EMPLOYMENT TRIBUNALS

Claimant: Mr M Rolston

Respondent: Moving People Limited

HELD AT: Manchester **ON:** 14, 15, 16 and 17 August 2017
7 and 8 November 2017
(in Chambers)

BEFORE: Employment Judge Feeney
Mr R W Harrison
Ms V Worthington

REPRESENTATION:

Claimant: In person assisted by his friend, Wilf Helliwell
Respondent: Mr M Keenan, Consultant

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claims of:

1. constructive unfair dismissal;

2. disability discrimination;

3. beach of contract in respect of notice pay and failure to return tools; and

4. unlawful deduction of wages in respect of overtime;

fail and are dismissed.

REASONS

1. The claimant resigned his employment on 13 May 2015 and claims constructive unfair dismissal, discrimination arising out of a disability, failure to make reasonable adjustments, notice pay, unpaid wages in relation to overtime and breach of contract in respect of the respondent's failure to return his tools.

Claimant's Submissions

2. In relation to constructive unfair dismissal the claimant relied on the following alleged breaches of contract:

(1) Until 2011 he was the only mechanic with 12-21 vehicles to maintain.

(2) In January 2014 whilst at home and in hospital he was receiving work-related phone calls.

(3) In January 2014 whilst off sick other staff were given a pay rise.

(4) In March 2014 working hours were increased from 40 to 45 hours without additional pay.

(5) In January 2014 he felt pressured into going back to work in March 2014 on full-time hours.

(6) Andrew's Parry's inappropriate behaviour, namely –

(a) In May 2011 throwing coffee at the claimant.

(b) In October 2012 locking the claimant in a portaloo.

(c) On 4 June 2014 driving a vehicle behind the claimant.

(d) On 8 and 10 July 2014 sticking his nose into the claimant's business re his purchases from Snap Tools and buying a car.

3. In relation to discrimination arising out of disability –

(1) That Mr Parry drew a boat on his head in 2012 when he was in a collapsed state due to his diverticulitis.

(2) In March 2014 he was pressurised to return to work to full-time hours. This was following an operation for diverticulitis and therefore both matters were said to be related to the disability of diverticulitis.

(3) Failure to make reasonable adjustments. The claimant relied on:

(i) In relation to the diverticulitis the PCP of "the application of the absence management policy in relation to his absence for diverticulitis";

(ii) In relation to dyslexia, the requirement to perform the role to the required standard. The claimant argued that a reasonable adjustment would have been allowing a phased return to work in March 2014. There were no specific reasonable adjustments pleaded in respect of the dyslexia PCP.

<u>Breach of Contract</u>

4. The claimant claims:

(1) that he was entitled to notice pay in respect of his constructive unfair dismissal claim should it succeed; and

(2) that the failure of the respondent to return his personal tools was a breach of contract within the Tribunal's jurisdiction.

Unlawful Deduction of Wages

5. The claimant claims that he was entitled to be paid overtime and he was only paid overtime on one occasion during his employment.

Respondent's Submissions

6. The respondent submitted that a number of the events the claimant relied on did not occur, in particular in relation to Andrew Parry's behaviour. Mr Parry agreed that he had spoken to the claimant about the tools and the car but that the conversation was innocuous; and in relation to the boat, that this was ongoing banter which was not unwelcome to the claimant.

7. In respect of the constructive unfair dismissal the respondent stated that the matters, either cumulatively or individually, did not amount to a fundamental breach or breaches of contract, and further that the claimant had waived or acquiesced in any breach by continuing to work for substantial periods of time in relation in particular to the earlier events he relied on. Further, that the claimant had resigned in response to the outcome of the grievance appeal not the alleged breaches. In respect of older matters the respondent stated that the claimant had delayed too long before resigning. The last event relied on was July 2014.

8. In respect of the claimant's Wages Act claim the claimant's written records of overtime were unreliable as had been demonstrated in Tribunal, and further that the contractual requirements were to obtain approval for overtime in order to be paid and approval had never been sought.

9. In relation to the breach of contract/ the " missing tools" issue the respondent stated that this was not within the jurisdiction of the Tribunal, and if it was the evidence was unreliable .

10. In relation to discrimination arising out of disability in particular, in relation to being pressured to return to work full-time hours, the respondent relied on the doctor's recommendation which did not suggest reduced hours. In respect of the "boat incident" the respondent relied on it not being unfavourable treatment as the claimant was agreeable to it.

11. In relation to reasonable adjustments the respondent stated that:

(1) They never applied the absence management policy to the claimant;

(2) That the claimant did not suffer a substantial disadvantage in relation to his dyslexia in performing his role to the required standard, as there was only one instance where the claimant had failed to perform his role well and this was following a bereavement. Further, in respect of the dyslexia adjustments had been made as far as appeared required;

(3) That the respondent did not know the claimant was at a substantial disadvantage in any event.

(4) That some of the claims were out of time.

Witnesses and Bundle

12. The Tribunal heard from the claimant himself and from his witness, Dominic Parker, who had been a mechanic and was no longer employed by the respondent.

13. For the respondent the Tribunal heard from Glenn Chamberlain, Engineering Director; and Andrew Parry, Operations Director.

Findings of Fact

The Tribunal's findings of fact are as follows:

14. The respondent is an organisation providing transportation services mainly to schools but also to football clubs and general private hire. The claimant was employed as a mechanic from March 2009. The claimant had worked with the owner of the respondent, Mr Stuart Coates, previously at Fraser Eagle. He had also worked there with Andrew Parry and with Glenn Chamberlain.

15. The maintenance of the respondent's vehicles was checked from time to time by VOSA later DVSA. DVSA were also able to make recommendations regarding the respondents mechanic to vehicle ration but never did so.

16. The claimant had an original contract of employment which was signed. Mr Chamberlain said he was unaware of this earlier contract. It was headed "Moving People" and had the claimant's name on it. It stated that his salary was £16,640 per annum and that he worked 40 hours per week. It stated his overtime payment (as approved by the Operations Manager) was at the rate of £8 an hour. It said salary would be reviewed annually in April of each year. The claimant was not entitled to sick pay only SSP, but the respondent had a discretion to pay full sick pay if it wished to do so. There was a later contract introduced by Glenn Chamberlain after he began working for the respondent but this was never signed by the claimant.

17. The claimant relied on an incident from May 2011 when he said that Mr Parry had thrown coffee at him. He brought Dominic Parker as a witness to support this. However Mr Parker had stated that he had not witnessed any such event when he was interviewed in the course of the claimant's later grievance,but said something different at the tribunal. Accordingly we found his evidence unreliable. In addition at Tribunal in his witness statement and under cross examination he only said that he had heard a commotion and seen a coffee cup on the floor, and therefore he could provide no actual corroboration that Mr Parry had thrown coffee at the claimant. Mr Parry completely denied the allegation. We find that we prefer Mr Parry's evidence.

He believed himself friendly with the claimant. The claimant did not raise this incident at the time. It seemed inherently improbable that this would have occurred and no complaint made. Further the claimant provided no context or detail and accordingly we found his assertion unconvincing.

18. The claimant was ill in October and November 2012 and eventually it would transpire that the claimant was suffering from diverticulitis.

19. In October 2012 the claimant said that Mr Parry locked him in a portaloo. There was no corroborative evidence of this from any other colleague. Mr Parry denied that he had done this and thought that the claimant may have misunderstood what had happened and that the lock had a problem. We find that the claimant was locked in the portaloo but this was due to a malfunction of the lock and he misunderstood the situation. It was not deliberate.

20. In June 2013 the claimant was absent from work for a total of 20 days with abdominal pain. Around this time the claimant obtained his diagnosis of diverticulitis, and it was decided that he would have an operation to try and improve the position. The claimant therefore went to have this operation in January 2014. He was in hospital for a week and then at home until the end of March. The claimant complained that he was put under pressure to return to work. Mr Parry stated that he visited the claimant every day he was in hospital, that he would check each day with him if he wanted anything in particular and he would take magazines in which the claimant liked to read, such as a Meccano Club magazine, a tractor magazine and a Classic Mechanics magazine. The claimant was interested in steam engines and built Meccano models. Mr Parry was under the impression during this time that he and the claimant were reasonably good friends, not to a large extent outside work but they did attend steam rallies Mr Parry thought together, although the claimant denied this. He said the claimant would get him tickets for steam rallies and they would attend the same ones. The claimant denied that he was friendly with Andrew Parry at all and said he felt pressurised to get the ticket for him, but we accept that it was Mr Parry's perception that they were friends. In any event Mr Parry's visits to the claimant we find were purely on a friendly, helpful basis.

21. Mr Parry stated that he did attend the claimant's home when he was sick on one occasion with Glenn Chamberlain to introduce the claimant to him, as Glenn Chamberlain had just started and he wanted to keep the claimant abreast of developments. He did not want the claimant to feel left out, but there was no pressure put on the claimant to return to working.

22. None of the witnesses, including the claimant, could fully explain how the claimant's return to work came about. Suffice it to say that the claimant was working one hour a day by the end of February and that this was, he said, as a result of the respondent stating it would be good for morale if he returned to work. However, the respondent's witnesses stated that it was the claimant who suggested this. We prefer the respondent's evidence. We find it inherently implausible that the claimant would have returned to work when covered by a doctor's note unless he wished to do so.

23. The claimant returned to full-time work on 27 March. There was a fit note of that date from his doctor which said he should start off on light duties and have a

slow return to his normal duties. This doctor's note did not say anything about the claimant working part-time during this slow return to full-time duties, and the claimant never complained that he was given his full duties too early. We therefore conclude that the claimant misunderstood the doctor's note as meaning that the slow return was generally a phased return to work in terms of hours rather than in terms of duties. As the doctor's note did not recommend reduced hours the respondent was not acting against the doctor's recommendations when the claimant returned to full-time work on 27 March.

24. The claimant then had another period of sickness absence around 14 May 2014, which described his condition as diverticulitis, dizziness and lethargy, echoing his previous absence. Accordingly Mr Chamberlain asked the claimant's permission to obtain a medical report from the claimant's GP. The claimant gave his permission.

25. The claimant stated that after he had returned to work he had a conversation with Mr Chamberlain on 15 May where Mr Chamberlain suggested that he considered early retirement on medical grounds and that he should look at pensions that he had in order to see whether this might assist him do that. Mr Chamberlain stated that it was the claimant who raised the issue of his Michelin pension and the circumstances on which he might be able to draw it. Mr Chamberlain responded that he did not have much knowledge regarding pensions and that he should speak to an adviser. The claimant had written to the Prudential and to the Michelin Pension Trust on 26 May stating that:

> "I have recently been off work and my employer is talking about retiring me on ill health grounds."

26. The claimant then sought information as to whether he could take any of his pensions early. The letter is corroborative of the matter being raised by the respondent. However, we accept Mr Chamberlain's evidence as we found him a convincing witness and also we found that the claimant did misinterpret situations.

27. A return to work did take place on 28 May. This had a heading "Accommodations if any" and stated:

> "I have discussed with Mark if there are any special measures or accommodations required in order for Mark to return to work and carry out his normal duties. Mark advised he doesn't know of any special measures or accommodations required.
>
> *Employee Comments*
>
> Mark feels he is able to return to work and carry out his normal duties other than that he has no further comments to make."

28. This was signed by the claimant and Mr Chamberlain.

29. Mr Chamberlain requested a doctor's report on 26 June. He described the claimant's job and his absence and asked a series of questions. The questions were:

> "(1) Is Mark currently suffering from any illness or condition? If so, how long do you anticipate this may last?

(2) Do you consider that they may be fit to continue in their position and carry out all their duties as described above?

(3) Do you consider the above detailed absences from work to be reflective of this condition?

(4) Could you provide any information on what absence level could be expected going forward for an employee with this condition?

(5) If you do not believe they will be able to carry out their position, it would be helpful if you could advise me what if any kind of work they are able to do?

(6) Do you consider that there are any reasonable adjustments I should consider to facilitate their ability to perform their role?

(7) Could you provide information on any relevant Mark is receiving or has been referred for?

(8) Do you consider Mark has or will have a disability under the meaning described in the Equality Act 2010?

(9) Could you also advise what if any effect his condition has on his day-to-day activities outside work?

(10) Please give any additional information that might assist in making our assessment."

30. Dr Ali replied to this. He described himself as the claimant's principal GP throughout the course of his illness over the last 18 months, although the claimant denied this.

31. In relation to the questions Dr Ali said the claimant would probably get worse as he gets older but the Dr Ali thought the claimant was fit to continue in his current position. He said it was quite common for patients to be off work if they have a flare-up but Dr Ali expected the claimant's episodes to become more infrequent. Dr Ali suggested in terms of reasonable adjustments whether it would be a good idea to look at the hours or work pattern of the claimant over the next 6-8 weeks so that the claimant felt less stressed. Dr Ali stated that the claimant did not have a disability under the Equality Act 2010 and he was unaware of any effects on the claimant's outside life. This report was received on 15 July however nothing specifically happened following the receipt of this report as other events intervened.

32. The claimant had booked time off as holiday from 17 July to 23 July. Unfortunately the claimant's father died suddenly on 18 July. The claimant's mother asked him not to return from his holiday as his father would not have wanted him to spoil his holiday, which was at a steam engine event. On 22 July the claimant undertook a procedure at hospital in respect of his diverticulitis and then returned to work on 23 July. The respondent was unaware of this hospital appointment and procedure. The claimant believed that he had undertaken the inspection which became the basis of disciplinary action on 23 July, his first day back at work after he had had the bereavement. It was agreed that the claimant could have bereavement

leave, Mr Chamberlain thought it was around 21/22/23 July but we find it occurred on 30 July and the days afterwards as the claimant's father's funeral was 30 July. The claimant asked for three days off and was given three days off.

33. On doing the inspection on 23 July the claimant missed some serious issues. The vehicle had an air leak from part of the system and the brake lining pad was insecure.

34. Following these errors being revealed on 4 August by the DVSA inspector, Mr Chamberlain and the claimant dis-assembled the brakes, saw the fault and rectified it. The claimant advised Mr Chamberlain that he had been the person who had inspected the brakes. They had a discussion and at the time the claimant said he understood the seriousness of the situation but said he had missed it, that he had issues with his vision at close range when not wearing glasses. He said he had not worn his glasses because they were expensive and he only had one pair and did not want to damage them. It was acknowledged that he had openly and honestly acknowledged the defect, but on 14 August the claimant was asked to attend a disciplinary hearing for alleged failure to properly inspect the braking system on the vehicle. It was said it would be regarded as misconduct and a statement of events was produced. It was stated the claimant could be awarded a warning or a final written warning if the matter was found proven.

35. At the formal disciplinary meeting on 15 August the claimant stated that his "head was up my backside with my dad and I have to hold my hands up". There was a discussion about the lighting in the garage. He said they could do with better light. He said he might have seen it had the vehicle been outside rather than inside. Mr Chamberlain asked if the bereavement of his father affected his work, and the claimant said it had. The claimant said his father's bereavement was on 18 July and he was off work until Wednesday 23 July. Mr Chamberlain stated this was the sixth day after his bereavement and they discussed what lighting the claimant had used.

36. On 19 August Mr Chamberlain issued the claimant with a written warning. He went through the points the claimant had made:

(1) That the three day schedule for the pre MOT inspection was challenging. Mr Chamberlain's view was that the DVSA inspector only had 50 minutes for the whole MOT test and he had managed to spot it, therefore he felt there was sufficient time for the claimant to have spotted this also.

(2) That it was agreed he had used a good inspection lamp and therefore lighting was not an issue.

(3) That his recent bereavement was a factor.

37. Mr Chamberlain mentioned that the claimant had not travelled home on learning of his father's death but stayed at the rally until 20 July. The claimant was understandably upset by this as Mr Chamberlain appeared to be implying the claimant was not bothered about his father's death as he had not returned from holiday. Mr Chamberlain said he was sympathetic to the claimant's bereavement but

did not feel it excused the error, and said he was issuing a first written warning which would be disregarded after six months.

38. The claimant went off sick from 21 August. His sick notes from then onwards were described as "grief reaction, bereavement, depression and mild depressive episode". The claimant suffered a number of incidents following his father's death. His partner's mother also died and he returned home to find his partner in their kitchen covered in blood, having suffered an accident.

39. On 9 September the respondent wrote to the claimant to ask him to attend an informal welfare meeting but his partner stated he was too unwell to speak to Mr Chamberlain.

40. The respondent then wrote to the claimant again on 16 September and asked him questions to be answered in writing if he did not wish to meet again with the respondent. The claimant did reply to that. He said that he had been subject to multiple bereavements, his immediate members of his family had health issues and he felt insensitive pressure was put on him given that he had been on sick leave for a month. He estimated he might return within three months. He said that he had felt harassed, felt that he had been put under pressure after having major surgery to return to work before he was fit enough, that his father then died followed by the death of his partner's mother, and his partner had accident the following day as well.

41. On 29 September the respondent requested that the claimant cooperate with them obtaining a further health report from an Occupational Health provider, a Dr Andrews. Again they described the claimant's role, described his absences and asked a number of questions similar to the previous questions, but in this case relating to the depression. Dr Andrews stated that he thought the significant depression would be covered by disability legislation but that the claimant's diverticulitis was also causing him some difficulty.

42. The claimant was invited to a further meeting on 31 October to discuss his absence again. The claimant requested a postponement of that and a further date of 11 November was proposed.

43. The claimant wrote to the respondent on 4 November saying that in respect of Dr Andrews' letter he thought the doctor was confused, where the doctor said that, "A strong negative perception on the part of Mr Rolston regarding his relationship with his employer which appears to start at the end of 2012". The doctor also talked about there being no immediate chance of a return to work.

44. A meeting then took place on 11 November. The claimant was allowed to attend with Wilf Helliwell, his friend, who was outside the normal definition of somebody allowed to attend such a meeting. In this meeting the claimant said his diverticulitis was getting no better. The claimant stated he could not suggest any reasonable adjustments which could be made and added, "I'm open to any reasonable ideas as to how we can settle this matter to our mutual advantage". An indication we find that he was looking for a settlement to leave his employment

45. The claimant complained about more hours and more work. He referred to doing extra hour a day He said that he got a note of the extra hours. He felt that the

hours had been increased. This referred to the fact that when Mr Glenn Chamberlain took over he had introduced clock cards, partly in order to have a better idea of what hours people were working and when he ascertained that the usual working hours for mechanics were 45 hours a week he issued a new contract to that effect. In evidence he said he was unaware of the earlier contract stating that the claimant was employed for 40 hours a week. The claimant also went on to complain that he had never had enough help with his work at the beginning of his employment. He complained about having phone calls in hospital and at home.

46. There were no adjustments that he could suggest to help him to return to work. Mr Chamberlain asked whether there was any other role that he thought he could do. He said "I don't know, I can't settle into anything". Glenn Chamberlain mentioned that there was the tours and excursions business administrator's job. Mr Helliwell criticised Glenn Chamberlain for this because he said he knew the claimant would not be able to do this job because of his dyslexia, but Mr Chamberlain said that was a vacancy and he did not want to make assumptions about the claimant's abilities.

47. The claimant said that he was unfit and he did not want to be around or facing people. He had had enough now so the meeting was drawn to a close. Mr Helliwell commented that the meeting had been fair, straight and well conducted.

48. The respondent arranged another meeting for 8 January. It was mentioned in the invitation letter that he might be put on notice of termination but they hoped this would not be the case.

49. On 8th January the claimant said he did not feel he could return to work for at least a couple of months and that that would probably be on lighter duties, but he later said he could not suggest light duties or hours at the moment. There was a break in the meeting and when he came back the claimant stated that, "I think that the pressure and stress and harassment I have had is likely to continue when I return to work and is unlikely to help the situation".

50. Mr Chamberlain said that previously the claimant had said there were no issues with the employer but the doctor had raised it and the claimant had said that the medical practitioner was confused, so he asked the claimant could he expand on what harassment he was referring to. The claimant said he had been subjected to verbal and sexual abuse, had coffee thrown at him and had no time to maintain the vehicles. The claimant said that it was Andrew Parry coming into the garage, messing about, asking him for a' blow job' and different comments. The claimant said he had reported it to Stuart but that Stuart had taken no notice. The claimant said he had asked Andrew Parry to stop making these comments but he had not done so. He asked him whether it was banter or had it crossed the line. The claimant said he could take banter but it had crossed the line and that it had caused his mental problems. Mr Chamberlain asked the claimant if he wanted it treating as a formal complaint and he said he did. Mr Chamberlain assured the claimant that if he returned to work nothing like that would continue.

51. The claimant was then invited to a grievance meeting on 12 January. The claimant provided additional information for that grievance meeting which his partner typed out for him. The issues that he raised were:

(1) that he felt he had been pressurised to returning to work on full-time hours and that he should have had three months off;

(2) that he had had to do too much work when he had first started at Moving People;

(3) that he was on call 24 hours seven days a week with no additional pay;

(4) that the contract was changed from 40 hours a week to 45 without any additional pay or notification, and that others had been given a pay rise whilst he was off sick;

(5) that he had not been paid for any additional hours and had no time off in lieu; and

(6) that Andrew Parry had behaved inappropriately in relation to verbal, sexual and physical nature with constant innuendos and touching in intimate areas, such as grabbing his bottom, and he felt it was getting worse since he had been ill.

The claimant then gave examples of the sexual comments he said Mr Parry made. However, the claimant did not pursue any of those comments in the Tribunal.

52. Further the claimant mentioned that in 2012 Mr Parry had drawn ships on his head when he was waiting for the ambulance, and that it was Mr Parry's suggestion that his head looked like a map of the weather forecast; that he had run the work's car at him from behind and "bibbed" the horn; that he had locked him in the portaloo (no date given); that he had had a cup of coffee thrown at him by Andrew Parry; that Andrew Parry had stated why did he not get a new car or use his partner's, and made comments on his purchases from the Snap On van (a tool provider). The claimant said the final straw was in July and August with the death of his father and the disciplinary. He felt that no consideration was taken of the fact that his father had died in the same week, and that Mr Chamberlain had commented that he had not come back from his holiday, therefore implying that he was not bothered about his father. He said the fact his mother had had one of her kidneys removed because of cancer, the loss of his father, his partner's mother then died and his partner had a serious accident in the home all within three weeks.

53. Mr Chamberlain held a meeting on 14 January then to discuss these issues, and Mr Helliwell was allowed to attend again.

54. The claimant had alleged he had spoken to Mr Chamberlain about Andrew Parry's behaviour but Mr Chamberlain said he did not have a conversation with him about it until it was raised in the capability procedure. Mr Chamberlain had then told him then to put a grievance in. The claimant said "Dom and Joe" had had similar issues and Joe had raised it with Mr Chamberlain. Mr Chamberlain denied this.

55. Regarding the disciplinary, Mr Chamberlain said the claimant could have appealed but at the time he seemed to accept the decision and was fine about it. The claimant was asked whether he had any documents regarding the working of extra hours but he said "no", whereas in fact the claimant produced at tribunal his own private timesheets.

56. Mr Chamberlain then interviewed Andrew Parry and he put the specific sexual comments to him. Mr Parry said he was shocked. He thought that the claimant was a friend, even before 2007. They had spent time together at rallies and steam fairs. He had bought his Christmas turkeys from him. He agreed that garage banter could be sexual but nothing out of the ordinary. Mr Parry said he did not recall any of the comments and that references were made to girls at Rays (to whom they made a delivery, so sexual banter was not strange to him). He said it was just guy talk. Mr Parry stated the claimant read pornographic material; he had it in a drawer. Mr Chamberlain raised the boat issue with Mr Parry. Mr Parry said it was the claimant who made fun of himself in garage banter. He often used to bow his head down and say "what will the weather be like today?" and refer to his receding hair "like a map on his head" and ask how the weather was coming on:

> "One day he said the same and I drew small ships on his head, quite intricate detailed ships as it happened; enjoyed it, he wasn't ill at the time, he went showing his head to others in the garage having a laugh. But later in the day he did have a collapse, he did have to ring the ambulance but this was later in the day."

57. Mr Parry said it is possible he may have been near the claimant in the car and "bipped" his horn to make him aware of it. In respect of some of the other issues, Mr Parry said he was not in work on 6 June one od the dates the claimant had relied on.. He did not recall the portaloo issue or issues regarding bringing bags in saying they would be useful to him (as colostomy bags). He had had a discussion with him about the pros and cons of having one. He stated he had not thrown a cup of coffee at anybody.

58. Mr Parry agreed that they had had a conversation about the claimant's car as the company had paid for him to have various repairs done to it, including a clutch, and it was done in the company's time, and there was just a discussion about whether the repairs were getting to the point where it would make more sense to buy a new car. The claimant's partner had a mobility car and Mr Parry had simply wondered if the claimant could use that, but the claimant said there were restrictions on its use and that was the end of the discussion.

59. Regarding the "Snap On" tools, Mr Parry was not sure what that was about as he himself had bought lots of tools from Snap On in any event.

60. Regarding the hospital visits, Mr Parry said he did visit the claimant but only to check how he was and to bring him anything he might need, not to pressurize him to return.. He bought him magazines and rang him to see if he needed anything. Mr Parry said the claimant had never asked him to stop visiting the hospital, making any comments or anything else. Regarding the telephone calls the claimant in the second grievance interview however only referred to two from Mr Parry, one of which was Mr Parry asking him if he wanted Mr Parry to pay a Snap On Tools bill that had come in whilst the claimant was sick in hospital, therefore clearly Mr Parry was seeking to help the claimant in this regard rather than him building up an unpaid debt.

61. Mr Chamberlain also interviewed Dominic Parker on 20 January without specifying any names and the only sexual conversations that he could recall were in

relation to the Rays delivery drivers. He said they were all up for a laugh and he had not seen any unwanted banter or harassment, and he had never reported any himself. He said everybody took part in it.

62. Joseph Stokes gave similar evidence, as did Steve Stokes who said nobody was singled out. Stuart Coates were also interviewed. He said nobody had reported things formally or informally. He said he had spoken to Andy Parry about speaking too harshly to staff, but no other issues had been raised.

63. Mr Chamberlain then arranged a second grievance meeting on 30 January. This had to be re-arranged for 6 February. He explored some of the issues further. The claimant said that Andrew Parry and Glenn Chamberlain visiting him at home when he had had his operation made him feel under pressure to return. Regarding phone calls he said Andrew Parry had rung him for the pin number for the credit card, and for the number of the Snap On Tools (see above: Mr Parry was arranging to pay the claimant's Snap On Tools bill if he wanted it). In evidence he suggested that Mr Parry had got Dominic Parker to ring him a number of times but he had not referred to this in his witness statement, nor had Dominic Parker given evidence to that effect. There had been a few technical questions from Dominic Parker. The claimant was asked to describe his on call duties. He said that at Christmas three years ago (2011) he had been called out to fix a vehicle. He said he was not writing it down. Mr Chamberlain asked him if he had got any extra information but he did not volunteer what he would later rely on, which were the timesheets. They discussed whether he was under too much pressure in the early days of the business and that he felt Andrew Parry was watching him.

64. The claimant said that the level of innuendo was the same as it had been before but he just could not take it anymore. We think this was a significant comment from the claimant, his perception did change and he looked back at earlier incidents in a different light. He did agree he had given some banter back but he had got to the point where he could not take it anymore, and he provided further detail of when the incidents with Andrew Parry had arisen. The claimant provided diary notes. He said that the other mechanics, particularly Dominic Parker, had witnessed the comments. The claimant was also asked about pornographic magazines found in his desk drawer. He said they were brought in a black bin bag for one of the lads on site.

65. Dominic Parker was interviewed and denied any knowledge of any sexual impropriety but did say the claimant had referred to a weather map on his head in a joking manner and Joe Stokes also said this is what the claimant had said, and that he was joining in joking about it. Mr Parker also said that the claimant had shown him pornographic magazines which he kept at work from when he started work with the respondent aged 16. mr Chamberlain looked at the dairy entries the claimant gave him but they did not fir with the allegations he had made.

66. Mr Chamberlain wrote to the claimant with his conclusions on 19 March stating that he was not upholding his grievance. In particular he stated that the home visit when he was on sick leave was to reassure him he was a valued employee and to keep him abreast of developments, to keep him involved given that Mr Chamberlain had just joined the business. In relation to telephone calls, it was believed that work colleagues felt the claimant was their friend and they had a good relationship and therefore they did this off their own bat; management did not

sanction them. In respect of being put under pressure with too many vehicles, the company had never been criticised by DVSA for this and now they had more mechanics. Regarding the contracts when Mr Chamberlain had come, he had introduced clock cards for three months to see what hours everybody was working. It was 45 a week and therefore had issued contracts to that effect (still at this stage Mr Chamberlain did not know about the earlier contracts).

67. Regarding pay increases, these had taken place for apprentices to ensure they got the National Minimum Wage. Mr Chamberlain assured the claimant he was a valued employee.

68. In relation to the comments allegations, it was agreed that Andrew Parry had drawn ships on the claimant's head but no evidence it had happened when the claimant was unwell; that other people agreed that he had embraced the culture around his head looking like a weather report, but he was agreed it was unacceptable and would assure the claimant he would put a stop to it. Regarding the car, it was agreed there was a conversation but it was not a negative one. Mr Chamberlain advised the claimant he could appeal. The claimant did appeal on 26 March.

69. In his appeal the claimant reiterated the point out returning to work too early; about the telephone calls; about the coach to mechanic ratio; he felt he was put under excessive pressure which caused his condition to deteriorate severely. The increase in working time, pay increase, not “being valued”, Andrew Parry’s harassment of the claimant, and that Mr Chamberlain had not explained how he came to the conclusions on the 14 allegations against Andrew Parry, particularly as he had got diarised notes regarding some of the incidents.

70. The company then appointed an independent consultant from Peninsula Business Services to handle the matter, and he met with the claimant on 17 April. His name was Mr Kuldeep Chehal. He also interviewed Glenn Chamberlain, Andrew Parry and Stuart Coates. Mr Chehal’s conclusions were that:

(1) He accepted Mr Chamberlain’s explanation for the visit to the claimant's home in February 2015; that it was to keep him involved.

(2) Regarding the telephone calls he accepted Mr Chamberlain’s explanation that the calls were not sanctioned by management.

(3) In respect of the pressure DVSA had accepted there were sufficient resources to maintain the required number of operator licences that the company held.

(4) Regarding the increase in hours, new contracts were introduced by Mr Chamberlain when he took over and although the claimant did not sign his contract he never objected or raised a grievance at the time so he continued working under the terms of the contract, accepting the terms by conduct.

(5) Pay review – Mr Chehal said that he was told the apprentices had their pay review earlier and the claimant accepted he too had a pay review

some months after the apprentices had their review, so they were at different times but one had been undertaken for the claimant.

(6) The claimant did not feel valued at the company – Mr Chehal explained that Mr Parry had visited the claimant everyday and that Mr Chamberlain had visited him at home to reassure him he was a valued employee, and that he had been reassured again in the grievance outcome letter dated 19 March.

(7) An allegation of sexual harassment – Mr Parry denied the allegations and the other workers, Steve Stokes, Joe Stokes and Dominic Parker, all denied knowledge of any sexual harassment by Mr Parry.

(8) In respect of the boats, this was agreed but it was not done when the claimant was unwell.

71. In view of the evidence stating that there was no further sexual harassment and that there was also evidence from colleagues that the claimant joined in the banter, Mr Chehal decided that Mr Chamberlain's findings in this regard, that there was no evidence to substantiate the complaints, was correct.

72. On 13 May the claimant wrote his letter of resignation stating:

> "As a result of the decision made by Kuldeep Chehal and after due consideration of this decision has totally destroyed the mutual trust and confidence that exists or ought to exist between an employer and an employee. Indeed after suffering in silence so many indignities for so long the total rejection of all my concerns was the last straw. I therefore tender my resignation with immediate effect."

73. Before the respondent had received this, which was sent on 13 May, they had sent a letter of 14 May inviting the claimant to a further medical capability meeting on 18 May.

74. Mr Chamberlain took the decision to gather up all the claimant's tools following his resignation. He put them in a locked shipping container and the claimant collected these on 16 June. At the time the claimant claimed he was missing a small black toolbox full of sockets and some large spanners. He showed the claimant the small black toolbox, the lower section of the toolbox and some large spanners. He claimed there were more large spanners in the bottom drawer of the respondent's toolbox. Mr Chamberlain said he had already collected all the claimant's tools from around the garage and put them in this container. The claimant, he felt, became aggressive and agitated and Mr Chamberlain said he refused to argue with him further but helped him load the tools onto his trailer.

75. The claimant then employed a firm of solicitors to write to the respondent on 1 July about his tools as he had many missing.

76. On receiving this letter Mr Chamberlain again searched the garage area but could not find any further tools belonging to the claimant and the respondent wrote to the claimant on 4 August to advise him they had searched further and there was nothing more they could do.

77. The claimant brought documentation to the Tribunal to show the tools he had bought from Snap On van and he alleged on that basis that there were further tools missing, obviously having taken off the ones that had been returned. The respondent stated they could help him no further. They had searched the premises. They believed that he kept some of his tools at home. They may have gone missing at home rather than at the garage. The claimant believed the respondent was still using some of his tools.

78. Regarding overtime payments, the claimant brought sheets that he personally had devised and completed to keep a record of his overtime. We found this very strange as the claimant had denied he had any record of this during the course of the grievance and further that on looking at some of these and the dates they did not appear to be entirely consistent with the dates the claimant worked, nor did they arithmetically add up as suggested by the claimant.

79. Further, it was noted that the claimant had been paid overtime on one occasion in May 2010 when Mr Parry's agreement had been obtained. The claimant's contract, which he has signed and which he relied on, stated that he needed to ask permission of the Operations Manager for any overtime.

Training 2000

80. The claimant referred to documentation from Training 2000 when he undertook a course in 2010/2011 where it was recorded that he had learning needs in respect of dyslexia. It was noted that the claimant did not want to complete a free writing assignment, and that he was weak in that area and would like support. However he was not required to do any extensive free writing in the course of his job.

81. In respect of his assessment the claimant was assessed by his company as having As and A+s save in relation to relationships (B) and self confidence (C). There was reference to him receiving a dyslexia assessment which indicated he would be given extra time and a re-draw scribe if necessary.

82. In September 2011, the date of the final review, the claimant received A+s for everything save for initiative and self confidence for which he received an A from his employer.

83. In relation to his dyslexia, the claimant was known to have an aide memoire in terms of a sheet of paper that had written down on it the main words he needed to use in his work.

The Law

Constructive Dismissal

84. An employee may lawfully resign employment with or without notice if the employer commits a repudiatory breach. Resignation can be interpreted as an election by the employee to treat himself as discharged from his contractual obligations by reason of the employer's breach. This is known as constructive dismissal and is a species of statutory unfair dismissal by virtue of section 95(1)(c) Employment Rights Act 1996.

85. It was described in **Western Excavating (ECC) Limited v Sharpe [1978]** by Lord Denning as follows: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed".

86. An employee must act reasonably quickly in responding to a repudiatory breach of contract otherwise s/he may be taken to have accepted the continuation of the employment contract and affirmed the contract. However, mere acceptance of salary without the performance of any duties by the employee will not necessarily be regarded as an affirmation of the contract following an employer's repudiation. In **W E Cox Toner (International) Ltd v Crook 1981 EAT** it was said that delay by itself was not enough there either had to be an additional factor(s) or continued delay. An employee can work 'under protest' but must make it clear that he or she is reserving their right to accept the repudiation of the contract. The EAT also considered this matter in **Chindove v William Morrison Supermarkets Limited [2004]** which said that:

"He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue, that the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case the employee is at work then by continuing to work for a time longer than the time in which he might reasonably be expected to exercise his right he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time, all depends upon the context. Part of that context is the employee's position."

87. A claimant can rely on implied or express terms of the contact. Express terms can be written or oral. The claimant relied on the breach of the implied term of trust and confidence in this case as well as the duty to provide a safe working environment and to investigate a grievance.

88. In **Wood v WM Car Services (Peterborough) Limited [1982]** the Court of Appeal approved the development of the implied term of trust and confidence. It was finally given House of Lords' approval in **Malik v BCCI** in 1997 where Lord Stein stated that the question was whether the employer's conduct so impacted on the employee that viewed objectively the employee could properly conclude the employer was repudiating the contract. It is not necessary to show that the employer intended to damage or destroy the relationship of trust and confidence. The court said the Tribunal should '"look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it".

89. In **Malik** the formulation is that the employer "must not conduct itself in a manner calculated and likely to destroy confidence and trust" and it is relevant to consider whether the employer's conduct in question was "without reasonable and proper cause". This is not the same as the range of reasonable responses test. However clearly if there was proper cause the claim will fail.

90. In proving breach an employee may pray in aid evidence of past repudiatory breaches even though he waived his right to object to them at the time. **Lewis v Motorworld Garages Limited [1985]**.

91. A failure to make adequate investigations into allegations of bullying or harassment can amount to a fundamental breach of contract – **Reed and another v Stedman EAT [1997]**.

92. Regarding breach of a suitable work environment/health and safety this was established in **Walton and Morse vs Mrs Jill Dorrington EAT (1997).**

93. The particular incident which causes the employee to leave may in itself be insufficient to justify resignation but may amount to constructive dismissal if it is the last straw in a deteriorating relationship. This means that the final episode itself need not be a repudiatory breach of contract although there remains the causative requirement that the alleged last straw must itself contribute to the previous continuing breaches by the employer, **Waltham Forest Borough Council v Omilaju [2004] CA),** and not be an unjustified sense of grievance.

94. Therefore the claimant has to show that the matters he relies on either individually or cumulatively amounted to a breach of the implied term of trust and confidence. He then has to establish that that breach played a part in his decision to resign (here a resignation letter maybe of evidential value but it is not determinative of what was the effective cause for the resignation) and he has to show that he has not unduly delayed or affirmed the contract.

95. A claimant can also rely on specific breaches without a continuing course of conduct however if they are in the past an argument maybe made that the claimant has either affirmed by not doing anything about it or it may found as a fact that the claimant has not resigned because of that breach given the passage of time.

96. The respondent can argue that there was a fair dismissal if constructive dismissal is found. Here the respondent relied on the findings of the claimant's pornographic magazines and the fact that he shared these with Dominic Parker when Dominic Parker was 16, and the fact that the claimant had been off sick for a considerable period and there seemed to be little prospect of a return to work.

Disability Discrimination

97. The claimant makes a claim under section 15, something arising in consequence of disability. Section 15 states that:

> "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."

98. In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe (2015) EAT** which stated that:

> "In a section 15 claim a Tribunal must firstly establish that the disability has the consequence of something; and that the treatment complained of as unfavourable was because of that particular 'something'.

99. An employer also has a defence to a section 15 claim if they can establish they had no knowledge of the claimant's disability (section 15(2)). Section 15(2) also states that it should be established that the employer could not be reasonably expected to know of the employee's disability. The employer, in accordance with the EHRC Employment Code, must do all it reasonably can to find out if the person has the disability, and knowledge held by the employer's agent or employee, such as Occupational Health adviser etc., will usually be imputed to an employer.

100. In **Hardys and Hansons PLC v Lax [2005]** Court of Appeal it was said, in respect of justification:

"It is for the Employment Tribunal to weigh the real needs of the undertaking expressed without exaggeration against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate…A critical evaluation is required and is required to be demonstrated in the reading of the Tribunal. In considering whether the Employment Tribunal has adequately performed its duty appellate courts must keep in mind the respect due to the conclusions of the fact finding Tribunal and the importance of not overturning a sound decision because there are imperfections in the presentation. Equally the statutory test is such that just as the Employment Tribunal must conduct a critical evaluation of the scheme in question, so the appellate court must critically consider whether the Employment Tribunal has understood and applied the evidence and assessed fairly the employer's attempts at justification."

<u>Section 20 – Reasonable Adjustments</u>

101. The claimant also makes a reasonable adjustment claim. Section 20 says:

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

The duty comprises the following three requirements. 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 such steps as it is reasonable to have to take to avoid the disadvantage."

102. In **The Royal Bank of Scotland v Ashton [2011] EAT** it was stated that the PCP must be 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, and by comparing to non disabled comparators it can be determined whether the employee has suffered a substantial disadvantage. The correct comparators are employees who could comply or satisfy the PCP and were not disadvantaged.

103. In **Environment Agency v Rowan EAT [2007]** the EAT said:

"A Tribunal must go through the following steps:

(2) Identifying the PCP applied by or on behalf of the employer;

(3) The identity of non disabled comparators where appropriate;

(4) The nature and extent of the substantial disadvantage suffered by the claimant."

104. Serota J stated:

"In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments…without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed amendment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."

105. Paragraph 21 of schedule 8 to the Equality Act provides that:

"A person is not subject to the duty if he does not know and could not reasonable be expected to know that an interested disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace or a failure to provide an auxiliary aid."

106. This encapsulates the idea of constructive knowledge i.e. that either someone within the respondent's organisation who is responsible for these matters, such as Occupational Health, knows of the substantial disadvantage, or that the respondent should have known from all the factors available but closed their eyes to it.

107. Further, the adjustment has to be reasonable and effective. Section 18B(1) of the Disability Discrimination Act 1996 (these matters are no longer in the Equality Act but they are useful to have in mind in considering what would be a reasonable adjustment) set out some factors to take into consideration as follows:

"(1) The extent to which the step would prevent the effect in relation to which a duty was imposed.

(2) The extent to which it was practical for the employer to take the step.

(3) The financial or other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities.

(4) The extent of the employer's financial and other resources.

(5) The availability to the employer of financial or other assistance with respect to taking the step.

(6) The nature of the employer's activities and size of its undertaking and matters relevant to a private household."

Jurisdiction/Time Limits

108. Section 123(1)(a) provides that:

> "Complaints ought to be presented within a period of three months starting with the date of the act to which the complaint relates."

109. Section 140B of the Employment Act 2010 provides for extensions to the time limit to facilitate early conciliation prior to the commencement of proceedings and that the time limits are extended accordingly.

110. The claimant completed early conciliation notification on 11 February 2016 and was issued with a certificate on 2 March 2016. He presented his complaint to the Tribunal on 30 March 2016. Therefore every complaint relating to events which occurred prior to 11 November is prima facie out of time (respondent's submissions). This, the respondent submitted, included allegations 1-19, 23 and allegation 2 in relation to protected disclosures.

111. In relation to reasonable adjustments section 123(3)(b) provides that:

> "A failure to do something is treated as occurring when a person decided upon it, and it requires the Tribunal to decide when something should have been done and the claimant has to bring his claim within three months of that date."

112. The respondent submitted that the claimant considered the reasonable adjustments ought to have been made prior to his dismissal on 12 November 2015 and accordingly allegation 15 is also out of time.

113. Where a matter is ostensibly out of time a Tribunal can find that there has in fact been a continuing act of discrimination. This is set out in section 123(3)(a) of the Equality Act 2010 which provides that:

> "An act of discrimination which extends over a period shall be treated as done at the end of that period."

114. The leading case on this issue is **The Commission of Police for the Metropolis v Hendricks [2003] Court of Appeal**. In **Hendricks** the Court of Appeal made it clear it was not appropriate for a Tribunal to take too literal an approach to the question of what amount to continuing acts by focussing on whether the concept of policy/rule/scheme/regime or practice fit the facts of the particular case. In **Hendricks** the claimant made 100 allegations of discrimination against some 50 colleagues. The Court of Appeal held that it was not necessary to discern a policy. The focus should have been on whether the Police Commissioner was responsible for an ongoing situation or continuing state of affairs in which female ethnic minority officers were treated less favourably, or was it an act extending over a period or a session of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

115. The Court of Appeal, however, in **Robertson v Bexley Community Centre** took a different approach, but Hendricks was then confirmed in **Lyfar v Brighton & Sussex University Hospital Trust [2006]** Court of Appeal. It was said that:

> "The claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs."

Just and Equitable

116. If a claim is out of time the Tribunal has a broad discretion to extend the time limit where it is satisfied that it is just and equitable to do so under section 123(1)(b) of the Equality Act 2010. The burden is on the claimant to establish that it would be just and equitable.

Unlawful deduction of wages

117. Under section 31 of the Employment Rights Act 1996 a worker has the right not to suffer unauthorised deductions. A "deduction" is defined in the following terms:

> "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated…as a deduction made by the employer from the worker's wages on that occasion."

118. The reference in parenthesis to "after deductions" is a reference to statutory deductions such as tax and national insurance. In this case the claimant claimed that he had worked overtime and not been paid for it and therefore he is required to establish:

(1) that he did work that overtime;

(2) that payment for that overtime was "properly payable" to him; and

(3) that it was not paid.

Breach of Contract

119. The contractual jurisdiction of the Tribunal is governed by section 3 of the Employment Tribunals Act ("ETA") [1996] together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Under section 3(2) of the ETA and article 3 of the Order a Tribunal can only hear a contractual claim if the claim is arises or is outstanding on the termination of the employee's employment and must seek one of the following:

(1) damages for breach of a contract of employment or any other contract connected with the employment;

(2) recovery of a sum due under such a contract;

(3) recovery of a sum pursuant to any enactment relating to the terms of performance of such contract.

120. In relation to "connected with employment" a claim was brought by a director in respect of the repayment of a loan he had made to his employers. The Tribunal in

that case decided that was not a contract connected with his employment. However, another Tribunal has found that a breach of a compromise agreement could be pursued in the Tribunal; particularly this was where the compromise agreement was contemporaneous with the end of the employment. If, however, the breach was after the termination of employment that cannot be brought in the Tribunal. This was confirmed in **Miller Brothers & F P Butler Ltd v Johnson [2002] EAT**.

121. We have also considered whether a tern could be implied into the contract. The legal tests for implying terms into a contract are:

(1) that the term is necessary in order to give the contract business efficacy; or

(2) it is the normal custom and practice to include such a term in contracts of that particular kind; or

(3) an intention to include the term is demonstrated by way in which the contract has been performed; or

(4) the term is so obvious that the parties must have intended it.

Conclusions

Constructive Dismissal

122. We have considered the matters the claimant relies on as fundamental breaches of contract individually and collectively:

(1) Until 2011 he was the only mechanic with 12-21 vehicles to maintain:

(a) The claimant did not identify a specific implied term that he said had been breached but on the basis that it would be that the employer has an obligation to provide reasonable support and assistance, we have considered the evidence. The respondent submitted in evidence from Andrew Parry that no objections had been made by VOSA at the time (now DVSA) regarding the number of mechanics compared to the number of vehicles, and neither of course had the claimant complained about this at the time. In fact there was another mechanic, as Mr Parry was a mechanic and would do his share of the work. Following this a number of mechanics grew to five including the claimant and apprentices.

(b) We have accepted the respondent's evidence that Mr Parry assisted in looking after the vehicles and that he had primary responsibility for that. Therefore we accept the claimant had a reasonable amount of assistance and therefore that the implied term has not been breached.

(c) If we are wrong on this then we would say it was not a fundamental breach in a situation where the claimant had not communicated that he was in any difficulties not was there any

evidence he was in any difficulties. Further, the claimant's evidence was that by 2011 there were sufficient mechanics and therefore the claimant has affirmed and accepted any repudiatory breach by continuing to work from 2011 to 2015.

(2) In January 2014 whilst at home and in hospital he was receiving work related phone calls:

(a) Again no particular implied term was identified and therefore we assume it would be the respondent had an implied duty to consider the claimant's health. However at the same time the claimant would owe a duty to the respondent as far as was reasonable to provide them with assistance whilst he was off sick.

(b) In addition we accept the respondent's evidence that management did not phone the claimant, it was his colleagues and they felt that they were in a position to do that due to the fact that they had a friendly relationship with the claimant. The claimant asserted that when Dominic Parker rang him he had been instructed by Andrew Parry to do so although he gave no primary evidence of that and Dominic Parker was not asked about that either but he attended as a witness, accordingly we do not accept that that was the case.

(c) As far as the two phone calls from Andrew Parry were identified, one concerned the claimant's debt to Snap On Tools which Andrew Parry generously offered to settle on behalf of the claimant as a temporary measure. He was being helpful and therefore there cannot be any breach of contract involved in this. As only one call was therefore potentially unnecessary that cannot be a breach of contract or certainly not a fundamental breach of contract.

(d) Accordingly we find that any phone calls which were made were within the bands of the fiduciary duty he owed to the respondent and were not a repudiatory breach of contract in any way.

(e) Again if we are wrong on that this occurred in January 2015, some 17 months before the claimant resigned, and therefore in our view by returning to work after these incidents and continuing to work without protest the claimant has affirmed the contract.

(3) Pay rise:

(a) Factually we do not accept that other people received a pay rise in similar circumstances to the claimant and he did not. The respondent's evidence was that the apprentices received a pay rise in order to comply with the National Minimum Wage. There

was also evidence that the claimant had subsequently received a pay rise in any event.

(b) The claimant could not provide any evidence of someone in an equivalent role to himself who had received a pay rise when he did not, and therefore factually that scenario is not accepted.

(4) In March 2014 working hours were increased from 40 to 45 hours without additional pay:

(a) This refers to Mr Chamberlain when he arrived introducing a clock card system in order to ascertain what hours people were working, and then producing contracts to reflect those hours. Mr Chamberlain was unaware of the earlier contract which made it clear the claimant's contracted hours were 40. The claimant never signed the 45 hour contract.

(b) Whilst this appears to have been a mistake on Mr Chamberlain's part, that is irrelevant to whether or not it was a fundamental breach and we find that it was a fundamental breach of contract for the respondent to increase the claimant's hours by five without any consultation and without any pay rise. However, we find that this occurred in March 2014 and the claimant did not complain about it at the time.

(c) Given that it was a provision which took effect immediately, we find the claimant accepted the change by not raising it with his employer for a further 12 months and there was no indication he was working under protest. Accordingly the claimant affirmed any repudiatory breach by the respondent.

(5) In January 2014 the claimant felt pressurised into going back to work in March and on full-time hours:

(a) This refers to the claimant after he had had his operation for diverticulitis returning to full-time work in March. This was based on the claimant misunderstanding the doctor's fit note which did not actually say anything about hours but just said he should do lighter duties for a month, and the respondent complied with this.

(b) Accordingly there was no breach of an express or implied term of the contract.

(6) Andrew Parry's inappropriate behaviour on –

(i) May 2011 – throwing coffee at the claimant;

(ii) October 2012 – locking the claimant in a Portaloo;

(iii) 4 June – driving a vehicle behind the claimant; and

(iv) 8 and 10 July “sticking his nose into” the claimant's business re his purchase from Snap Tools and buying a new car:

Allegation (i) – the coffee incident

(a) the claimant brought Mr Parker to corroborate the coffee incident, however Mr Parker did not see anything actually happen; he saw the alleged aftermath of the coffee being thrown at the claimant. Mr Parry denied throwing coffee at the claimant. Dominic Parker in his interviews with Mr Chamberlain denied he had seen any coffee thrown when he was interviewed in the grievance procedure although he gave different evidence to the Tribunal (still not establishing the coffee was thrown), therefore we found his evidence unreliable in any event.

(b) We prefer Mr Parry’s evidence on this as there was nothing to suggest that Mr Parry’s behaviour towards the claimant was of this ilk rather it was of banter, a practical joke type relationship.

(c) If we are wrong on this and this incident did occur it would be a breach of contract but without more we would not find it was a fundamental breach of contract i.e. we have no idea of the context or how hot the coffee was or whether the claimant was accidentally missed or deliberately missed, and it was simply a gesture of frustration as it was denied. The claimant did not provide any contextual detail of that nature.

(d) Again if we are wrong on this and it was a fundamental breach of contract by itself we would say the claimant affirmed the contract by continuing to work for the respondent for a further four years without complaining.

Allegation (ii) – October 2012 locking the claimant in a Portaloo

(e) We accept Mr Parry’s evidence that this did not happen as the claimant described that there may have been a misunderstanding: the lock stuck rather than the claimant being deliberately locked in.

Allegation (iii) – driving a vehicle behind the claimant

(f) Mr Parry accepted that there would be occasions when he would be behind people in the yard and he would “bip” his horn to alert them to this or to persuade them to move out of the way.

(g) There was nothing from the claimant's evidence to suggest there was anything sinister in what Mr Parry did

and therefore we accept the innocuous explanation given and find no breach of contract.

Allegation (iv) – "sticking his nose" into the claimant's business

(h) The issue regarding the tools and the car are indicative of the claimant's skewed view of some events following his illness. These remarks were completely innocuous and there was nothing remotely denigrating about the remarks and accordingly we find there was no breach of contract at all.

Considering the matter overall

123. Considering the matter overall we do not find that there was a breach of contract or a fundamental breach of contract save in relation to (4) where, as we have already found, there was affirmation. In relation to (4) we find that the claimant did not resign because of (4); the claimant resigned because he was unhappy with the outcome of his grievance and could not see a way to returning to work once he had lapsed into a depression following unrelated to employment but significant personal events and not because of any other matters he has raised as breaches.

124. If we are wrong on this then as the last breach was July 2014 he delayed too long before resigning.

Fair Dismissal

125. In relation to the respondent's submissions that (1) the claimant would have been dismissed for gross misconduct in sharing pornography with Mr Parker when he was 16, we find, unfortunately, that because of the nature of the banter in the workplace and the casual attitude taken towards these matters the respondent would not have dismissed the claimant for this.

126. In relation to the claimant's ill health we do find that the claimant would have been dismissed for ill health after a further period of two months. We find from the evidence there was no prospect of the claimant returning to work. The claimant had been off for a considerable period of time and was unable to give a prognosis of when he might return. We feel that he would not have returned as he had such a view of the respondent's conduct that was unlikely to change. It was not justified view in the light of our findings and therefore we think that the likelihood of the claimant returning to work even if he felt better was nil. Therefore we believe the respondent would have been able to fairly dismiss the claimant due to ill health absence within two months of his resignation. Therefore even if the claimant had succeeded his compensation would have been limited to two months.

Disability Discrimination

Discrimination arising out of disability

127. The issues the claimant relies on in relation to this are:

(1) 2012 when Mr Parry drew a boat on his head; and

(2) March 2014 when he was pressurised to return to working full-time hours.

128. In relation to (1) we were concerned that this was not a matter which arose out of the disability diverticulitis which was the disability relied on. The claimant argued that it was as he was ill with the diverticulitis and unable to resist when Mr Parry did this. Mr Parry's objection was a factual one, that in fact the claimant got ill later on in the day. However we had concerns that it was not a matter arising out of his disability and that it was certainly out of context a matter which was inappropriate but it did not arise because the claimant had diverticulitis. However, the respondent did not take this point so although that is our initial view if it is a matter which did arise out of the claimant's diverticulitis then it would be discrimination.

129. However, we have found that the claimant has got confused about this and that while he may have felt ill the apex of his illness came later in the day as described by Mr Parry. Further the drawing of the boat on his head and the weather forecast was within the context of the banter common in their relationship, which the claimant had not at all made clear was unacceptable and unwelcome to him. Other members of staff confirmed that the claimant referred to the weather on his forehead in a joking manner himself.

130. In relation to (2), again the claimant relied on his diverticulitis as this relates to the time when he had had his operation. We cannot accept the factual basis of this as the claimant's doctor stated he was fit to return to work and made no mention of not working full-time hours only of light duties, and therefore there was no less favourable treatment.

Out of Time

131. Both claims are out of time as the claim was put in significantly more than three months after these events and time runs from the events. No reasons were put forward for why we should extend time on a just and equitable basis and we decline to do so. Clearly the claimant was depressed from after his father's death but he was able to attend meetings and articulate his concerns.

Failure to make reasonable adjustments

132. The claimant relies on one matter in relation to diverticulitis and one matter in relation to dyslexia.

Diverticulitis

(1) In relation to diverticulitis, this was the application of the absence management policy in relation to his absence for diverticulitis. This refers to when he was absent in early and then in May 2015 The respondent's position was that the absence management policy was never relied on. The actions that the respondent took in relation to the claimant's diverticulitis absence were contacting his GP, Dr Ali, for a report and his report said it was reasonable for the claimant to continue with his work, but that he may have absences as time went on due to a flare up.

(2) Although the claimant sought to argue that Dr Ali was not the appropriate GP to approach he did not raise these points at the time and frankly this is irrelevant to the PCP he relies on in any event. No steps were taken regarding the claimant's absence because of diverticulitis as the disciplinary action issue arose and the later meetings regarding his absence were unconnected to the diverticulitis. They were connected with his depression occasioned by bereavement and the other significant incidents that arose after the claimant's father died i.e. his partner's mother dying and his partner having an accident at home. Therefore other than obtaining a doctor's report no action was taken at all regarding the claimant for absence due to diverticulitis.

(3) We accept the respondent's position that in fact the PCP cited was never applied to the claimant. The claimant's absence which the respondent sought to manage was due to depression but the claimant had not relied on depression as a disability. However, even then no detriment ever took place as the meetings were diverted by the claimant's grievance.

(4) In addition the claimant's claim is out of time as he returned to work in March 2014 and no further action was taken. The obtaining of a report was potentially a further and last act (although we believe there was nothing by way of a disadvantage in obtaining the report) .This was in July 2014 so the claimant was out of time in relation to that also. Again there was no evidence as to why we should exercise our just and equitable discretion to extend time limits.

<u>Dyslexia</u>

(5) In relation to dyslexia, the claimant formulated a very broad PCP here, namely that the respondent applied to him a requirement to perform the role to the required standard. The respondent did clearly require the claimant to perform the role to the required standard. The claimant's suggestion was, although no reasonable adjustments were actually articulated, that the respondent should have researched dyslexia and provided the claimant with support to enable him to do his job. They pointed out the Training 2000 recommendations from 2010.

(6) However the respondent argued that they had no knowledge of any substantial disadvantage as a result of the dyslexia as the claimant, until the incident following his father's death, had never made any mistakes at work nor had he failed to complete any work to their required standard. When he did make a mistake it was due to his recent bereavement and therefore the disciplinary was not connected with his disability.

(7) We therefore find that as the respondent was unaware that the claimant was suffering from a substantial disadvantage his claim cannot succeed.

Wages Act Claim re Overtime

133. The claimant produced many pages of a record of the overtime he had worked, even though during the grievance meeting he stated to Mr Chamberlain he had no such records. The records were detailed but in many respects did not make sense. We were not convinced of the authenticity of these records as they were never referred to during the currency of the claimant's employment or during the grievance when he was specifically asked if he had any other information.

134. However, we find that the claimant was not entitled to overtime on the basis that his original contract which he relied on stated by an express term that overtime required Mr Parry's approval and that the one time overtime was paid it was with the agreement of Andrew Parry which supports that the contract was not routinely ignored..

135. Accordingly the claimant had not complied with the conditions necessary to obtain an overtime payment under his contract and therefore no overtime was "properly payable".

Tools

136. The claimant had submitted that because Employment Judge Sherratt had allowed this claim to go forward at a CMD that meant Employment Judge Sherratt had agreed it was within the jurisdiction of the Tribunal. We disagree with the claimant on this. Employment Judge Sherratt agreed it could go forward for this Tribunal to decide whether or not there was a claim within the Tribunal's jurisdiction.

137. There is a tort of conversion which could apply here where the claimant asserts that the respondent has kept tools which were his own personal tools. They say that i.e. conversion, could be a cause of action (in the county court not the tribunal). The respondent argued that the allegation was not sufficiently connected with the employment contract to come within the Tribunal's contract jurisdiction; alternatively that as the issue arose after termination and it was not an issue that was outstanding on or arose on termination. Further the respondent resisted that there should be any implied term that the respondent was obliged to return the claimant's tools, or if there was that that was subject to a reasonableness clause i.e. to make a reasonable search for the tools and return them.

138. There is no case law (as far as I or the parties could ascertain)establishing an implied term that personal tools should be returned on termination or on request. However we find that it is appropriate to consider such a term should be implied into a contract, for business efficacy at least, as if a respondent requires an employee to use their own tools it must be a concurrent responsibility to return those tools. Also we find that on the ground that the term is so obvious the parties must have intended it.

139. However, any implied term that the respondent was required to return the claimant's tools would be subject to the respondent taking all reasonable steps to return the claimant's tools which, on the evidence, we find that the respondent has done in this case.

140. In respect also of the respondent's submission that the matter arose after the termination of employment because the claimant attended the garage to recover his

tools on 16 June, we are not convinced of this. If there is an implied term that tools should be returned it would be on termination or request. Therefore we find that such a term was outstanding on termination whether or not the claimant raised it and therefore would come within the Tribunal's contract jurisdiction; however, this point is really irrelevant in the light of our findings on the implied term.

141. Accordingly, for several reasons described above we find that this claim also fails.

Employment Judge Feeney

Date: 6th December 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

14 December 2017

FOR THE TRIBUNAL OFFICE