EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104580/16

Held in Glasgow on 1, 2, 3, 7 & 8 March 2017 and Members` Meeting on 14 March 2017

Employment Judge: Robert Gall
Members: Ms Neelam Bakshi
Mr Ijaz Ashraf

Mr Daniel Weber — **Claimant**
Represented by:
Ms M Gribbon - Solicitor

Jarvie Plant Group Limited — **Respondents**
Represented by:
Ms M Laurie - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is:-

1. That the claim of (constructive) unfair dismissal brought in terms of Section 95(1)(c) of the Employment Rights Act 1996 is unsuccessful.

2. The claim of discrimination brought in terms of Sections 24 and 13 of the Equality Act 2010 is unsuccessful.

3. The claim in respect of unauthorised deductions from wages brought in terms of Section 13 of the Employment Rights Act 1996 is unsuccessful.

REASONS

1. This case called for a Hearing at Glasgow. The Hearing proceeded on 1, 2, 3, 7 and 8 March 2017. When the case concluded on 8 March 2017, it was not possible to hold a Members` meeting that day due to the lateness of the hour.

2. A Members` meeting took place on 14 March 2017.

3. During the case the claimant was represented by Ms Gribbon. The respondents were represented by Ms Laurie.

4. The Tribunal heard evidence from the following parties:-

- The claimant.
- The claimant`s wife, Mrs Marie Weber.
- Douglas Rennie, Labourer with the respondents.
- Brian Galt, Manager for West Region with the respondents.
- Gary Morris, Workshop Foreman with the respondents.

5. The following parties are also relevantly named at this point:-

- Stewart Devaney, former Labourer with the respondents who retired at Christmas 2015.

- John Jarvie, CEO of the respondents.

- David Jarvie, a senior employee with the respondents, son of John Jarvie.
- Christy Fletcher, HR within the respondents` organisation.

- Stewart Gratton, works within respondents` finance section.

- Gillian Graham, works within respondents` finance section.

- Tam Crawley, Driver who commenced work with the respondents on 29 March 2017.

6. A joint bundle or productions was lodged. During the Hearing, various documents were added to the joint bundle originally produced. There was no objection by either party to any such additional documentation.

Brief Background

7. The claimant resigned in circumstances which he said constituted a valid basis for a claim of constructive dismissal to be brought. In short, he said that as a result of a health issue and a medical decision that he could not drive HGV vehicles for a period pending further tests, he had moved on a temporary basis from being a driver with the respondents to being a labourer. On receiving the "*all clear*" after medical tests, he sought to return to his driving post. The respondents had then said to him that Mr Crawley was now in that role. The claimant continued with the respondents for a period and received pay at the appropriate rate for a labourer. He said that he had been underpaid in the time from the date when he was able to return to driving duties but had not been permitted by the respondents to return to

them. He subsequently resigned. He also maintained that the respondents, in employing Mr Crawley to fill the role which the claimant himself had filled as a driver, had committed an act of discrimination on the basis that they perceived the claimant to be disabled. He sought compensation in respect of the constructive unfair dismissal, payment in respect of unpaid wages being the difference the rate payable to a driver and that paid to a labourer and also sought compensation for injury to feelings. Loss, apart from any sum which might awarded as injury to feelings, was agreed between the parties.

8. The respondents' position was that, at the time when the claimant was precluded for medical reasons from driving his HGV truck, there was an agreement between the respondents and the claimant that the claimant would become a labourer. In other words, his job role changed. It was not a temporary change of duty pending the outcome of medical tests. The respondents recruited a driver, Mr Crawley, in those circumstances, given the change of job of the claimant. When the claimant received the news that he was able to return to driving, the respondents were unable to accommodate what was, in their view, a request that the claimant take up a driving post. In circumstances where he had agreed that his job was to be that of labourer and indeed had requested that move, this refusal by the respondents of the request for the claimant to commence driving once more with the respondents was not a fundamental breach of contract. It did not therefore found a constructive unfair dismissal claim. There had been no underpayment of wages. There was no basis on which an act of discrimination could have occurred. The respondents also took points as to the time taken the claimant to resign after the alleged fundamental breach of contract. They took a timebar point in relation to the discrimination element of the claim.

Facts

9. The following were found to be the essential and relevant facts in the case.

Background

10. The claimant was born on 2 July 1958. He is an HGV1 Driver. He was employed with the respondents between 1 September 1994 and 4 July 2016. He resigned by letter of 4 July 2016. A copy of that letter appeared at page 135 in the bundle.

11 The claimant`s initial contract of employment appeared at pages 95 to 105 of the bundle.

12. The respondents hire out plant and equipment to customers. They have depots in different parts or Scotland. Their main office is in Grangemouth. They have offices in Irvine, in Glasgow at Govan, Paisley, Aberdeen, Cowdenbeath and Inverness.

13. The claimant drove a low loader lorry for the respondents. That is a heavier, larger vehicle than other lorries. An HGV licence is required to drive such a vehicle. His average gross weekly wage with the respondents was £537.07. His average net weekly wage with the respondents was £351.61.

14. The hourly rate for a labourer/valeter with the respondents in March 2016 was £7.50 per hour. The hourly rate for a labourer with the respondents at that time was £8.13 per hour. At that time the hourly rate for an HGV1 driver with the respondents was £10.60 per hour.

15. An HGV1 licence is granted to a driver on the basis that he/she is able to drive to age 45 without regular checks being carried out. After the age of 45 such a driver requires to seek renewal of his HGV1 licence. This occurs every 4 or 5 years. When an HGV1 driver attains the age of 60, he/she is required to renew his/her licence every 2 years.

16. The claimant was valued by the respondents as an employee. There was no benefit to the respondents in moving him from the post of driver to a post as a labourer.

17. At time of the discussions between the claimant and the respondents in March and April 2016 and for the period after that, the respondents had driver cover available such that they could have covered the duties which the claimant would have carried out as an HGV driver from staff employed by them at that time. There was no requirement for them to recruit any additional personnel to cover those duties in the time when the claimant was unable to fulfil them.

The Claimant`s Health

18. In October 2010 the claimant had a heart attack. He attended hospital and received treatment. A stent was inserted. He was absent from work at that time for some 6 weeks. His HGV1 licence was automatically removed. He required to prove his fitness to be authorised to drive again by the issuing of his HGV1 licence once more. He did that. He was able to resume driving duties approximately 12 weeks after his heart attack. He had no health issues relating to his heart between that time and early 2016.

19. In early 2016 the claimant was at work. He felt unwell. He experienced symptoms which he recognised as being similar to those he experienced when he has suffered a heart attack in October 2010. He felt breathless and had chest pain. He was worried and concerned. He was scared. He subsequently referred in discussion with Mr Rennie to having had a “heart scare”.

20. The claimant attended his doctor who referred him to the hospital. He received notification of his hospital appointment, the appointment being scheduled for 1 March 2016. The respondents gave the claimant time off to

attend the hospital appointment as he had made them aware of that appointment.

21. The physician with whom the claimant had an appointment on 1 March 2016 was Dr Findlay. The claimant explained to Dr Findlay his medical history and the issue which he currently had. Dr Findlay said to him that in no circumstances should he drive an HGV vehicle until the position had been investigated and the problem identified.

22. Dr Findlay did various tests on the claimant at this point. He asked him to do a "*treadmill test*". The claimant understood that the requirement was that he manage 9 minutes on the treadmill. On doing the treadmill test the claimant managed 4.5 minutes. Dr Findlay decided to refer the claimant to the Golden Jubilee Hospital for further investigation in relation to his heart.

Discussion between the Claimant and the Respondents regarding the Claimant`s Role

1 March 2016

23. When the claimant returned to his house having met with Dr Findlay on 1 March 2016, he telephoned the respondents. The claimant`s wife and son were present in the room when the claimant made that call. The claimant`s wife could hear what the claimant said to the respondents. She could not, however, hear what the respondents said to the claimant.

24. The claimant spoke with Brian Galt. Brian Galt was the claimant`s Line Manager. He is the Manager for the West Region with the respondents. He is responsible for the day to day management and control of orders from customers for equipment and also for management of staff at the Glasgow Govan, Paisley and Irvine depots of the respondents. On speaking to Mr Galt, the claimant informed Mr Galt that he had met with Dr Findlay. He said to Mr Galt that Dr Findlay had informed the claimant that the claimant

should not drive HGV vehicles due to his heart problem. Mr Galt asked whether the claimant was prevented from driving HGV vehicles for good. The claimant replied saying that that was not the case, that it was just until he received test results.

2 March 2016

25. The claimant attended work on 2 March 2016. He met with Mr Galt. The claimant and Mr Galt were the only people present during that meeting.

26. The claimant discussed with Mr Galt the fact that he was not able to drive HGV vehicles for medical reasons and that further tests were to be involved. This was as he had explained the preceding day.

27. The respondents operate with two labourers in the yard. Until Christmas 2015 those labourers had been Stewart Devaney and Douglas Rennie. Mr Rennie had been employed with the respondents for 17 years at that point. At Christmas 2015 Mr Devaney had retired. The respondents had not been able to replace Mr Devaney. David Jarvie and Mr Galt had decided that they would look to have, in the post formerly filled by Mr Devaney, someone with operator's tickets to enable that person to drive plant on the site of customers as some customers sought that service from the respondents.

28. The claimant said to Mr Galt that he was keen to obtain the post of labourer. He said he wished to obtain that post at that point given that it was then available. He said he was concerned that the post might not be available in the future when he might no longer be able to drive. The claimant was aware that the rate of pay for a labourer was lower than the applicable for an HGV driver. The claimant remained keen on the post. Mr Galt said that he would discuss the position with Mr David Jarvie. Mr Galt was clear from this conversation that the claimant wished the job as labourer as a change of post from being a driver. That was what the claimant sought in his conversation with the respondents This was not therefore requested as a

short term alteration in duties. It was a change of job by the claimant so that he was to become a labourer rather than a driver. That was what the claimant sought. Mr Galt suggested that the claimant might wish to await the outcome of medical tests before making the decision. The claimant did not wish to do so. Mr Galt suggested to the claimant that he sleep on his decision. Mr Galt then discussed the situation with David Jarvie given the claimant's wish to become a labourer and given the fact that claimant did not have operator's tickets.

3 March 2017

29. On 3 March 2017 Mr Galt received a telephone call from John Jarvie. Mr Jarvie had heard from his son David that the claimant was seeking a post as labourer. Mr Jarvie said to Mr Galt that they should accommodate this request. He was conscious of the claimant`s length of service and said that if the claimant needed help from the respondents then that help should be given.

30. Mr Galt then spoke with the claimant and informed him that the post of labourer was his if he wished it. Th claimant confirmed that he wished to accept that position. It was agreed that the claimant, within the role, would also be out valeting vehicles, washing and cleaning them. Those duties were felt to be slightly lighter than those of a labourer and would therefore provide the claimant with a mixture of duties, those of labourer and also the slightly lighter duties of valeter. The claimant was happy with this arrangement. He handed over the phone and keys which he had in his role as HGV driver. He took up the duties of labourer/valeter on a full time basis. Subsequently, the job of the claimant became, by agreement, that of labourer rather than labourer/valeter.

Driving of Respondents` vehicles in March 2016

31. In March 2016 the respondents had cover enabling all driving duties to be met, notwithstanding the fact that the claimant was not able to drive the low loader at this point. They had a relief driver. They had 4 drivers as cover. They could therefore meet the driving obligations which they had from staff resources, excluding the claimant. That situation could have continued if the claimant was temporarily carrying out duties as a labourer. In discussions between the claimant and Mr Galt on 2 and 3 March 2016, however, the claimant had "*vacated*" the role of driver in order to become a labourer. This meant that there was a vacant post as driver at that point. It was therefore appropriate from the respondents` point of view to adopt a long-term solution at that stage by recruitment of a new driver on a permanent basis.

Recruitment of Tam Crawley

32. With there now being a vacant post of driver and the need on the respondents` part for an employee to commence work on a permanent basis with them as a driver, the respondents asked those within the workforce if they were aware of anyone who was appropriately qualified and who wished a driving job. The respondents had prior to Christmas time advertised on their website seeking a driver. They had not had success through that route. The respondents` recruitment policies envisage advertisements, application and interview. Having a vacant post, however, and having had a lack of success through advertisement, they adopted the route detailed.

33. Through this route they were referred by one of their employees to Mr Crawley. They spoke with Mr Crawley. Mr Crawley was offered the post as driver, on a standard employment basis (i.e. not as a "*stop gap*" or "*temporary appointment*") around 22 March 2016, He accepted and commended work with the respondents as a driver on 29 March 2016. The claimant was aware of his appointment, though not the terms of that appointment. The claimant assisted Mr Crawley by showing him routes and passing on information as to the role of driver with the respondents.

34. At the time when Mr Galt offered Mr Crawley the post as driver, that post was vacant as detailed above. The claimant had relinquished his job as driver. He had become a labourer. Mr Galt was aware that the claimant was affected by an illness which at that point precluded him from carrying out HGV driving duties. He was aware that the claimant was awaiting further medical tests being carried out to identify the precise nature of the issue he had and with a view to any such issue being potentially treated. He was not aware for how long the claimant might be prevented from driving HGV vehicles.

The Claimant`s Terms and Conditions of Employment as Labourer

35. The respondents did not write to the claimant at time of his "*job switch*" from driver to labourer. They did not specifically confirm to him the hourly rate payable to him as a labourer.

36. The respondent did, through Mr Galt, give the claimant a letter dated 7 March 2016 and a statement of terms and conditions of employment signed by Mr Galt on 28 April 2016. Both those documents were given to the claimant on 28 April 2016. A copy of them appeared at pages 124.1 to 124.5 of the bundle. Amongst the terms in that document was one stating that the claimant as holder of the post was subject to a 3 month probationary period.

37. Mr Galt asked that the claimant sign the terms and conditions having taken them home to read them. The claimant returned to speak to Mr Galt the following day and said that he was not signing those terms and conditions. By then, in the circumstances detailed below, the position was that the claimant wished to resume driving an HGV vehicle with the respondents. The respondents had stated to the claimant that whilst a relief driver post was available, his former post was not available to him.

The Claimant`s wages as a Labourer

38. The respondents did not action the reduction in hourly rate payable to the claimant immediately upon the claimant taking up his post as labourer/valeter. Mr Galt had communicated to the finance section that the claimant had the job title of labourer/valeter with the date of change being 7 March 2016 and the hourly rate being £7.50. That however, was not acted upon. The claimant continued to be paid at the rate applicable to a driver. That was the position until 14 April 2016 when the respondents` finance section adjusted the claimant`s pay. Deductions were made from his pay at that point. Further deductions were due to be made to result in the rate of pay for the period being that applicable to a labourer/valeter. Mr Galt intervened to prevent that happening by way of one deduction, following an approach by Mrs Weber. Further deductions were therefore spread over a period.

39. When the claimant became labourer rather than labourer/valeter, he received the appropriate hourly rate of pay, £8.13.

The Claimant`s health and further medical tests

40. The claimant duly received intimation of an appointment at the Golden Jubilee Hospital. He attended that appointment. Tests were carried out. It was confirmed to him that the health issue he had experienced was not a recurrence of his heart issue. The stent which had been inserted in 2010 was still doing its job. It was confirmed to him that, from a medical perspective, he was able to resume HGV driving duties.

41. The claimant asked his wife to telephone Mr Galt to advise Mr Galt that the test results looked okay. This was on 13 April 2016. Mrs Weber did that. The claimant was unable to attend work for a 7 day period and it was agreed that this would be treated as holiday.

42. The claimant returned to work on 21 April 2016. He met with Mr Galt that day. He said to Mr Galt that the test results looked fine and that there was really good news. He said that he had been told verbally that he could drive again. Mr Galt was pleased for the claimant. The claimant said that he would like to resume driving duties again. Mr Galt said that the claimant should pass to him written confirmation that he was now able to drive HGV vehicles once more and that Mr Galt would do what he could to get the claimant back driving for the respondents. He was sympathetic to the claimant in general and specifically in relation to the claimant's wish to return to a driving job. Mr Galt was aware that the respondents had ordered a new truck sometime previously and that there was a long delivery time in respect of trucks. The truck was not therefore immediately available but would be available later in the year. He advised the claimant of this. He also said to the claimant that the claimant could drive the new truck when it appeared. It was indicated to the claimant that the new truck would be likely to be available around September 2016. In the interim he suggested to the claimant that the claimant might wish to drive as a relief driver. In that role he could drive almost every day potentially. His wage would be restored, when driving was carried out, to the rate applicable to a driver. Mr Galt was conscious that the months of May through to August 2016 saw drivers having holidays. Additional cover would therefore be of assistance to the respondents. The respondents were also keen to have an experienced driver such as the claimant readily available to them when the new truck became available. They had had difficulty recruiting experienced drivers in the past.

43. The claimant was not happy at the reaction of Mr Galt. He said to Mr Galt that he was not interested in the post of relief driver. He said that he wished his own job back. His view was that Mr Galt had given his job away.

44. On emerging from this meeting, the claimant spoke with Mr Rennie in the yard. The claimant seemed to Mr Rennie to be down and upset. The

claimant said to Mr Rennie that he had been told by Mr Galt that there was no lorry for him to drive.

45. The claimant telephoned his wife following this meeting on 21 April 2016. He said to her that Mr Galt had said that the driver`s job was not there anymore as someone else was now doing this job. That was a reference to Mr Crawley.

46. The claimant obtained a letter from the hospital confirming that he was able to drive HGV vehicles from a health perspective. A copy of that letter appeared at page 129 of the bundle. It is dated 27 April 2016. The claimant gave that letter to Mr Galt. Mr Galt copied the letter and handed it back to the claimant.

47. Later that day, being 28 April 2016, Mr Galt gave to the claimant the letter and terms and conditions referred to above, being pages 124.1 to 124.5 of the bundle.

Steps taken by the Claimant after discussions with Mr Galt in April 2016

48. The claimant had said to Mr Rennie that he was unhappy about, as he saw it, not getting his job back at the time when he had been "*cleared*" by medical personnel to resume driving duties. Mr Rennie said to the claimant that the union Unite might be able to assist the claimant. The claimant`s wife called Unite just prior to 6 May 2016. She explained the claimant`s view of the position. Unite said that they could not assist the claimant as he was not a member of the union.

49. The claimant then submitted an application form to join Unite. Unite spoke with the claimant on 6 or 7 May 2016. The claimant`s wife was present when the claimant received that telephone call from Unite. Unite said to the claimant that they could not assist him as he had not been a member of the union for long enough for that to occur.

50. One of the claimant`s friends subsequently suggested that the claimant speak to a solicitor, specifically Quantum Claims. The claimant`s wife telephoned Quantum Claims on 16 May 2016. A note of the conversation prepared by the person within Quantum Claims who received the telephone call, appeared as pages 160 and 161 of the bundle.

51. Quantum Claims wrote to the respondents on 27 June 2016. A copy of that letter appeared at pages 133 and 134 of the bundle. The letter was received by the respondents on 28 June 2016. The respondents did not ever reply to that letter. A reminder was written by Quantum Claims to the respondents on 18 July 2016. The respondents did not reply to that letter.

Termination of the Claimant`s Employment

52. The claimant enjoyed driving. He wished to drive for the respondents having been confirmed as medically able to drive on 13 April 2016. He had been happy driving an HGV vehicle for the respondents in the period to March 2016. It was the preclusion of driving for medical reasons which occurred on 1 March 2016 which prompted the claimant to seek a job as a labourer with the respondents.

53. The respondents similarly had no issue with the claimant as an employee. They were prepared to vary the requirements for the post of labourer to dispense with the need for the person who they recruited to the vacant post to have operator's tickets. This was in order to enable the claimant to take up that post. When the claimant was once more able to drive HGV vehicles, Mr Galt was also prepared to try to assist the claimant to return to driver duties through offering him driving as a relief driver until the new truck appeared. The claimant was earmarked by the respondents as being the driver of that new truck had he remained as an employee.

54. The claimant was unhappy with the respondents. He believed that they should have given his job back as a driver in April 2016. That was the point

when he was able to confirm that this was medically possible from his point of view.

55. The claimant was aware of the grievance policy of the respondents. He did not ever lodge a grievance with the respondents.

56 The claimant commenced looking for alternative employment in early June 2016. He registered with Reed, an employment agency, on 2 June 2016. On 16 June 2016 he applied for a job as a driver with a different company, W H Malcolm. He attended for interview with that company on 1 July 2016. He was offered the job by that company on 4 July 2016 and accepted that offer that day.

57. It is unclear whether the claimant returned to work on 16 June 2016. He was in possession of Fit Notes from his doctor confirming his absence from 14 June to 21 June 2016 and 22 June to 6 July 2016. Those appeared at pages 131 and 132 of the bundle. There was a clock in card produced in respect of the claimant. A copy of that appeared at page 159 of the bundle. That showed, in respect of the swipe card used for clocking in and out by the claimant, that the claimant had been at work between 16 and 20 June 2016. There was no discussion between the claimant and Mr Morris or between the claimant and Mr Galt in the week commencing 16 June 2016 which related to the question of the claimant`s employment as labourer or driver with the respondents.

58. The claimant continued to be paid at labourer rate from mid-April 2016 (when he confirmed that he had been "*cleared*" by medical practitioners to drive HGV vehicles once more) until date of his termination with the respondents.

59. Knowing that he had secured alternative employment the claimant resigned from employment with the respondents. He did this on 4 July 2016. He did

not know at that point whether there had been a reply or not to the letter sent by his solicitors on 27 June 2016.

60. The claimant`s letter of resignation appeared at page 135 of the bundle. It read:-

> "*TO WHOM IT MAY CONCERN,*
>
> *Please accept this letter as my 2 weeks notice to terminate my employment with your company effective from 4/7/16.*
>
> *Thank you for employing me for all these years but it is now time for me to move to pastures new.*
>
> *Once again thank you."*

61. That letter was handed into the respondents on 4 July 2016.

Respondents' reaction to resignation

62. Mr Galt was on holiday from the evening of 30 June 2016, returning to work on 18 July 2016. On his return he became aware of the resignation of the claimant. He wrote to the claimant on 18 July 2016. A copy of that letter appeared at page 137 of the bundle. That letter confirmed that a position in a full time driving role was available for the claimant with the respondents. The claimant did not reply to this letter.

The claimant's New Employment

63. A copy of the claimant`s particulars of terms of employment in relation to his employment with W H Malcolm Ltd appeared at page 146 to 151 of the bundle. It confirms the claimant`s date of commencement with W H Malcolm Ltd as being 18 July 2016. His rate of pay for the first 9 hours of each day is £8.70 per hour.

64. The hourly rate therefore payable by W H Malcolm Ltd in respect of the claimant`s employment with them is lower than that paid to him as an hourly rate by the respondents. The claimant, however, works longer hours with W H Malcolm Ltd such that his income with effect from 18 July 2016 exceeds that which he gained from the respondents.

The Issues

65. The parties had helpfully agreed the issues for determination by the Tribunal. Those agreed issues were:-

"***Perceived Disability***

1. Did the Respondent believe that the Claimant was suffering from an impairment which satisfied the definition of disability in terms of Section 6 and Schedule 1 of the Equality Act 2010 ("the 2010 Act")?

1(a) Has the Claimant shown, on the balance of probabilities, that the Respondents did believe that he was suffering from an impairment which satisfied the definition of disability in terms of Section 6 and Schedule 1 of the 2010 Act?

2. Was the Respondent`s treatment of the Claimant caused because of their incorrect belief that he had an impairment which satisfied the definition of disability in terms of Section 6 of the 2010 Act?

3. If so, did the Respondent`s decision to permanently remove the Claimant from his HGV driver post/permanently appoint someone else to fill the Claimant`s HGV driver post (as

intimated to the Claimant on 21 April 2016) amount to less favourable treatment?

4. *If so, was the fact that the Claimant was perceived to have a disability the reason for the less favourable treatment pursuant to Section 13(1) of the 2010 Act.*

5. *Who is the actual or hypothetical comparator for the purposes of determining less favourable treatment?*

Illegal deduction from wages

6. *Was the Respondent`s decision to pay the Claimant a (reduced) labourer/valeter`s salary in the period 27 April 2016 up until the effective date of termination:-*

   (a) an agreed contractual variation expressly agreed between the parties and if so, the date on which parties agreed orally or in writing to the variation; or

   (b) an unlawful deduction from wages in breach of Section 13 of the Employment Rights Act 1996 ("the 1996 Act").

Constructive Dismissal

7. *If the Claimant`s claims under Section 13 of the 2010 Act and/or 1996 Act are upheld did either or both of these alleged continuing statutory breaches amount to a repudiatory breach of the Claimant`s contract of employment (the implied duty of trust and confidence) entitling him to resign?.*

8. *If so, did the Claimant resign in response to either or both of the alleged continuing statutory breaches?*

9. *If the Tribunal finds that the Claimant was constructively dismissed, was that dismissal justified on the grounds of some other substantial reason, a potentially fair reason pursuant to Section 98(1) of the 1996 Act, and therefore not unfair in the circumstances?*

10. *In the event that the Tribunal finds that any compensation is due to the Claimant should that compensation be reduced to reflect or have regard to:-*

    (a) *The principles set out in Polkey –v- A E Dayton Services Ltd [1987] IRC 143.*

    (b) *The Claimant`s contribution to his constructive dismissal.*

    (c) *The justice and equity of the case*."

Applicable Law

66. The law applicable to the areas for possible determination by the Tribunal related to perceived discrimination, timebar in relation to such a claim, including whether if timebarred such a claim is to be permitted to proceed due to that being viewed by the Tribunal as being just and equitable, unlawful deduction from wages, and constructive dismissal. Given the findings in fact by the Tribunal however, the applicable law in relation to those areas is not set out.

Submissions

67. Both parties made full and extremely helpful submissions to the Tribunal in support of their respective positions. There were substantial elements of the submissions made both for the claimant and for the respondents which dealt with grounds of claim which do not require to be determined by the Tribunal given the findings in fact made by the Tribunal.

68. As detailed in the findings in fact and as explained below, the Tribunal unanimously concluded that the discussion between the claimant and the respondents on 2 and 3 March 2016 resulted in an agreement that the claimant would move post, relinquishing the post of driver and taking up the job or post of labourer/valeter, then labourer. There was no "*rider*" to that restricting the time for which the claimant would be labourer. It was a change of role or job for the remainder of his employment with the respondents, subject of course to any subsequent agreed change in that job or post.

69. As the claimant agreed that he was to be a labourer, a claim for underpayment of wages falls away. Similarly the recruitment of Mr Crawley in a driving role was not an act which could potentially be discriminatory, given that the claimant had vacated that role and that it was free, from the respondents' perspective, to be offered to any other party. Further, when the claimant`s health had fortunately improved and he was able to recommence driving, he was making a request to obtain a driving job rather than invoking with the respondents an agreement to return to his role. The fact that the respondents did not restore the claimant to his former post was not therefore a fundamental breach of contract. Similarly payment at the rate of pay applicable to a labourer was not, from the time when the claimant was able to resume driving duties, a fundamental breach of contract by the respondents.

70. On the basis of the facts found by the Tribunal, and given that these points had been superceded, the submissions made by each party in relation to them are either not included in narration of the submissions or are

mentioned more briefly than they might have been had the matters been live and for determination by the Tribunal.

Submissions for the Claimant

71. Ms Gribbon said that while there were factual disputes between the parties, there were not as many as might appear to be the case from the pleadings.

72. Mr Galt had not given evidence, she said, with the same degree of certainty as had been set out in form ET3. The claimant had a good recall, although it was recognised that he was not good at recalling specific dates. He was credible, however. His evidence was consistent with his position as set out in form ET1.

73. Ms Gribbon said that the claimant`s wife had been an excellent witness. She had given her evidence in a clear confident manner. She had a strong recall of the dates and the events. Where there was any issue with the claimant`s recall of dates, and where his wife had given evidence as to dates, the evidence from his wife should be preferred to that of the claimant.

74. Douglas Rennie had been employed by the respondents for 17 years. He had appeared in response to a Witness Order. It had been suggested by the respondents in cross-examination that his evidence was coloured by his relationship with Mr Galt. That was not so, Ms Gribbon said. His evidence had been untainted, truthful and was presented in a matter of fact way.

75. As far as Mr Galt was concerned, Ms Gribbon said that he had embellished his evidence. Much of his evidence seemed to have been made up on the hoof as he provided the evidence. There were contradictions in his evidence both as given at Tribunal and also between his evidence at Tribunal and the position of the respondents in terms of form ET3.

76. Mr Morris had said that he only became aware of the Tribunal case a week ago. That seemed strange. He said that he had informed Mr Galt of a

conversation with the claimant at the end of February 2016. There was no reference, however, in form ET3 to any such conversation. Further, the evidence of Mr Morris as to his discussion with the claimant was vague in the extreme. The claimant was assisted by Mr Morris`s evidence that there had been no explicit reference to duration of the claimant`s time working in the yard as a labourer when Mr Morris and the claimant had spoken. Mr Morris provided no evidence that the claimant had been told that Mr Crawley had obtained permanent employment,

77. The case was, Ms Gribbon submitted, full of assumptions on the part of the respondents. Mr Galt and Mr Morris said that the duration of employment of the claimant in the labourer`s role had not been discussed. They said it had come across as being a permanent change. The response form said that it was reasonable for the respondents to assume that it was permanent.

78. It was, Ms Gribbon said, telling that Mr Morris, while saying that the claimant had returned to work on 16 June 2016, said he was not aware of the reason for the claimant`s absence in the period prior to that. Mr Galt, however, had said that the claimant had referred to cellulitis in the presence of Mr Morris and had shown his legs in the office area where Mr Morris was, to underline the problem he was having.

79. The Tribunal should treat Mr Morris`s evidence with caution as he appeared to have been brought in at the eleventh hour in what, Ms Gribbon said, was a desperate and hasty attempt to support the evidence of Mr Galt.

80. Ms Gribbon highlighted to the Tribunal the evidence which the claimant had given as to having felt unwell and as to having been referred by his doctor to Dr Findlay at the Royal Alexandra Hospital and subsequently to the Golden Jubilee Hospital. He had been told by Mr Dr Findlay to refrain from HGV driving pending further tests. He had telephoned Mr Galt and, in response to a question from Mr Galt, had said that he had not been told not to drive "*for good*". The claimant had referred to there being further tests. The claimant`s wife was present when this call was made. This evidence

should be accepted rather than the evidence of Mr Galt who denied any such call. The respondents had failed to produce mobile phone records on the basis of an implausible reason, namely that the phone system had changed. Those records would have established whether a call was made. Requests had been made for the documents. Further, Mr Galt had initially said that there was no call. He had then said that the claimant might have called the department. He had subsequently said that it was possible that the claimant would have spoken to him.

81. Although the claimant and his wife had said that they were worried after the appointment with Dr Findlay, the claimant had said in evidence that he knew this episode in early 2016 had not been a heart attack. Mrs Weber was clear that the advice from Dr Findlay did not lead to the claimant thinking that he would never drive again. Mrs Weber also said that her husband did not wish a permanent transfer. They had both said that the claimant loved driving. Mrs Weber had said that her husband was to ask Mr Galt for a temporary move.

82. Ms Gribbon considered the evidence as to what had happened on 2 March 2016. The claimant`s evidence was that it had been his suggestion that he work in the yard when he was unable to drive on the basis that he wanted to be earning rather than being idle. He was worried as to the financial position as he would only have been in receipt of SSP. He was keen to ensure that a wage kept coming in, even if that was at a lower level than would be paid for driving. The claimant`s position was that there was no vacant post in the yard as that had not been advertised. He sought a temporary post. He had not spoken to Mr Morris. Mr Galt made no reference to the claimant having had a discussion with Mr Morris.

83. Mr Galt`s evidence in chief was that duration of the claimant`s switch to a labourer`s post had not been discussed. It had "come across" that the claimant had lost confidence in being able to drive. This position could be contrasted with the position as set out in form ET3, Ms Gribbon said. In the

response, the position went much further, with the claimant allegedly having said that it was only a matter of time before he was unable to drive on a long-term basis, even if that was not the position now. In evidence, however, Mr Galt had said that he did not remember the word "*permanent*" being stated. On that basis Ms Gribbon concluded that the response in form ET3 had been embellished. There were times in evidence when Mr Galt appeared to have difficulty remembering exactly what was said. He had, however, given information which resulted in the completion of form ET3 where there were quite specific and detailed recollections set out. He had said in evidence that the claimant had said that he had a mortgage to pay. The claimant had not, however, ever had a mortgage. Mr Galt`s evidence had been "*made up on the hoof*".

84. Mr Rennie had said that there was no advertised vacancy for a labourer`s post as at March 2016. The claimant had told him, he said, that he was coming to the yard to work for a short period of time while his health problems were sorted out. Mr Rennie said that in conversation Mr Galt and Mr Morris had said that the claimant would be in the yard giving some assistance.

85. Mr Galt`s evidence had been that he could not recall whether the word "permanent" had been used on 4 March 2016. This was consistent with the respondents' position as set out in paragraph 9.2 of the response form which appeared at page 29 of the bundle. Other parts, however, of form ET3 said that there had been a clear position on the part of the claimant that the move was to be permanent.

86. The position might be described as one where the respondents had erroneously assumed that the claimant wished a permanent transfer, Ms Gribbon said. There was, however, no basis for that view.

87. In the period after 7 March 2016, the claimant ceased to be an HGV driver and became a labourer, according to Mr Galt. There had been a material

and permanent change in his employment if that was right. There was no evidence, however, that HR were told of this. No steps had been taken to confirm such a change in writing to the claimant. There was no step taken at that point to issue the claimant with a new contract of employment.

88. Whilst form JPD13 was produced at page 126 and an email was produce at page 127, those were internal documents. The document at 126 also said it was page 1 of 2 pages. Page 2 was not produced, however. The email produced at page 127 referred to an attached payroll return. That attachment had not been produced to the Tribunal.

89. The claimant also said that there was no detailed discussion regarding his wages. He knew that he was to be paid less while labouring than he was paid as an HGV driver. He was not told, however, in writing what his wage would be. The change had then taken effect with a deduction on 14 April 2016 which had led to a significant shortfall in the wage which the claimant and his wife believed would be received by the claimant. This had led to a call to Mr Galt. Mr Galt remembered that call. Mr Galt said in evidence that HR had made a hash of things.

90. The claimant`s position in the case was that he did not make a claim in respect of underpayment of wages until the time came when he was ready to resume his job as a driver, was denied that resumption and had therefore continued as a labourer receiving labourer`s wages whereas he ought to have been a driver paid at driver`s rates. He claimed the difference in pay between the wage which he was paid as a labourer and the wage to which he was entitled as a driver.

91. Ms Gribbon reminded the Tribunal of the evidence of the claimant as to his meeting with Mr Galt on 21 April 2016. At that point the claimant had informed Mr Galt that he had received the all clear and wanted to return to his old job. The claimant said that Mr Galt had told him that his job had gone. This had been a bombshell in the claimant`s evidence. He had asked

Mr Galt whether he was joking. Mr Galt had said "*No*" and that the claimant was working in the yard. The claimant had confirmed that Mr Galt had offered him relief driving, as Mr Galt`s evidence had also confirmed. The evidence from the claimant was that he had said no to that offer and that he wanted his old job back. The claimant had, Ms Gribbon said, not consented to giving up his post as driver.

92. There was a differing version of the meeting with Mr Galt. Mr Galt`s evidence was that this had been a positive meeting. The claimant on the other hand said that when he was made aware that he was not going to return to his old job as a driver now that he had the "*all clear*" he had said to the respondents that if they thought they were going to get away with that, that was not going to happen. He had been very angry, he said. There was therefore a contrast between the claimant`s evidence and that of Mr Galt. Mr Galt had said that this was a win win situation in that the respondents needed a driver and the claimant wanted to drive.

93. If the claimant, however, was moving to become a relief driver, this had not been confirmed to the claimant. HR did not appear to have been told. There was no form JPD13. Further, if the claimant was to become a relief driver, that was at odds with Mr Galt having prepared a contract and signed it on 28 April 2016. The contract said that the claimant`s post was that of labourer.

94. Mr Rennie had confirmed that the claimant was upset when he saw him that day. He had said to Mr Rennie that his job had gone to someone else. Mr Rennie had suggested the claimant speak to Unite. Ms Gribbon highlighted the evidence in that regard.

95. Mr Galt`s evidence as to there being two contracts and two letters issued to the claimant was also something to which Ms Gribbon drew the Tribunal`s attention. Mr Galt said that the claimant received the letter and contract at pages 124.1 to 124.5 and also received the letter at 120. There had been

two meetings, Mr Galt said. That was not the respondents` position in terms of form ET3. The claimant said that he had said to Mr Galt that he would not sign the contract. According to the claimant Mr Galt had said that this did not matter as the contract would be legally binding in 90 days. It was unlikely that the claimant had invented that as a remark made by Mr Galt, Ms Gribbon said. If Mr Galt was to be believed, the claimant had come to his office and had received the contract signed by Mr Galt. The claimant had not, however, been chased up for his signature. The claimant as a matter of fact did not ever sign the contract. It might be that Mr Galt indeed thought that the contract became legally binding after 90 days.

96. The evidence as to the claimant being contacted by Unite through his wife and subsequently joining Unite was referred to by Ms Gribbon. The claimant`s evidence as to the impact of not being permitted to return to his job was also recalled by Ms Gribbon.

97. Ms Gribbon detailed the conflict in evidence as to the claimant being at work or not being at work in the week commencing 16 June 2016 and as to submission of Fit Notes by the claimant.

98. On balance, Ms Gribbon said that this evidence supported the claimant`s position that he had been absent.

99. The Tribunal had also heard evidence as to Mr Galt`s previous employment. The circumstances and the information from Mr Galt`s previous employer were matters to which the Tribunal was entitled to have regard in assessing the credibility of Mr Galt, Ms Gribbon said.

100. Ms Gribbon addressed the evidence which she said supported the view that there had been a fundamental breach of contract and that the claimant had resigned in circumstances where that had played a part in his decision. The fact that he had looked for another job, attended for interview for a job on 1 July 2016 and been successful in obtaining that job, this being confirmed to

him on 4 July 2016, did not mean that his claim of constructive unfair dismissal could and should not be successful.

101. The letter from Ms Gribbon as the claimant`s solicitor, which had been received by the respondents on 28 June 2016 was also highlighted. Mr Galt said he was unaware of that letter before departing on holiday. He also said that he had been informed prior to going on holiday that the new truck would be available for the respondents, arriving on 2 September 2016. He had not taken the step, however, of informing the claimant of this.

102. The Tribunal should reject the evidence of Mr Galt that he was unaware of the letter from the claimant`s solicitor prior to his departure on holiday. The letter had been received by his employer two days before Mr Galt went on holiday. It articulated that the claimant had no intention of signing the contract for the post as labourer and that he believed that discrimination had occurred. It confirmed the claimant sought redeployment as a driver. The Tribunal should also reject Mr Galt`s evidence that when he sent the letter of 18 July 2016 to the claimant on his return from holiday, he was unaware of the existence of the letter from the claimant`s solicitor. The letter of 18 July 2016 which appeared at page 137 was also vague. It did not mention a return to HGV duties. The offer was not in good faith. The claimant had in any event obtained another job driving and was concerned that he would be shown the door if he returned to the respondents.

103. Mr Crawley had been in employment with effect from 29 March 2016 on a permanent basis. From evidence it now appeared to be the position that he had been offered the job the week prior to that. The spirit of the recruitment policy had not been followed. There had been no advert, no application form and no competitive interview as the policy set out.

104. Ms Gribbon addressed evidence in relation to the claimant`s new job and whether that was less onerous than his driving job with the respondents. Submissions in that regard are not rehearsed here as they were not relevant to the decision reached by the Tribunal.

105. Ms Gribbon detailed findings in fact which she urged the Tribunal to make. She set out her position and rationale in relation to the approach which should be adopted by the Tribunal in a case where perceived disability was alleged to have occurred. She referred to the cases of ***Coleman –v- Attridge Law [2008] IRLR 722***, ***English –v- Thomas Sanderson Blinds Ltd [2009] IRLR 206***, ***Nagarajan –v- London Regional Transport [1999] IRLR 572*** and ***J –v- DLA Piper UK LLP [2010] IRLR 936***. She also referred to the EHRC Equality Act Code of Practice (Chapter 3). She referred to the burdon of proof in terms of Section 136(2) of EQA. She returned to Section 13 of EQA and the question of comparators.

106. Ms Gribbon`s able submissions in this regard are not set out given the view reached by the Tribunal on the evidence which was that there was no act which was potentially discriminatory.

107. There were also submissions from Ms Gribbon in relation to Section 13 of ERA. Again these submissions are not rehearsed given that the Tribunal concluded, on the evidence, that there was no unlawful deduction of wages.

108. Given the Tribunal`s conclusion that there was no fundamental breach of contract when the claimant sought to return to driving duties in that he had switched jobs so that he had become a labourer, the submissions of Ms Gribbon in relation to the constituent elements necessary for there to have been a constructive dismissal and as to affirmation are not set out. Similarly the submissions of Ms Gribbon in relation to quantum, including injury to feelings and mitigation, are not set out.

109. The respondents made submissions in course of which at an early stage they highlighted that in their view there was a timebar issue in relation to the claim of discrimination. Brief evidence was taken by the Tribunal from the claimant with a view to the claimant supporting the proposition that if the

Tribunal did find the claim of discrimination to be timebarred, it was just and equitable nonetheless that the claim be permitted to proceed.

110. Given the Tribunal`s findings that there was no discriminatory act, the question of timebar and the application of the just and equitable "*safety net*" do not require to be determined by the Tribunal. Submissions therefore in relation to those points are not rehearsed.

Submissions for the Respondents.

111. Ms Laurie, for the respondents, lodged written submissions. She supplemented those as she took the Tribunal through her submissions.

112. Ms Laurie commenced by making observations on the evidence. In her submission the evidence from the witnesses for the respondents was credible, reliable, consistent and was supported by relevant documentation. She placed emphasis upon the letter of resignation submitted by the claimant. The evidence of the witnesses for the respondents should be preferred, Ms Laurie said, where there was a dispute with evidence from the claimant or his witnesses.

113. It was highlighted by Ms Laurie that the claimant was valued by the respondents and viewed in a very positive light. The claimant had accepted in evidence that there was no benefit to the respondents in changing his role from driver to labourer permanently. The respondents needed experienced drivers like the claimant and were keen to retain his expertise.

114. The evidence for the claimant had been inconsistent and incredible on the whole, Ms Laurie submitted. His resignation letter did not sit with how he said he viewed matters at time of his resignation. He had repeatedly contradicted himself, she said. This had occurred both in evidence in chief as well as in cross-examination. Evidence had been given by him which

was inconsistent with written documentation from the time. He did not provide detail on various matters.

115. The claimant had changed his position in evidence from that set out in his pleadings. His pleadings had themselves changed. He had made no mention in the original case of a telephone call to Mr Galt on 1 March 2016. He had at that point referred to having informed Mr Galt of his position immediately following an appointment with his GP on 5 February 2016. He had also said he had informed Mr Galt that he had received the medical "all clear" on 13 April 2016. That was then changed to having informed Mr Galt on 21 April 2016.

116. The claimant had also said in his further particulars that Mr Galt had informed him that the respondents could offer him a relief driver position covering Glasgow and Grangemouth. The claimant had said in his pleadings that he had passed a copy of Dr Findlay`s letter to the respondents on 27 April 2016. This could not have occurred as the letter was dated that date. His pleadings had referred to absence on his part from about late May or early June 2016 until resignation. That had then been altered in further particulars to become that he had been absent from 7 June 2016 until resignation.

117. As far as the call on 1 March 2016 was concerned, Ms Laurie highlighted that this had not been mentioned in the original form ET1. There was no mention at that point of the claimant`s wife or son being privy to any call. In questioning when asked as to when he first discussed with the respondents the position regarding his HGV licence he had replied "*2 March*". He had gone on, however, to describe a call on 1 March 2016 which he said lasted 5 to 10 minutes. He could not provide any detail of what had been discussed over that time. He said that when he met Mr Galt on 2 March 2016 Mr Galt had asked him how he got on. That was consistent with there being no prior conversation, Ms Laurie submitted.

118. On the basis of the foregoing Ms Laurie urged the Tribunal to find that the call on 1 March 2016 had not occurred.

119. In relation to the move on the part of the claimant from the position as driver to the job as labourer, Ms Laurie drew the attention of the Tribunal to the claimant`s acknowledgement that he was aware that a vacancy was created by retirement of Stewart Devaney at the end of 2015. His evidence in relation to advertisements was also contradictory. He asserted that there had been no advert for the labourer`s position and placed emphasis on that. In re-examination, however, when asked if notification of vacancies was put on the board he said "*Now and again but most of the time if there is a job going: see the boys and see if a job's going*".

120. The claimant had accepted that one of the criteria for the labourer`s job that was made known to him was that the keeper of the post had operator`s tickets. He did not have those. He accepted that Mr Galt said that as he did not fit the criteria Mr Galt would have to speak to Mr Jarvie. He accepted that he had been given a wash bay role initially.

121. It was accepted by the claimant that there was no benefit to the respondents in changing his role permanently and that there were people available to cover his role as driver temporarily. He accepted that the only reason for changing the role was that the respondents were accommodating his request. He had said that he was delighted when told on 3 March 2016 that the job was his. He had handed over his phone and keys.

122. The claimant had accepted that Mr Crawley commenced work on 29 March 2016. He had further accepted that at that point the timing of the medical tests which he was awaiting was unknown to him. He accepted that he did not know at that point how long he would be unfit to drive.

123. Ms Laurie concluded this part of her submission by saying that the claimant`s evidence that the change of role was subject to medical tests was not credible.

124. In relation to change in the wage payable to the claimant, he had acknowledged that he knew that the rate of pay for a labourer would be less than that for a driver. He had said that he knew that the rate was £7.50 per hour for a labourer but he did not believe that the respondents would place him on as low a rate. His evidence was that when his wife spoke to Mr Galt on 14 April 2016 Mr Galt had confirmed the rate as £7.50 per hour. He said that the rate had then been increased. He confirmed that he got a letter advising him of the rate and giving him a new form of contract. He did nothing by way of lodging a grievance when deductions were made from his salary in mid-April 2016 due to an overpayment.

125. In evidence the claimant said that he thought he was first given the contract for the labourer/valeter role in early April 2016. That was consistent with Mr Galt`s evidence.

126. Ms Laurie highlighted that the claimant made no mention of any claim for pay in his letter of resignation.

127. It was Ms Laurie`s submission that, from the evidence, the claimant`s position that he was unaware that he would receive a reduced rate, and what that rate of pay was to be, in the labourer`s role was not credible.

128. As far as the discussion between the claimant and the respondents as to the claimant carrying out relief driving or becoming the driver of an additional truck was concerned, Ms Laurie went over the evidence. She highlighted that the claimant`s position was that he had asked to resume his driving duties on 21 April 2016, with Mr Galt saying that the job was "away". The claimant said he had asked Mr Galt if he was having a joke and Mr Galt had replied "*No*". There had been no further discussion, apart from the claimant`s remark which he said he had made that if Mr Galt though he was going to get away with that "*we`ll see about it*". In cross-examination, however, when asked about the meeting on 21 April 2016 the claimant had

agreed that Mr Galt had been sympathetic to his position and was looking to find ways to get the claimant back into driving. He accepted that Mr Galt had suggested relief driving over the summer months. He had said in evidence in chief that he had turned down relief driving saying to Mr Galt that he would rather have his old job back. He had, however, said in relation to the duties he was carrying out at the end of April 2016, that the driving duties had "*fizzled away*".

129. Although the claimant had denied that Mr Galt had suggested that another truck might be coming, Ms Laurie said that when paragraph 8.4 of form ET3 was put to the claimant, that paragraph appearing at page 28 of the bundle, then during that passage of re-examination the claimant had said that he asked Dougie "*if the new truck had arrived and no new truck had arrived when I was off*." That, Ms Laurie said, clearly indicated that the suggestion of a new truck had been raised with the claimant as Mr Galt had said.

130. It was therefore clear, Ms Laurie said, from the claimant`s own evidence that the claimant was offered a relief driving role and that there had been a discussion about a new truck.

131. Turning to the meeting which had taken place on 29 April 2016, Ms Laurie said that the claimant`s evidence was so at odds with that of Mr Galt that the claimant`s evidence was unbelievable. The claimant had said that the meeting lasted seconds. He had handed the letter over to Mr Galt, this being the letter which confirmed that he was fit to drive. Mr Galt had made no response whatsoever. Mr Galt had handed him the contract and told him to sign it and bring it back. This was unbelievable, Ms Laurie said. She said it was clear that the claimant was lying and had been unable to come up with an alternative scenario. He had therefore adopted the default position that Mr Galt had gone mute.

132. In relation to the conversations between the claimant and Unite in May 2016, Ms Laurie submitted that it seemed incredible that Unite had called

the claimant to ask how they could help him and had then said that they could not really do much for him. According to the claimant they had not even suggested that he at least invoke the internal grievance procedure of the respondents.

133. As far as the period between 7 June 2016 and 4 July 2016 was concerned, Ms Laurie rehearsed the evidence for the claimant. That was that the claimant had been absent from work, had applied for the role with W H Malcolm on 16 June 2016, had attended interview thereafter and had been successful in obtaining the job. He had attended his GP on 15 June 2016 and there had been an altercation. He said he had a sick line for the period 16 to 21 June 2016 as well as for the subsequent week. Mr Galt, however, said that he saw the claimant at work on 16 June 2016. The clock in records confirmed that the claimant was at work that day. The claimant had confirmed that he kept his clock in card with him at all times and that it could not be interfered with. The claimant`s evidence therefore that he had not been at work was, Ms Laurie submitted, wholly fabricated.

134. Moving on to address the question of the claimant`s resignation, Ms Laurie said that the claimant made no complaint in his resignation letter of 4 July 2016. He confirmed in cross-examination that it was open to him to raise a grievance but that he chose not to take that course. He accepted in cross-examination that his reason for leaving was to move onto pastures new. In re-examination he said he did not know what the response of the respondents was to his solicitor`s letter of 28 June 2016.

135. In reality a driver`s job could have been offered to the claimant. He resigned, however, notwithstanding that. Ms Laurie submitted that the claimant`s position that he resigned for a reason other than to secure alternative employment was not credible.

136. Evidence had been put forward designed to undermine Mr Galt`s credibility. The claimant had said that Douglas Rennie had told him of this information but that the information was common knowledge. The claimant said,

however, that he had only ever heard Mr Rennie talk about it. This was indicative, said Ms Laurie, of the claimant`s tendency to exaggerate and fabricate the evidence.

137. As far as Mrs Weber was concerned, it should be borne in mind that her evidence was dependent upon what the claimant chose to share with her. She was not present when conversations between the claimant and Mr Galt took place. At time of the ET1 being submitted there was no mention of the discussion which she said she had heard on 1 March 2016. She had been very definite in evidence about dates and times of events. The discussion she did have with Mr Galt related to the deduction of wages due to initial overpayment to the claimant.

138. Mrs Weber also confirmed that, as Mr Galt said in evidence, she spoke with him when she delivered the sick note on 22 June 2016. That was the only sick note which Mr Galt said he had received. Mrs Weber had said, conveniently Ms Laurie said, that "*she would have*" handed in sick lines to reception. She had not placed what was a confidential sick note in an envelope and had not addressed it to Mr Galt. Ms Laurie asked the Tribunal to accept that this was because the sick note was not in fact ever handed into the respondents.

139. There had been an altercation between the claimant and his GP. Both the claimant and his wife said that it took place on 15 June 2016. The respondents` position was that no sick line for the week commencing 15 June 2016 had been submitted to them. That was consistent with there having been a dispute between the claimant and his GP on 15 June 2016 resulting in no such sick line being issued.

140. Ms Laurie said that although Mrs Weber seemed from her evidence to know exactly what the claimant had discussed with Mr Galt on 1 March 2016, she had no discussion with her husband as to what had been discussed

between him and Unite in May 2016 other than to say that there was no much that Unite could do.

141. Mrs Weber`s evidence was, Ms Laurie submitted, unreliable and should be disregarded.

142. Mr Rennie`s evidence was limited. He had taken great delight in having the chance to undermine Mr Galt who was his line manager. The evidence he had provided, however, was based purely on rumour and speculation.

143. Mr Rennie had recognised that here was a vacancy for a labourer role and that this had been advertised before Christmas. There had been two labourers. He had asked Mr Morris if anyone was coming to help out. This was consistent with and supported Mr Morris`s evidence that the claimant had approached him about the labourer`s role.

144. Mr Rennie`s evidence as to whether the role of the claimant as labourer was permanent or temporary relied on what the claimant had chosen to tell him. He had not witnessed any discussions between the claimant and the respondents on that topic. He had been unable to cast light on what temporary meant or if a duration for the labourer role had been agreed. His evidence was irrelevant and unreliable, said Ms Laurie.

145. In relation therefore to any conflicts in evidence between the evidence of the claimant and the respondents, the Tribunal should accept the evidence from the respondents` witnesses.

146. Ms Laurie then set out suggested findings in fact based upon her assessment of the evidence from the different witnesses. She then addressed the law in relation to the areas before the Tribunal.

147. Ms Laurie made full submissions in relation to discrimination and perception of discrimination.

148. Ms Laurie made submissions in relation to the unlawful deductions from wages that is said to have occurred. Given the Tribunal`s findings that the claimant`s job had "*switched*" from that of driver to labourer, the unlawful deduction claim fell away. Submissions in this regard are therefore not set out.

149. Similarly the submissions Ms Laurie made in relation to constructive dismissal are not rehearsed given the Tribunal`s view that the claimant`s job "*switched*" by agreement. There was no fundamental breach of contract therefore when the claimant was not given a job as a driver when he received the "*all clear*" from the medical practitioners on 21 April 2016.

150. Ms Laurie also made submissions in relation to loss claimed.

151. As far as timebar was concerned, again submissions by Ms Laurie are not set out given that the facts necessary to found a claim of discrimination have not been found by the Tribunal to have occurred.

Discussion & Decision

152. The evidence in this case was such that determining what it regarded as being the facts established involved much consideration and debate by the Tribunal. A unanimous position was reached, however.

153. There were also many tricky, and in some cases novel, points of law raised.

154. The Tribunal was greatly assisted by full and able submissions made by each representative.

155. The key area for determination by the Tribunal was as to the basis upon which the claimant had taken up duties as a labourer following upon the decision by Dr Findlay on 1 March 2016 to refer the claimant to the Golden

Jubilee Hospital for further tests and to preclude the claimant at that point from driving HGV vehicles.

156. Put briefly, if that change was a change of job so that the claimant was in post as a labourer, he would be due to be paid from then on as a labourer. He would in that circumstance have no ground of complaint if, at the time when he was able to drive once more, he was not immediately moved from his job as a labourer to a job driving an HGV vehicle. Recruiting Mr Crawley could not be an act of discrimination as there would be no detriment to the claimant given that he had moved into the job as a labourer. Equally there could be no claim of constructive dismissal as there was no fundamental breach of contract both through maintaining the claimant`s salary at the level for a labourer and in not restoring the claimant immediately to the role of HGV driver.

157. If, on the other hand, the move of the claimant into the post of labourer had been on the basis that it was a short term move pending the outcome of medical tests, the basis existed for there to be claims advanced of unlawful deductions from wages, discrimination and constructive dismissal.

The Claimant`s move from Driver to Labourer

158. It was undisputed evidence that the claimant had had a heart attack in October 2010. He gave evidence as to being affected by similar symptoms in early 2016. He had experienced breathlessness and chest pain. He said he was "*worried*" and described it as "*scary*". He said to Mr Rennie that it was a heart scare. At the appointment with Dr Findlay on 1 March 2016 he had been unable to continue on the treadmill for what he understood to be the required time of 9 minutes. He only been able to complete less than half of that time.

Phone Call 1 March

159. There was a dispute as to whether there was a phone call between the claimant and Mr Galt on 1 March 2016.

160. The Tribunal preferred the evidence of the claimant and his wife as to there having been such a call. It seemed logical that the claimant would have phoned his place of work given that his role was to drive an HGV vehicle and that he had been told that in no circumstances was he to drive an HGV vehicle at that point. Further, Mr Galt`s evidence was not convincing as to there being no such phone call. His evidence varied and altered. Initially he said there was no such call. He then said that the claimant might have phoned the office. That then became a concession that the claimant might have spoken to him on 1 March 2016. Other than reporting on the appointment with Dr Findlay, it is difficult to know why the claimant would have phoned on 1 March 2016. It would also be difficult to imagine that if the claimant did speak to Mr Galt on 1 March 2016, he would not inform Mr Galt of the view of Dr Findlay.

161. Mrs Weber heard her husband`s side of that conversation. Her evidence was consistent with that of her husband as to what was said by him. The conversation, however, did not assist the Tribunal with establishing in its own mind, on the evidence, exactly what had happened on 2 and 3 March 2016 when the claimant and Mr Galt met. It provided some assistance in assessment of credibility, however it did not assist in relation to whether the discussion in the ensuing few days was on the basis of the move between driver and labourer jobs being short term or not. The conversation described by the claimant and Mrs Weber was that the claimant had said that Dr Findlay had instructed him not to drive HGV vehicles. Mr Galt had asked whether that was "*for good*". The claimant had then said that it was not for good as he was being referred for further tests. That did not of itself provide a basis for the conclusion that the move from driver to labourer had been permanent or temporary.

162. It was not the respondents` position that the claimant had said when he and Mr Galt met face to face that the claimant was never to be permitted to drive HGVs again. It was not the claimant`s position that he had said anything to Mr Galt on the telephone call on 1 March 2016 as to seeking another post on any basis. Emerging from the telephone call, Mr Galt would have been aware that the claimant was at that point not able to drive HGV vehicles and was being referred for further tests.

The Agreement Reached

163. Evidence of the meeting on 2 March 2016 saw diametrically opposed versions being presented to the Tribunal. The claimant was clear that he had used the word "*temporary*" and was in no doubt that he had made it plain that whilst he wished the labourer`s job to provide him with an income, this was a temporary move rather than a wish or decision on his part not to drive ever again for the respondents. Mr Galt, on the other hand, said that the words "*temporary*" or "*permanent"* were not used. Duration had not been discussed. It was, however, he said, clear that the claimant wished to secure a post as a labourer as he was worried about whether he would be able to drive again in the future. He was concerned that if that came about either on this occasion or at some point before long there would not at that point be an alternative post available to him. Such a post **was available** in early March. Mr Galt also said that he had suggested to the claimant that he might want to await the outcome of test results before making his decision. The claimant had however, said no to that possibility. The claimant had confirmed his position having slept on it.

164. Sometimes in a situation where there are differing versions of events, the evidence is such that a Tribunal can see that there has been a misunderstanding between parties with one or both potentially "*getting the wrong end of the stick*". In this case, however, there was, on the evidence, no basis on which that could be the conclusion reached by the Tribunal. This was not a situation where words that either party used were capable of

interpretation by the other in a way which had led to the other party having a totally different view of what was meant. The claimant was clear that he had expressly said that the move of job was to be temporary pending the outcome of tests. The respondents were equally clear that, whilst the word "permanent" had not been used, the claimant wished to move jobs to take advantage of an alternative job being available and did not wish to wait to see what would happen when the test results were known. It was important for him to make the move while an alternative job was available.

165. The Tribunal required to assess the credibility of the claimant and of Mr Galt. It did so. In undertaking that exercise it took account of the evidence of the other witnesses in the case who were not party to the conversations between the claimant and Mr Galt but who had had some interaction with either or both parties around this time.

166. Mrs Weber was regarded as being the most credible witness in the view of the Tribunal. She was straightforward in giving her evidence and had a good grasp of events and dates. She did not, in the view of the Tribunal, exaggerate. She accepted in some areas that she did not know the position on different points. She was not however present at the meetings between the claimant and Mr Galt.

167. Mr Rennie was not able to add much to the core issue. His position was that the claimant told him that he was to work in the yard for a short time until he got his health problems sorted. His understanding was the claimant was working in the yard on a temporary basis. The claimant spoke with Mr Galt on 21 April 2016, Mr Rennie said that he spoke to the claimant shortly after that. He said that the claimant was quite down and quite upset. He said that the claimant had said to him that there was no lorry for him to drive and that there was no lorry available as a new driver was doing that job.

168. Mr Morris also had relatively limited evidence to provide. That related to a conversation which the claimant was said to have had with Mr Morris when

the claimant had enquired of Mr Morris at the end of February 2016 as to whether the labourer`s job was available. The claimant denied that there was any such conversation.

169. The Tribunal found parts of Mr Galt`s evidence in the case in general to be unsatisfactory. The paperwork for the respondents and procedures adopted by them were somewhat chaotic and were unhelpful from the point of view of ascertaining exactly what had happened. Mr Galt confirmed that the same paperwork would be sent to HR and payroll whether the change was temporary or permanent., so that did not assist the Tribunal. A simple letter to the claimant after the meetings at the beginning of March 2016 confirming the basis on which he was taking up the post of labourer would almost certainly have avoided dispute and this subsequent Tribunal case. There was no such letter or communication. No notes of any meeting were produced. The letter which was addressed to the claimant and which was dated 7 Mach 2016, page 124.1 of the bundle, was said by Mr Galt to have been backdated. Whilst he gave evidence of there being a statement of employment particulars or contract of employment given to the claimant in early April 2016, that was considered by the Tribunal to be incredible evidence. There was in the bundle at pages 121 to 124 an unsigned statement of terms and conditions of employment detailing the claimant as being a labourer/valeter being paid at £8.13 per hour. The statement of terms and conditions of employment which appeared at pages 124.2 to 124.5 also referred to that post and provided that the hourly rate was £7.50 per hour. Mr Galt had signed the second of those statements at page 124.5 on 28 April 2016. There was, in addition to the letter dated 7 March 2016 addressed to the claimant, a letter addressed to the claimant dated 28 April 2016. It appeared at page 120. It bore to enclose a statement of terms and conditions. Both the letter at page 120 and the letter at page 124.1 referred to a three month probationary period which, it was accepted, was not appropriate given the length of employment which the claimant had with the respondents.

170. The internal procedures adopted within the respondents` organisation did little to comfort the Tribunal as to the accuracy of the evidence given by Mr Galt. As mentioned above, page 2 of the form JPD13, page 1 appearing at page 126 of the bundle, was not part of the documentation for the Tribunal. Similarly an attachment to the email which appeared at page 127 of the bundle was not before the Tribunal. These documents might have added nothing to the position. The fact, however, that they were not present led to a degree of questioning and speculation during the leading of evidence in the case as to what they contained and what they might have revealed, and indeed why they were not present.

171. In the view of the Tribunal, Mr Galt exaggerated the evidence as to how the claimant had presented when they met on 2 March 2016. In Mr Galt`s evidence the claimant had begged him to give him the post of labourer. He had been in tears. The Tribunal considered that this behaviour on the part of the claimant was unlikely.

172. Equally, however, the Tribunal considered that the claimant had not accurately represented his position in evidence. He said in the course of his evidence to the Tribunal that he was not concerned that he would never drive again. He said that he knew he had not had a heart attack. He said he always knew that he would be coming back to driving. This, however, did not square with other evidence which he gave to the Tribunal. That evidence was that he had experienced, in January 2016, similar symptoms to those which occurred when he had had a heart attack. He said that he was breathless and had had chest pain. He had managed less than half of the time which he understood to be required on the treadmill when asked to take the treadmill test by Dr Findlay. He said that his health was quite a worry in 2016. He said that at the end of the call on 1 March 2016 with Mr Galt, he was not sure entirely regarding his job. He said he was hoping to go in to see Mr Galt. He knew he couldn`t drive and was hoping to find an alternative, a bit of hope. He said he would ask if there was something else he could do.

173. Faced therefore with the evidence from the claimant and from Mr Galt, each of whom gave entirely different versions of events, and bearing in mind the reservations which the Tribunal had as to the accuracy of evidence both in terms of credibility and reliability as detailed above, the Tribunal considered the other evidence before it and the documentation in front of it.

174. The Tribunal had regard to the evidence before it from Mrs Weber, Mr Rennie and Mr Morris. It also kept in mind the following points:-

- The claimant loved driving

- The respondents said, and the claimant accepted, that there were other personnel employed by the respondents who could cover driving duties when the claimant was not able to drive. There were people available therefore to cover the claimant`s role temporarily.

- The claimant accepted that it was not necessary for the respondents to recruit permanently when he was unable to drive.

- The claimant accepted that there was no benefit from the respondents' perspective in altering the claimant`s job permanently.

- The claimant accepted that he did not meet the criteria which the respondents had at that point for a labourer`s job but that Mr Galt said he would discuss the position with Mr David Jarvie. The claimant accepted that Mr Galt had then come back to him the following day to say that he had spoken with Mr Jarvie senior and that the labourer`s job "*was yours*".

- The claimant was aware of recruitment of Mr Crawley and indeed had helped with training of Mr Crawley.

- After the claimant and Mr Galt had spoken, the claimant went home and returned the following day when agreement to the labouring post was confirmed.

175. When the claimant received the "*all clear*" on his health, the claimant accepted that Mr Galt had been sympathetic towards him and sympathetic to the fact that he wanted to return to driving. The claimant accepted that Mr Galt had suggested relief driving to the claimant at this point.

176. There was therefore no evidence of any issue as between the respondents and the claimant. There was no suggestion by the claimant either from his own evidence or in questioning of Mr Galt that there was any agenda on the part of the respondents towards the claimant or that the statement that they valued him as an employee and that he was valuable to them as an experienced driver was nonsense or was other than correct.

177. The Tribunal kept in mind that the claimant had been with the respondents for over 22 years. A new truck was coming in September 2016. There was no desire on the part of the respondents, nor any reason on their part, to bring the claimant`s employment to an end or to prevent him from driving. Had the arrangement for him to do the work of a labourer been put in place for a short period, there was no reason to think that the respondents would not have honoured that agreement, dispensing with Mr Crawley`s services if required, to enable the claimant to resume his post in implementation of the agreement as to the switch to the labourer`s job being for a short period.

178. It was viewed as very significant from the Tribunal`s point of view that within 3 weeks of the arrangement that the claimant take up the post of labourer, the respondents had recruited Mr Crawley as a permanent employee to drive the vehicle which the claimant had driven. There was no suggestion in the evidence nor any proposition put to the respondents that Mr Crawley had been someone they wished to recruit before that time or someone to whom they had been speaking about the post.

179. It was viewed by the Tribunal as being of critical significance that the respondents had, within a very short time after the meeting and agreement with the claimant, set off to recruit a permanent replacement for the claimant as HGV driver and indeed had managed to secure someone to fulfill that role on a permanent basis.

180. Further, when the claimant received the "*all clear*" and it was confirmed to him by the respondents that there was no job as an HGV driver given Mr Crawley`s appointment, he did not lodge a grievance, although he was aware of the policy. From Mr Rennie`s evidence the claimant was quite down and quite upset after this conversation towards the end of April 2016. Mr Rennie described the claimant as having told him that Mr Galt had said that there was no job driving, no lorry for him to drive. Had the respondents gone back on their word and not stuck to an agreement, it might have been anticipated that the claimant would have said something along those lines to Mr Rennie. This was a further factor in the Tribunal`s assessment of the position.

181. The Tribunal was satisfied that the agreement had been that the claimant would move to the labouring post, taking up the job as labourer and vacating the job as HGV driver. He had been worried as to his health and, at the time when the agreement was struck, had in his view failed the treadmill test having experienced similar symptoms to those which he had experienced on the occasion in 2010 when he had had a heart attack.

182. On one view, the letter of resignation which the claimant wrote on 4 July 2016 could be seen as a polite, non-controversial end to his employment. It certainly gave no hint of dissatisfaction on the part of the claimant with the actions of the respondents. There was no "*parting shot*" of any type. Indeed the letter went beyond a formal resignation and was friendly and appreciative in its terms. At this point the claimant had spoken with Unite and had taken legal advice. His solicitor had written to the respondents.

From the evidence the claimant had not spoken with his solicitor prior to writing the letter of resignation. Its terms lent no support to the view that there had been an agreement by the respondents to the claimant having a short term move in post, with that agreement then having been reneged upon.

183. In its assessment of the evidence and credibility, the Tribunal considered the evidence before it as to Mr Galt`s previous employment, the ending of that and charges which had apparently been made. There was, however, no prosecution and consequently no verdict. The Tribunal did not see that, on the information before it, any view could be taken as to, for instance there being no weight which could be attached to any evidence from Mr Galt. In fairness it was not suggested by Ms Gribbon that the Tribunal should simply disregard Mr Galt`s evidence due to the evidence from Mr Rennie and the claimant as to what they understood the position to be in relation to Mr Galt`s former employment, as backed up by the email from Mr Galt`s former employers which appeared at pages 157 and 158 of the bundle.

184. As to the evidence in relation to whether the claimant was or was not at work on 16 June 2016, the Tribunal was inclined to accept the evidence of the claimant that he had not been at work given the Fit Notes which appeared. It recognised that the clock in records appeared to show the claimant attending work. There was no explanation, however, of how “fail safe” the clock in system might be. The entry for 18 June 2016 showed the claimant clocking in at 7.21am, clocking out at 7.22am and clocking back in at 7.22am. It was hard to understand why such an entry might appear. In short the Tribunal had in its view insufficient material to be able to be certain that the clock in records established that the claimant had indeed been present at work on 16 June 2016.

185 Mr Morris did not give evidence of having seen the claimant show his legs to demonstrate the effects of cellulitis, although Mr Galt said that the

claimant had done this in the office when Mr Morris was present. Whether the claimant was or was not present at work on 16 June 2016, did not assist with determination of whether he had, prior to that, switched jobs to become a labourer or was simply carrying labourer`s duties pending medical tests and receiving the outcome of those.

Other grounds of claim

186. Having come to the view that the claimant took up the job as labourer, switching from his job as driver and leaving the driver's job unoccupied, and that this was discussed and agreed at the time, the other elements of claim fell.

187. Thus, there was no fundamental breach of contract when the claimant sought driving duties and the respondents did not accommodate that. That was something they were entitled to do having agreed with the claimant that he became a labourer.

188. Similarly, there was no underpayment to the claimant of wages given that he had moved into the post of labourer and was paid the appropriate rate for that job.

189. Likewise, the offer of the driving post to Mr Crawley and the appointment of Mr Crawley to that post were not potentially acts of discrimination in that the post was free to be offered to Mr Crawley. It is not therefore necessary for the Tribunal to determine what is necessary in law in its view to found a claim of perceived disability discrimination and whether on the evidence an act of discrimination, the perceived characteristic being disability, had occurred in this case. It is also not necessary to address the question of timebar and whether the claim would, if timebarred, be permitted to proceed nonetheless, that being just and equitable.

Employment Judge: Robert Gall
Date of Judgment: 04 April 2017
Entered in register: 04 April 2017
and copied to parties