to the claimant notifying him of their decision to terminate his employment. That letter appears at page 83 of the bundle and says:

> "On the advice of senior management it is with regret that I write to terminate your employment with effect from the date of disclosure noted as 3 January 2017, as you are no longer able to fulfil your position of reload driver within the company…Recognising your signed contract dated 2 October 2013 indicating a notice period of two weeks your last day of employment will be Friday 13 January 2017 and you will be paid up to and including this date along with any outstanding holidays accrued and not taken."

43. That letter was sent in the name of Melanie Gerrard who we were told is Mr Finlayson-Green's assistant.

44. The claimant went to his GP on the evening of 10 January for a pre-arranged appointment. His GP signed him off sick for a month and gave him a fit note. Although it was not put to the claimant that he was not genuinely sick, there were indirect suggestions both in the evidence of the respondent's witnesses and in Mr Bourne's submissions, that the claimant may not have been genuinely sick. However, that was not put to him. We accept he was genuinely not well enough to attend work.

45. On 25 January 2017 Mr Rayfield wrote a letter to the company saying he felt he had been unfairly dismissed and unfairly treated. We accept that that letter was not received by the company until 30 January 2017. The claimant asked in that letter that the company reconsider his position.

46. The respondent did not reply to that letter until 23 February 2017. The response was in the form of a letter from Melanie Gerrard, described in the letter as "Executive Assistant to Group Managing Director, Anthony Finlayson-Green". That letter was sent to the claimant on the instructions of Mr Finlayson-Green who dictated its content. In that letter it said:

> "I would advise you do have the right to formally appeal this decision; please write to Mr Anthony Finlayson-Green, Group Managing Director, within five days of receipt of this letter outlining fully your reasons against the company's decision to terminate your employment as HGV reload driver."

47. However, the letter went on to state:

> "I would advise employers do not have a legal obligation to provide an alternative job for an employee who is unable to perform the role for which they have been employed due to capability, which in your circumstances was dictated by the surrendering (on your verbal advice) or revoking of your licence to DVLA which instantly rendered you incapable of carrying out your role as an HGV driver for S J Bargh. In full consideration of the circumstances, termination of your employment on this basis is not deemed unfair. Particularly in the current situation of which you are aware, milk contracts are changing and this impacts on the business as a whole and capable drivers have to be utilised where possible across the business."

48. It would have been clear to the claimant that that letter had been written on behalf of Mr Finlayson-Green and that it represented his views. It is clear that in that letter Mr Finlayson-Green was seeking to justify the decision to dismiss the claimant.

49. The claimant did not appeal. It was not unreasonable for him to decide not to appeal. Although the claimant would not necessarily have known of Mr Finlayson-Green's involvement in the original decision to dismiss him, the letter revealed that he had already formed a view on the fairness of the claimant's dismissal. And although Mr Finlayson-Green suggested in his evidence that he would not have heard the appeal alone, there was no indication of that in the letter sent by his assistant.

50. The claimant made an application in April 2017 to have his HGV licence restored. In response to that application, the claimant underwent a pre-arranged medical examination on 5 May 2017. Following that medical examination the claimant's HGV licence was restored to him in May 2017.

Law

Unfair dismissal

51. An employee has the right, under section 94 of the Employment Rights Act 1996, not to be unfairly dismissed (subject to certain qualifications and conditions set out in the Act).

Reason for dismissal

52. When a complaint of unfair dismissal is made, it is for the employer to prove that it dismissed the claimant for a potentially fair reason ie a reason falling within section 98(2) of the 1996 Act, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held.

53. Under ERA 1996 section 98(2)(d) the employer will have a potentially fair reason for dismissal where it can show 'that the employee could not continue to work in the position which he held without contravention (either on his part or that of his employer) of a duty or restriction imposed by or under any enactment'.

Reasonableness

54. If the respondent shows that it dismissed the claimant for a potentially fair reason the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) of the Employment Rights Act 1996.

55. Section 98(4) of ERA 1996 provides that: "… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b. shall be determined in accordance with equity and the substantial merits of the case."

56. In assessing reasonableness, it is not for the Tribunal to substitute its view for that of the employer: the test is an objective one and the Tribunal must not fall into the substitution mindset warned against by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, [2009] IRLR 563. The objective approach requires the Tribunal to decide whether the employer's actions fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439).

Discrimination

57. It is unlawful for an employer to discriminate against an employee by dismissing him: section 39(2) of the Equality Act 2010.

Burden of proof

58. The burden of proof in discrimination cases is dealt with in section 136 of the 2010 Act, which sets out a two stage process.

59. Firstly the Tribunal must consider whether there are facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the claimant. If the Tribunal could not reach such a conclusion on the facts as found, the claim must fail.

60. Where the Tribunal could conclude that the respondent has committed an unlawful act of discrimination against the claimant, it is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.

61. We make further observations on the burden of proof below.

Discrimination arising from disability

62. An employer discriminates against a disabled employee if it treats that person unfavourably because of something arising in consequence of his disability and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim: EqA 2010 s15.

63. Simler P in Pnaiser v NHS England [2016] IRLR 170, EAT, gave the following guidance as to the correct approach to a claim under EqA 2010 s 15:

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.

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. 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. 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.

64. For an employer to show that the treatment in question is justified as a proportionate means of achieving a legitimate aim, the legitimate aim being relied upon must in fact be pursued by the treatment.

65. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. The Tribunal must weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure or treatment and make its own assessment of whether the former outweigh the latter: Hardys & Hansons plc v Lax [2005] IRLR 726, CA. In doing so the Tribunal must keep the respondent's workplace practices and business considerations firmly at the centre of its reasoning (City of York Council v Grosset UKEAT/0015/16) and in appropriate contexts should accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly): O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145, [2017] IRLR 547.

Failure to make reasonable adjustments

66. Under section 39(5) of the Equality Act 2010 a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination: EqA 2010 s21.

67. Section 20 of the EqA 2010 provides that the duty to make reasonable adjustments comprises three requirements, set out in s 20(3), (4) and (5). This case is concerned with the first of those requirements, which provides that where a provision, criterion or practice of an employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

68. In considering whether the duty to make reasonable adjustments arose, a Tribunal must consider:

a. whether there was a provision, criterion or practice ('PCP') applied by or on behalf of an employer;

b. the identity of the non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee: Environment Agency v Rowan [2008] IRLR 20.

69. The EAT has held that a 'practice connotes something which occurs more than on a one-off occasion and which has an element of repetition: Nottingham City Transport Ltd v Harvey [2013] EqLR 4, EAT. That said, the EAT has also said that when determining whether there was a PCP 'the protective nature of the legislation means a liberal, rather than an overly technical approach should be adopted': Carrera v United First Partners Research UKEAT/0266/15 (7 April 2016, unreported).

70. There will not have been a breach of the duty to make reasonable adjustments unless the PCP in question placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

71. The predecessor to the Equality Act 2010, the Disability Discrimination Act 1995, contained guidance as to the kind of considerations which are relevant in deciding whether it is reasonable for someone to have to take a particular step to comply with the duty. Although those provisions are not repeated in the Equality Act 2010, the EAT has held that the same approach applies to the 2010 Act: Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43, [2015] ICR 169. This is also apparent from Chapter 6 of the statutory Code of Practice on Employment (2011), which repeats, and expands upon, the provisions of the 1995 Act.

72. The 1995 Act provided, as does the Code of Practice, that in determining whether it is reasonable for an employer to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to—

a. the extent to which taking the step would prevent the substantial disadvantage;

b. the practicability of the step;

c. the financial and other costs of making the adjustment and the extent of any disruption caused;

d. the extent of the employer's financial and other resources;

e. the availability to the employer of financial or other assistance to help make an adjustment;

f. the type and size of the employer.

73. The Code of Practice goes on to set out examples of steps which an employer may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments. Those examples include: allowing a disabled worker to take a period of disability leave; allowing an employee to be absent for rehabilitation, assessment or treatment; and transferring an employee to fill an existing vacancy.

74. The Court of Appeal has explicitly confirmed that, in some circumstances, it may be a reasonable adjustment NOT to dismiss a disabled employee: Aylott v Stockton-on-Tees Borough Council [2010] EWCA Civ 910, [2010] IRLR 994.

75. If there is no prospect of the proposed step succeeding in avoiding the disadvantage, it will not be reasonable to have to take it; conversely, if there is some prospect - even if considerably less than 50 per cent - it could be: Birmingham City Council v Lawrence UKEAT/0182/16/DM applying Romec Ltd v Rudham UKEAT/0069/07. The uncertainty of a prospect of success will be one of the factors to weigh in the balance when considering reasonableness (see per Elias LJ in Griffiths at para 29 and per Mitting J at para 18 in South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley UKEAT/0341/15).

Direct disability discrimination

76. Section 13 of the Equality Act 2010 provides that it is direct discrimination to treat an employee less favourably because of disability than it treats or would treat others.

77. In determining whether there is direct discrimination it is necessary to compare like with like. This is provided for by section 23 of the Act, which says that in a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

78. The Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258 made the following points in relation to the application of the burden of proof in claims of direct discrimination:

79. It is important to bear in mind in deciding whether the claimant has proved facts from which the Tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of … discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

80. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

81. It is important to note the word 'could' in the legislation. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

82. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

83. According to the Court of Appeal in the case of Madarassy v Nomura International plc [2007] IRLR 246 a difference of status and a difference of treatment will not usually be sufficient to reverse the burden of proof automatically. Nor will simply showing that conduct is unreasonable or unfair usually, by itself, be enough to trigger the transfer of the burden of proof: Bahl v The Law Society [2003] IRLR 640, EAT approved by the Court of Appeal at [2004] IRLR 799.

84. Where the claimant has proved facts from which the Tribunal could conclude that the respondent has treated the claimant less favourably because of disability, it is then for the respondent to prove that it did not commit that act, or as the case may be, is not to be treated as having committed that act. As the Court of Appeal made clear in Igen, to discharge that burden in a case of alleged direct discrimination it is necessary for the respondent to prove, on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic. Where there is more than one reason for an employer's act, the question is whether the protected characteristic was an 'effective cause': see O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor [1996] IRLR 372, [1997] ICR 33, EAT and O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615, CA.

Conclusions

Unfair Dismissal

Reason for dismissal

85. The respondent's case is that the claimant was dismissed because he could not continue to work in the position which he held without contravention of a duty or restriction imposed by or under an enactment, given that he did not have an HGV licence.

86. There can be no question that the claimant could not, at the time of his dismissal, continue to work as an HGV driver without being in breach of an enactment. The question for us is whether that was the reason, or the main reason, for the claimant's dismissal.

87. The letter terminating the claimant's employment does state that this was the reason for dismissal. It appears to us, however, that there were other factors at play. Specifically, it seems clear that the claimant going off on sick leave on 10 January was some kind of trigger for the claimant's dismissal: Mr McKay and Mr Finlayson-Green did not dismiss the claimant immediately on becoming aware that he would be without an HGV licence for at least three months; they only dismissed him on the day he went off sick. Nevertheless, we accept the respondent's case that the main

reason operating in the minds of Mr Finlayson-Green and Mr McKay was that the claimant was legally unable to drive for a minimum of three months and potentially longer.

88. We accept, therefore, that the principal reason for dismissal was that the claimant could not continue to work in the position which he held without contravention of a duty or restriction imposed by or under an enactment. This was a potentially fair reason for dismissal, falling within section 98(2)(d) of the Employment Rights Act 1996.

Reasonableness

89. We must next determine whether the respondent acted reasonably or unreasonably in treating the claimant's inability to work without contravening an enactment was a sufficient reason for dismissing the employee, taking all the relevant circumstances into account.

90. The relevant circumstances include matters such as: the cause of the claimant being unable, legally, to carry out the duties of his position; how long that legal restriction was likely to continue; the need of the respondent to have the work done which the employee was engaged to do; the cost to the employer and the employer's resources; the effect of the claimant's inability to work on other employees; and the availability of alternative employment.

91. The fact that the claimant was legally unable to drive an HGV at the time of his dismissal was caused by his medical condition. Both Mr McKay and Mr Finlayson-Green knew this to be the case at the time of the dismissal.

92. As for how long the restriction on driving an HGV was likely to continue, Mr McKay and Mr Finlayson-Green knew that a diagnosis of Type 1 diabetes did not mean that the claimant would be permanently unable to drive an HGV. They knew that the claimant would certainly not be able to drive an HGV for three months. They also knew there was a possibility he would not be able to do so for a longer period.

93. At this time there was no reasonable basis on which the respondent's managers could form any view as to how soon, after that three month period, Mr Rayfield would be able to recover his HGV licence. However, any reasonable employer would have recognised that the fact that the DVLA bar can be lifted in three months implies that some people diagnosed with Type 1 Diabetes manage to stabilise their blood sugar levels within three months to the satisfaction of the DVLA. The respondent's managers had no reason at this time to believe that the claimant would not be one of those people.

94. The respondent's case is that it was not reasonable to expect them to manage even for three months without dismissing the claimant. As we understand it, the respondent's position was that it could not, reasonably, be expected to absorb the claimant's workload within its permanent workforce even for a period of three months and that taking on additional drivers to provide cover would be costly. The respondent's position in effect was that it could not reasonably manage without bringing in a permanent replacement for the claimant.

95. We readily accept that the respondent needed to have the work done which the employee was engaged to do. But even if we accept that that work could not reasonably be done without bringing in a permanent replacement for the claimant, it does not necessarily follow that it was reasonable to dismiss the claimant at the time that the respondent did. The respondent operated a fleet of around 350 vehicles and had a frequent turnover of HGV drivers. It was perfectly possible that there would have been HGV driver work available for the claimant if and when he was able to recover his licence, even if a permanent replacement driver had been brought in during the claimant's absence. It is telling that, on being asked what the advantage was to the company in dismissing the claimant at the time he was dismissed, Mr McKay was unable to identify any advantage to the company. He was also asked whether there would have been any disadvantage to the company had they not dismissed him at that time. Again, he was unable to identify any disadvantage.

96. Although Mr McKay could identify no advantage to the company of dismissing the claimant at that time, it seems clear to us that one advantage to the company was the avoidance of paying company sick pay. The claimant's contract provided that he was entitled to up to eight weeks' company sick at £278.25 per week. We acknowledge that if the respondent had not dismissed the claimant it would have had to pay the claimant sick pay, in addition to paying the salary of a replacement driver, at least while the claimant was unable to perform alternative duties, and that this would have been an additional cost to the company. This was not a significant cost, however, and Mr McKay's evidence was that the decision to dismiss was 'not about money.'

97. In any event, the respondent would only have had to pay sick pay if there was no alternative work available to the claimant that he was willing and able to do. Although the claimant had phoned in sick on the day the decision was taken to dismiss him, at that point the respondent did not know how long the claimant would be off work for– he had not even visited his own doctor at that point. The fact that the respondent retrained the claimant showed that it was feasible for the claimant to do other things for the respondent as and when that work was available. There had been alternative work available for a fortnight just the day before the claimant was dismissed. There was no suggestion that that work had disappeared: the only difference between the situation on 9 January and 10 January was that the claimant had phoned in sick. Mr McKay's own evidence was that alternative work could be available on a fluctuating basis. There were therefore no grounds for the respondent to consider that no alternative work would be available for the claimant during the period he was without his HGV licence.

98. The claimant had been working for the company continuously for three years and had had a previous stint of employment with them. Mr McKay's own evidence, which we accept, was that the claimant was considered an honest and good employee.

99. Looking at all the circumstances we conclude that, even if we were to accept that the respondent could not reasonably manage without bringing in a permanent replacement for the claimant from the outset, dismissing the claimant at the time that the respondent did fell outside the range of reasonable responses open to a reasonable employer. Given the very limited disadvantage to the employer of doing so, any reasonable employer would have delayed making a decision as to the

claimant's future with the company for at least 2-3 months, by which time the respondent would have been in a position to inform itself on the true medical position and when the claimant was likely to recover his HGV licence, with the benefit of medical evidence and the claimant's experience of managing his blood sugar levels, and, identify at that time whether an HGV driver vacancy was available or likely to become available.

100. For those reasons we find that the respondent acted unreasonably in treating the reason identified above as sufficient reason for dismissing the claimant. The claimant's dismissal was, therefore, unfair.

101. In any event, we do not accept that that the claimant's work could not reasonably have been done without bringing in a permanent replacement immediately. We accept that bringing in agency workers will often be more costly than appointing a permanent replacement. However, we heard evidence that the company also has its own pool of temporary workers that it can draw from. In addition, the respondent could absorb some of the claimant's duties among existing permanent drivers, bearing in mind that it is not a small company, operating a fleet of around 350 vehicles. We bear in mind that, ordinarily, a Tribunal should accord a substantial degree of respect for the judgement of decision-takers as to their reasonable needs. As we have already noted, however, we did not find either Mr McKay or Mr Finlayson-Green to be reliable or credible witnesses and we are sceptical about their evidence as to the effect of the claimant's absence on the business. Notwithstanding the evidence of the respondent we find the respondent could reasonably have covered the claimant's work temporarily for a two to three month period with a combination of absorbing the work among existing permanent staff, taking on temporary workers from their own pool of workers and/or using agency workers. This would not have been without some difficulties and costs but in the absence of reliable evidence to the contrary we conclude that those difficulties and costs would not have been significant. In these circumstances any reasonable employer would have delayed making a decision as to the claimant's future with the company for at least 2-3 months.

102. This reinforces our conclusion that the respondent acted unreasonably in treating the reason identified above as sufficient reason for dismissing the claimant and that the claimant's dismissal was, therefore, unfair.

103. Further and separately any reasonable employer, acting reasonably, would also have consulted the claimant, and discussed the matter with him, giving him an opportunity to make representations before a decision was taken to dismiss him. The respondent did not take that basic step and Mr Bourne recognised that this alone rendered the dismissal unfair.

Section 15

104. As recorded above, we have found that the main reason operating in the minds of Mr Finlayson-Green and Mr McKay when deciding to dismiss the claimant was that the claimant was legally unable to drive for a minimum of three months and potentially longer.

105. The reason the claimant could not lawfully work as an HGV driver for a minimum of three months was that he had had to surrender his licence as a direct consequence of being diagnosed with Type 1 Diabetes. It is abundantly clear that the surrender of the claimant's licence arose in consequence of his disability.

106. Mr Bourne suggested in his submissions that, for the purposes of section 15, the reason for dismissal was the non-availability of work for the claimant. We have no hesitation in rejecting this submission, which is plainly unsustainable. It contradicts the respondent's own case in relation to the unfair dismissal claim in which it was contended that the main reason for the claimant's dismissal was the loss of his HGV licence. In any event we reject the suggestion, on the facts, that there was no work available for the claimant. There had been alternative work available for a fortnight just the day before the claimant was dismissed. There was no suggestion that that work had disappeared: the only difference between the situation on 9 January and 10 January was that the claimant had phoned in sick and Mr McKay's own evidence was that alternative work could be available on a fluctuating basis.

107. We must therefore consider whether dismissing the claimant was a proportionate means of achieving a legitimate aim.

108. The respondent's case was that the aim being pursued by the respondent was "the efficient and effective management of the respondent's resources in circumstances where the respondent was already facing difficult financial circumstances".

109. We accept that the respondent was facing difficult financial circumstances. We also accept that the respondent wanted to make efficient and effective use of its resources, and that that is a legitimate aim for the respondent to have pursued.

110. It is for the respondent to show that the treatment of which the claimant complains, i.e. his dismissal, was a proportionate means of achieving that aim. There are two elements to that requirement. First of all the dismissal must actually help achieve that aim. Secondly, it must be a proportionate means of achieving that aim.

111. As to the first of those elements, it is significant that Mr McKay could identify no advantage to the company of dismissing the claimant at that time he did, and nor could he identify any disadvantage that the respondent would have experienced if it had not dismissed the claimant at that time. Neither of the respondent's witnesses explained how dismissing the claimant at the time they did contributed to the efficient and effective management of the respondent's resources. As noted above, we have ourselves identified the cost of paying sick pay as a possible disadvantage of not dismissing the claimant but this was not relied on by the respondent. It is implicit in the respondent's case that there was considered to be a need to recruit a permanent HGV driver to do the work the claimant was, at the time, unable to do, but, for the reasons already given, in the particular circumstances of this case that did not appear to us necessitate the claimant's dismissal. We are not satisfied that the respondent has shown that the dismissal of the claimant went any way towards achieving the aim of making efficient and effective use of its resources. The burden is on them and they have not satisfied it.

112. Even if dismissal was a means of achieving that aim, the respondent has not satisfied us that it was a proportionate means of achieving it. The effect of the claimant's dismissal was that he lost secure employment through no fault of his own and despite his good and loyal service to the company. We acknowledge that the respondent needed the work of the claimant to be done by someone but for reasons already explained we do not accept that this reasonably necessitated the claimant's dismissal at that time. We do not accept that that the claimant's work could not reasonably have been done without bringing in a permanent replacement immediately given the size and resources of the employer. In any event, even if a permanent replacement had to be found, for reasons already explained, that did not reasonably require the termination of the claimant's employment given the frequent turnover of drivers in the business. The claimant's continued employment might have involved the payment of sick pay (depending on how long the claimant's sickness absence continued and the availability of alternative work), some disruption and additional burdens on other drivers if and to the extent that the claimant's duties were absorbed among the existing workforce, and the prospect of some additional costs if and when agency cover was needed. But on the evidence before us, including Mr McKay's inability to identify what the advantage was to the company of dismissing the claimant when they did, we do not find the costs and burdens on the employer of continuing the claimant's employment for at least 2-3 months would have been significant. As noted above in relation to the unfair dismissal complaint, we have concluded that any reasonable employer would have delayed making a decision as to the claimant's future with the company for at least 2-3 months, by which time the respondent would have been in a position to inform itself on the true medical position and when the claimant was likely to recover his HGV licence, with the benefit of medical evidence and the claimant's experience of managing his blood sugar levels. In all the circumstances we conclude that, even if dismissing the claimant was a means of making efficient and effective use of its resources, it was disproportionate.

113. In the circumstances the claimant's claim of disability discrimination under section 15 is made out.

Failure to make reasonable adjustments

114. In light of our conclusions on section 15 it is not necessary for us to consider the alternative submission that the dismissal was discriminatory because of a failure to make reasonable adjustments. Nevertheless, we have, for the sake of completeness, considered that matter.

115. The first issue for us to determine is whether the respondent applied a provision, criterion or practice ("PCP").

116. The claimant's case is that the respondent applied a practice of dismissing employees who had lost their HGV licence. The respondent denies they applied such a practice.

117. Mr Bourne submitted that a claim based on a failure to make reasonable adjustments can only succeed if the alleged PCP was applied to all employees. We reject that submission. Such a requirement is not found in the wording of the legislation – all that is required is that the respondent applies the PCP. Nevertheless,

this is a case in which the claimant alleges that the respondent had a particular practice, namely dismissing employees who have lost their HGV licence. Case law has made it clear that a "practice" implies something that is more than a one off act.

118. We were referred to documents at pages 147-150 in support of the claimant's case. These documents show that the respondent dismissed another individual who lost their driving licence. That person lost their licence through drink driving. At the same time as terminating his employment the company offered him alternative employment. We are not told any more about the background to that termination. It does not seem to us, however, that it provides clear evidence of a 'practice' of dismissing employees who have lost their HGV licence as opposed to a practice of looking at situations on a case by case basis. The evidence of Mr McKay and Mr Finlayson-Green was that they would consider each case on its own merits. Whilst we have expressed scepticism about the reliability of the evidence of these individuals, we do accept their evidence on this point. It is our conclusion that the respondent did not have a practice of dismissing employees who had lost their HGV licence.

119. Based on the way the claimant put his case, his complaint that the respondent failed to comply with its duty to make reasonable adjustments is, therefore, not made out. We note the observations of the Employment Appeal Tribunal in the case of Carrera v United First Partners Research and are mindful of the need not to take too rigid an approach to the identification of a PCP. However, this is a case in which the claimant was legally represented and the claimant's representative did not seek to put the claimant's case on any other basis. The respondent can only respond to the case as put by the claimant. It is possible that had the claimant's representative put the case in a slightly different way we might have found the case of discrimination under section 21 had been made out. We do not criticise the claimant's representative for not doing so, however, as it seems to us that this is the type of case that is more sensibly considered under section 15 in any event.

120. If we are wrong on this and there was a PCP we would have reached the following further conclusions:

a. The PCP put the claimant at a substantial disadvantage compared to someone who was not disabled. We say this because his disability meant he was more likely to lose his licence for reasons for which he was not culpable. Therefore the duty to make reasonable adjustments would have been triggered.

b. For reasons already explained, it would have been reasonable for the respondent to have delayed making a decision as to the claimant's future employment with the company for at least 2-3 months, by which time the respondent would have been in a position to inform itself on the true medical position and when the claimant was likely to recover his HGV licence, with the benefit of medical evidence and the claimant's experience of managing his blood sugar levels, and, identify at that time whether an HGV driver vacancy was available or likely to become available.

c. In failing to take that step the respondent failed to comply with its duty to make reasonable adjustments.

Direct discrimination

121. As with the reasonable adjustments claim, it is unnecessary for us to consider the alternative submission that the dismissal was directly discriminatory, in light of our conclusion that the dismissal constituted discrimination within section 15. Nevertheless, we have, for the sake of completeness, considered that matter.

122. The claimant had suggested that other drivers who had had their HGV licence revoked had not been dismissed. The only evidence put before us of any other driver whose HGV licence was revoked for a reason other than disability, however, concerned an individual whose employment was in fact terminated by the company following the loss of his licence but who was at the same time offered alternative work. Given that both he and the claimant were dismissed we find that, in dismissing the claimant, the respondent did not treat the claimant less favourably than this individual. So far as the offer of alternative employment is concerned, although the claimant was not offered alternative work, he was at the time of his dismissal off sick and, therefore, his circumstances and those of his comparator were, we find, materially different.

123. The question remains, however, whether the claimant was treated less favourably, because of disability, than a hypothetical comparator in the same circumstances would have been treated.

124. As recorded above, we have accepted that the respondent has shown that the main reason operating in the minds of Mr Finlayson-Green and Mr McKay when dismissing the claimant was that the claimant was legally unable to drive for a minimum of three months and potentially longer. If this had been the sole reason for dismissal then clearly the claimant's direct discrimination claim would not have been made out as, although the claimant's inability to work was caused by his disability the reason for dismissal would not have been the disability itself.

125. As we have said, however, it appears to us that there were other factors at play in the decision to dismiss the claimant. Specifically, it seems clear that the claimant going off on sick leave on 10 January was some kind of trigger for the claimant's dismissal: Mr McKay and Mr Finlayson-Green did not dismiss the claimant immediately on becoming aware that he would be without an HGV licence for at least three months; they only dismissed him on the day he went off sick. Furthermore, there was evidence from Mr Finlayson-Green that suggested he took into account his own experience of diabetes when deciding to dismiss. This suggests that it was not the loss of the HGV licence alone that caused the respondent to dismiss.

126. Bearing in mind the guidance given by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258 we are satisfied that the claimant has proved facts from which the Tribunal could conclude that the respondent has treated the claimant less favourably, because of disability, than it would have treated someone else in the same circumstances. It is therefore for the respondent to prove that it did not dismiss the claimant because of disability.

127. We have accepted the respondent's evidence that the main reason operating in the minds of Mr Finlayson-Green and Mr McKay when dismissing the claimant was that the claimant was legally unable to drive for a minimum of three months and

potentially longer. And whilst Mr Finlayson-Green took into account his own experiences of diabetes, we are satisfied that he did so in the context of considering how long the claimant was likely to be unable to fulfil his HGV driving duties. In so far as the fact of the claimant going on sick leave may have motivated the respondent's managers to dismiss the claimant, we consider this is more likely to be a sign of a desire to avoid paying sick pay rather than conscious or subconscious bias motivated by the claimant's disability itself and/or an aversion to employing drivers with Type 1 Diabetes (or any other disability). Looking at all the evidence in the round, and notwithstanding our misgivings about the reliability of the respondents' witnesses, we are satisfied on the balance of probabilities that the respondent did not dismiss the claimant because of disability itself ie the claimant's disability itself was not an effective cause of the dismissal. The claimants direct discrimination claim is not made out.

Remedy

128. We hope that the parties will be able to agree on an appropriate remedy without the need for a further hearing. If they are unable to do so the following directions apply:

a. The claimant must write to the Tribunal to request a hearing within three weeks of the date on which this judgment is sent to the parties. The claimant must identify any dates within the following four months on which the claimant, his representative and/or any witnesses will not be able to attend a hearing, enclose an up to date schedule of loss, and copy the correspondence to the respondent.

b. Within a further week the respondent must write to the Tribunal identifying any dates within the following four months on which any witnesses the respondent intends to call to give evidence as to remedy and/or its representative will not be able to attend a hearing, enclose a counter-schedule of loss, and copy the correspondence to the claimant.

Employment Judge Aspden

Date 28 December 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
9 January 2018

FOR THE TRIBUNAL OFFICE