EMPLOYMENT TRIBUNALS

Claimant: Mr S Hassall

Respondent: Melitta UK Ltd (formerly Wrap Film Systems Limited)

FINAL HEARING

Heard at: Birmingham **On:** 4-7 & 10-13 September 2018
(13 September deliberations in private)

Before: Employment Judge Camp Members: Ms SP Outwin
Mr MP Machon

Appearances
For the claimant: Mrs S Hassall, lay representative (claimant's wife)
For the respondent: Mr T Sadiq, counsel

RESERVED JUDGMENT

(1) By consent, all and any complaints relating to the respondent allegedly not permitting the claimant to return to work around 12 October 2015 are dismissed upon withdrawal, in accordance with rule 52.

(2) The Judgment in paragraph (1) was made and took effect on 6 September 2018.

(3) The claimant's other complaints all fail and are dismissed.

REASONS

Introduction; complaints & issues

1. The claimant was employed by the respondent, a company that manufactures and supplies cling film and aluminium foil products from premises in Telford, from 23 September 2013 until his resignation without notice on 24 July 2017. For most of his time with the respondent, he worked as a Warehouse Operative. He went through early conciliation from 27 April to 10 June 2017 and presented

a claim form claiming disability discrimination on 28 June 2017. A complaint of constructive unfair dismissal, based on an alleged breach of the so-called trust and confidence term, was added by amendment at or following a preliminary hearing on 19 September 2017. The claimant provided further particulars of his claim in a document headed "*Schedule of Alleged Acts of Disability Discrimination*" ("Schedule"). There was then a further preliminary hearing, coincidentally before the Employment Judge chairing this Tribunal, on 4 December 2017. By way of background, we refer to the written records of both preliminary hearings.

2. The complaints being pursued and the issues potentially arising in relation to those complaints are set out in the written record of the preliminary hearing of 4 December 2017, which incorporates a list of complaints and a list of issues. One of the case management orders made at that preliminary hearing was, "*The parties must inform each other and the Tribunal in writing* ***within 21 days of the date this is sent to them****, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.*" Neither party ever contacted the Tribunal challenging what was stated about the complaints and the issues in the Case Management Summary section of the written record of that preliminary hearing. And at the very start of this final hearing, Mrs Hassall, on the claimant's behalf, confirmed that the complaints being pursued were indeed those recorded there – no more and no less.

3. We have not, in relation to every complaint, dealt with every issue that potentially arose. In the main, we have only dealt with those it was reasonably necessary for us to deal with to decide this case. Similarly, in these Reasons we do not mention all facts or even deal with all factual disputes that have been raised before us, but only those we felt we needed to in order to explain and justify our decision. This will almost certainly mean there are some things that either or both parties consider important that we have not covered. We mean no discourtesy to the parties and we appreciate they may be disappointed by this, but our focus has been on what we consider relevant and important in relation to the complaints of disability discrimination and unfair dismissal that are before us.

4. The claimant is complaining about 30 different things that happened (or, in some cases, allegedly happened) between November 2013 and July 2017. All 30 of those things are relied on in relation to constructive unfair dismissal. 27 of them are also alleged to amount to disability discrimination of various different kinds. Respondent's counsel, Mr Sadiq, helpfully re-ordered (approximately chronologically) and numbered the claimant's complaints. Subject to one change, we gratefully adopt his numbering, which was used for convenience sake throughout the hearing.

5. The change that needs to be made to Mr Sadiq's numbering so that it fits with what was is in the written record of the preliminary hearing of December 2017 is: Mr Sadiq's complaint 25 should not be a numbered complaint, but should instead be an unnumbered set of allegations relating just to constructive unfair dismissal; complaint 25 is a reasonable adjustments complaint about an alleged

failure to meet and welcome the claimant on his return to work on 14 June 2017.

6. One complaint – number 8 – was withdrawn part way through the hearing, leaving discrimination complaints 1 to 7, 9 to 26 and 28 and three sets of allegations – two unnumbered and one designated complaint 27 – relating just to constructive unfair dismissal.

7. The claimant was a disabled person at all relevant times because of anxiety and depression and various related conditions, set out towards the bottom of the first page of the document attached to his claim form containing details of his claim. In summary, his claim is to the effect that the respondent failed to take adequate care for his mental health during his employment, leading to his condition deteriorating significantly and ultimately to his resignation. The respondent accepts it knew he was a disabled person from November 2014 onwards. It defends all of his complaints on the merits and also relies, in relation to some complaints, on a defence of lack of knowledge of disability and/or on the basis of time limits.

8. As we told the parties shortly after the start of evidence, we are not considering any remedy issues at this stage. We also decided to reserve our decision and give it in writing. Had the claimant won any of his complaints, there would have been a separate remedy hearing at a later date.

The law

9. The relevant law is accurately set out in Mr Sadiq's preliminary skeleton argument and is reflected in the wording of the list of issues. Our starting point is the wording of the relevant legislation, in particular sections 13, 15, 20, 23, 26, 123, 136, and paragraph 20(1)(b) of schedule 8 of the Equality Act 2010 ("EQA").

10. Dismissal includes an employee terminating, "*the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*": section 95(1)(c) of the Employment Rights Act 1996 ("ERA"). What this means was definitively decided by the Court of Appeal in Western Excavations v Sharp [1977] EWCA Civ 165, in the well-known passage beginning , "*If the employer is guilty of conduct which is a significant breach…*" and ending, "*He will be regarded as having elected to affirm the contract.*"

11. The claimant relies, as the "*significant* [a.k.a. fundamental or repudiatory] *breach*", on a breach of the 'trust and confidence term'; that is to say, the claimant alleges that the respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between employer and employee. Any breach of that term is repudiatory. This serves to highlight that it is a high-threshold test: "*destroy or seriously damage*" is the wording used. It is not enough, for example, that – without more – the employer acted unreasonably or unfairly.

12. As was explained by Lord Steyn in Malik & Mahmud v BCCI [1997] ICR 606 at 624, although it is possible for the trust and confidence term to be breached by

conduct the employee is unaware of, such conduct cannot be the basis of a constructive dismissal claim. This is because the employee must resign in response to the breach in order to have been constructively dismissed.

13. This is – allegedly, to an extent – a 'last straw' case. An essential ingredient of the final act or last straw in a constructive dismissal claim of this kind is that it is an act in a series the cumulative effect of which is to amount to the breach of the trust and confidence term. The final act need not necessarily be blameworthy or unreasonable, but it has to contribute something to the breach, even if relatively insignificant. See Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493 and Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 at paragraphs 39 to 46.

14. In Wright v North Ayrshire Council UKEATS/0017/13, the EAT emphasised that in a constructive dismissal case, the repudiatory breach of contract in question need not be the only or even the main reason for the employee's resignation. It is sufficient that it "*played a part in the dismissal*"; that the resignation was, at least in part, "*in response to the repudiation*"; that "*the repudiatory breach is one of the factors relied upon*" by the employee in resigning. This is the one and only part of the test for whether someone is constructively dismissed in relation to which it is appropriate to look at matters subjectively, from the employee's point of view.

15. Turning to the discrimination complaints, in terms of case law, our starting point is paragraph 17, part of the speech of Lord Nicholls, of the House of Lords's decision in Nagarajan v London Regional Transport [1999] ICR 877. We also note the contents of paragraphs 9, 10 and 25 of the judgment of Sedley LJ in Anya v University of Oxford [2007] ICR 1451.

16. So far as concerns EQA section 136 – the burden or proof: although the threshold to cross before the burden of proof is reversed is a relatively low one – "*facts from which the court could decide*" that there was unlawful discrimination – unexplained or inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status[1] and/or incompetence are not, by themselves, such "*facts*"; unlawful discrimination is not to be inferred just from such things – see: Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] EWCA Civ 33; Chief Constable of Kent Police v Bowler [2017] UKEAT 0214_16_2203. Section 136 involves the tribunal looking for facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred: see South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23.

17. Similarly, in relation to direct discrimination, it is for the claimant to prove a prima facie case of less favourable treatment. "*To be treated less favourably necessarily implies some element of comparison: the complainant must have been treated differently to a comparator or comparators, be they actual or hypothetical.*" Harvey on Industrial Relations & Employment Law L[235]. The

[1] i.e. the claimant can point to someone in a similar situation who was treated more favourably and who is different in terms of the particular protected characteristic that is relevant, e.g. is a different age, race, sex etc.

claimant must show he was treated less favourably than the respondent treats or would treat others in a comparable situation and merely proving, without more, that the respondent treated him badly is insufficient.

18. We have also been particularly assisted by, and have sought to apply the law as set out in, the following cases:

    18.1 in relation to the burden of proof generally, paragraphs 36 to 54 of Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913;

    18.2 in relation to the [EQA] section 15 and reasonable adjustments claims, Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, at paragraphs 15 to 29, 41 to 47, 57 to 68, 73, and 79 to 80;

    18.3 in relation to the harassment claim, Richmond Pharmacology v Dhaliwal [2009] ICR 724, at paragraph 7 to 16;

    18.4 in relation to time limits, paragraphs 9 to 16 of the EAT's decision in Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283 and Hale v Brighton & Sussex University Hospitals NHS Trust [2017] UKEAT 0342_16_0812, at paragraphs 34 to 44.

19. Our decision is based much more on factual than legal issues, with possibly one exception. The one legal issue that has been significant in terms of our decision-making is whether a one-off act – something that happened just to the claimant and only once, in a particular set of circumstances – and that is not a "*policy*" or a "*criterion*", can be a "*provision, criterion or practice*" ("PCP") under EQA section 20. We accept Mr Sadiq's submission that (exceptional cases to one side)[2], in accordance with the EAT's decision in Nottingham City Transport Ltd v Harvey [2012] UKEAT 0032_12_0510, [2013] Eq LR 4, a one-off act of that kind can't be a PCP, because, "*"Practice" has something of the element of repetition about it.*"

The facts

20. Many of our findings on disputed questions of fact are not set out in this section of these Reasons; they are set out in the section headed "*Decision on the issues*".

21. We refer to the chronology and cast list prepared by the respondent, which should be deemed to be incorporated into these Reasons. On the claimant's behalf, we heard evidence from the claimant himself and on the respondent's behalf, from: Colin Austin, Warehouse Team Leader; Rachel Wilson, Warehouse Manager; Michal Chabros, Warehouse Supervisor; Neil Jones, Process Development Engineering Manager; Sarah Drummond, HR Manager; Adrian Barratt, Plant Manager; Adrian Brown, Managing Director; Emma Holden, HR Assistant; Vance Downing, Production Supervisor; Jon Shirley, Warehouse Operative; and Michael Thomson, also a Warehouse Operative at the relevant time – he is now a Warehouse Administrator. We also watched a video of what we were told was (and what we accept was) the claimant driving a

[2] In Gallop v Newport City Council [2016] IRLR 395, HH Judge Hand QC left open the possibility that there may be circumstances in which a one-off act would be a "*practice*".

forklift truck into a stanchion in the warehouse in which he was working on 8 November 2016.

22. We excluded some of Mr Thomson's statement as irrelevant and the rest of his evidence took matters no further. It is not his fault, but we are not sure why the respondent called him as a witness. The respondent was originally intending to call a further witness – Chad Brothwood – but there was nothing in his statement relevant to the issues in the case. Without objection on the respondent's behalf, we decided we did not want to hear from him and have not taken any of the contents of his statement into account.

23. Many of the respondent's witnesses, but in particular Mr Barratt, Mr Brown, and Mrs Holden, displayed a surprising lack of familiarity with much of the contents of their own witness statements. Mrs Holden, for example, was completely unable to recall a discussion with Mr Brown in June 2017 that is recorded in paragraph 22 of her statement. She initially said she was content for a line to be put through that paragraph on that basis. Counsel intervened and she then said that although she could not recall it now, she had recalled it when she signed her statement. We did not believe her in this respect – her statement was signed in July 2018, only just over two months before this final hearing. Similarly, Mr Barratt and Mr Brown were unable in oral evidence to recall a number of potentially important things until parts of their own witness statements and/or extracts from documents were put to them in re-examination, at which point they purported to be able to do so. We give little weight to those parts of their evidence.

24. As we reminded the parties and witnesses several times during the hearing, giving evidence is not supposed to be a memory test. If a witness genuinely cannot remember something, it is much better that they be straightforward and honest about this, and say that they can't remember, than that they pretend otherwise. We don't expect anyone to remember, off the top of their heads, all details of things that happened over a year ago. However, most of the respondent's witnesses appeared to have much greater difficulties recalling events than is usual in cases of this kind.

25. The case management order for witness statements made at the preliminary hearing in December 2017 made clear that all of the parties' evidence needed to be in their witness statements. Before the claimant gave evidence, we reminded Mrs Hassall of this: that his evidence would be what was in his statement and what he told us orally from the witness table. We explained that if there were important things missing from his statement, she could seek our permission to ask some supplementary questions at the start of his evidence. She thought about it, and told us that the claimant would stick with what was in his statement.

26. Because of the claimant's condition and the treatment he has been having for it, he has severe memory problems. This obviously affected his evidence to a very significant extent; he could remember very little indeed. We don't criticise him for this is any way. However, we can only decide the case on the basis of the evidence that is before us. If the claimant cannot remember something, that means we have no evidence from him on it. We have a duty to make reasonable adjustments to accommodate the claimant's disability, but whatever

reasonable adjustments we make, we can't take into account evidence that simply isn't there.

27. Because of the difficulties with the witness evidence – understandable from the claimant's side, less so from the respondent's – many of our findings have of necessity been based largely on the contents of contemporaneous documentation and on the inherent probabilities of particular situations.

28. The offer of employment to the claimant, in a letter dated 19 September 2013, made clear that although he would at first be working from 6 am to 6 pm, he would be required to transfer onto a "*continental night shift*" – 6 pm to 6 am – from January 2014. There is no evidence that he told the respondent that moving onto the night shift would or might be a problem for him. He moved onto a 'non-continental' night shift in October 2013, and his move onto the 6 pm to 6 am shift with effect from 6 January 2014 was confirmed in a letter of 13 December 2013.

29. There are three areas to the respondent's premises: production; warehouse A – broadly, for incoming goods and materials; warehouse B – broadly, for outgoing goods. The claimant was in warehouse B as an Operative, a job that involved, amongst other things, moving around goods on pallets using a forklift truck.

30. When the claimant started work for the respondent, on 23 September 2013, he completed an occupational health questionnaire stating that he suffered with depression, for which he had medication from his doctor. That form stayed with occupational health and did not go to HR or management.

31. The claimant's first significant period of sickness absence, with (according to his fit note) "*Low mood*", was for a month or so from 12 March 2014. He was assessed by an occupational health nurse on his return to work and she was happy with the state of his health.

32. On 3 November 2014, the claimant resigned by email. His resignation was also a grievance. He was unhappy about what had happened on a particular shift, which, exceptionally, he had worked in warehouse A, during which he felt he had had inadequate support. The email stated his GP had advised he come off nights. He was persuaded to retract his resignation and there was a meeting to discuss his grievance a couple of days later. He was encouraged to apply to move onto a day shift and his transfer onto a day shirt from the week commencing 1 December 2014 was confirmed in a letter of 12 November 2014.

33. The claimant went off sick, initially with sinusitis, around 24 November 2014. On 3 December 2014, he texted Rachel Wilson stating something like, "*Not coming back. Personal reasons.*" Mrs Wilson texted back long these lines: "*Sorry to hear that Steve. Let me know if there's anything I can do. I will let Sarah know of your resignation.*"

34. Later on 3 December 2014, Mrs Hassall emailed Mrs Drummond. The email included this, "*I understand that Steven* [the claimant] *has text*[ed] *Rachel* [Wilson] *to say he resigns from his job. … he has been quite depressed over the last few weeks … I came home … & he … said he'd resigned. This is not about work but his illness. … I appreciate that his resignation has been accepted but felt you needed to understand that currently he is not well and*

able to make such decisions. I would like to thank you all for offering him a day shift, which I think would've helped him in the long term. It's a shame he had done this today". Mrs Drummond replied stating that, "…*due to data protection etc, I'm unable to discuss Steve's employment with you. However, please do let him know a letter is going out in the post … and if either of you need to contact me further, please do not hesitate to do so.*" The letter referred to, sent on 8 December 2014, stated, "…*following your resignation from your employment, your wife emailed me to provide the Company with some more information about your decision. … If next year, or even in subsequent years, you are looking for employment and would like to consider the possibility of returning … please do let us know…*".

35. On 28 January 2015, Mrs Hassall emailed the respondent asking the respondent to, "*re-consider his contact of the 3rd December and withdraw it as* [a] *statement of resignation.*" She stated, "*Steve has been depressed and on 3 December 2014 didn't have the mental capacity to make any informed decision. Under the Mental Capacity Act (2005) & the Equality Act (2010) we have been advised that the actions taken on 3 December via text message query whether the law has been followed.*" Mrs Drummond replied on 10 February 2015 stating something to the effect that the respondent maintained its stance that the claimant had resigned and that it was unwilling to allow him to retract it. Mrs Hassall emailed back on 12 February 2015, the email ending, "*we will be including previous correspondence and issues as we see you in court*". In a letter of 17 February 2015, Mrs Hassall referred to, "*the tribunal papers*" and "*a 3 month window for the papers to be submitted*". We understand that the claimant, through Mrs Hassall, began an ACAS early conciliation process around this time.

36. By a letter from Mrs Drummond of 20 February 2015, the respondent, after taking advice from its solicitors, decided that, "*Whilst we are confident of the current position nevertheless and exceptionally the Company is prepared to rescind*" the claimant's *"resignation and reinstate his employment with us … there will be no break in continuity*".

37. On 13 March 2015, the claimant's GP produced a retrospective fit note covering the period from 1 December 2014 to 11 March 2015, stating the claimant had been not fit for work due to "*Anxiety with depression*".

38. The claimant returned to work around 20 May 2015. He was monitored by occupational health, who were happy with his progress until around late July 2015. He saw an occupational health nurse advisor on 3 August 2015 who recorded that he was complaining about finding 12 hour shifts very tiring, that he was going to start alcohol detox treatment, and that he had said he was, "*hearing voices mainly at night and in the morning, and has recently had his medication increased*". She advised that he should not drive the forklift until after he had had his alcohol detox treatment and that advice was then followed.

39. During August and September 2015, because the claimant was unable to drive a forklift, other jobs had to be found for him in the warehouse. On 17 August 2015, Mrs Hassall emailed Mrs Drummond complaining that there was nothing for him to do and about him being expected to do cleaning.

40. In late summer 2015, through into autumn, there were discussions between the parties about changing the claimant's shift pattern and also, potentially, his job role. Those discussions ended with him confirming, in an email of 15 November 2015, that he wanted to remain in his existing role working his normal hours.

41. On 10 September 2015, at a welfare meeting, the claimant told Mrs Wilson and Mr Barratt he was on medication – anti-psychotics containing a tranquillizer – that caused him to feel tired, drowsy and dizzy all morning and that he was not taking his medication the night before he went on shift to try to reduce his symptoms. Mr Barratt suggested this [not taking his medication] was not a good idea and that the claimant start a bit later in the mornings: 8 am instead of 6 am.

42. The claimant undertook an alcohol detoxification programme in hospital from 2 October 2015. He was signed off sick for 3 weeks from 1 October 2015 and then again until 4 November 2015. On the face of the documents, he had a largely successful, phased return to work from 4 November 2015. Occupational health reported on 20 January 2016 that he had, "*no issues relating to work, he is enjoying his job role and feels that being at work is helping him*". He was discharged from occupational health in March 2016.

43. On 7 June 2016, the claimant drove a forklift truck into a roller-door, causing significant damage. He was breathalysed shortly afterwards; the test result was negative. There was evidently some concern within the respondent and its occupational health department that the accident might have occurred due to the side effects of medication, and he was taken off driving duties as a precaution. In emails sent in July 2016, the claimant insisted that his medication had not affected his driving. There is no evidence before us that this accident in June 2016 had anything to do with the claimant's disability. The respondent followed occupational health advice and allowed the claimant to return to driving, following retraining and re-testing, when advised that he could. On 6 September 2016, the respondent informed him that it would not be pursuing disciplinary action against him in relation to this accident.

44. On 24 October 2016, using a forklift truck, the claimant placed a pallet full of goods in a dangerous position, from which it could have fallen causing serious injury to anyone below it. The dangerous placement of this pallet was not discovered until 10 November 2016. Mrs Hassall has sought, on the claimant's behalf, to make something out of the fact that it took the respondent 17 days to notice. But even if the respondent should have spotted it sooner, the only evidence we have suggests it was the claimant who put it there; that he should not have done so; and that it was potentially a disciplinary matter for him to have done so whenever it was discovered.

45. On 8 November 2016, the forklift truck accident that we watched a video of occurred. What we noted from the video is that the stanchion the claimant drove into was clearly visible, straight ahead of him, for some seconds before he collided with it, and that he just, for no obvious reason, drove straight into it. The claimant's key complaints in these proceedings relate directly or indirectly to that accident and its aftermath. The claimant gave a very short handwritten statement on the day to Mr Chabos. On 11 November 2016, he attended a "*fact finding*" interview with Mrs Wilson. In the interview, he said that he simply didn't see the stanchion that he hit; that he had been looking for a colleague, Piotr

Bajon, to tell him where he had put some pallets away; that at the time of the collision, he was looking at Mr Bajon. Piotr Bajon had on 8 November 2016 given a statement consistent with that account from the claimant. During the interview on 11 November 2016, the claimant was also asked about the misplaced pallet. He could recall nothing about it.

46. As best we can tell, the first time either the claimant or anyone on his behalf suggested that the accident in November 2016 might have had something to do with his disability was at his disciplinary meeting in January 2017.

47. The claimant was removed from driving duties from 8 November 2016 onwards. On 10 November 2016, Mrs Wilson produced a "*Hazard or Near Miss Report*" on the pallet incident and the following day produced a "*Management Investigation Report*" on the driving incident. In the latter report, amongst other things, she recommended that the claimant be removed, "*from all driving duties indefinitely. This is because this is not the first incident involving SH* [the claimant] *and his driving capabilities. He has previously hit a mezzanine floor post (structural) and the rapid rise door causing massive damage and cost. It is too much of a risk to leave SH with a licen*[c]*e.*" In the report into the pallet incident, she had stated that he should be removed, "*from driving duties given the recent trend of risk and incidents*".

48. Mrs Wilson was mistaken about the claimant having previously hit a floor post (stanchion), but she believed he had when she signed the report on 11 November 2016. We note that the genuineness of her belief at the time in a previous stanchion accident was not challenged in cross-examination and that that non-existent previous accident never formed part of a disciplinary case against the claimant.

49. The respondent decided to take the claimant down a disciplinary route in relation to the misplaced pallet and the accident of November 2016. At the claimant's / Mrs Hassall's request – requests made for good reasons – the disciplinary hearing was rescheduled twice and eventually took place on 20 January 2017.

50. All three of the letters inviting the claimant to disciplinary meetings were in, or were based on, a standard form, and included warnings that, "*the Company may choose to issue you with a final warning and transfer you to production which does not require driving duties, as part of the disciplinary process*" and that *"failure to attend without good reason may be considered as insubordination, which may be added to the list of allegations against you.*"

51. Mr Barratt was the decision maker at the disciplinary hearing. In relation to the pallet incident, the claimant effectively made a full admission to him, and put forward nothing in mitigation on the basis that he could not recall the incident at all. In relation to the accident, he agreed that he had been looking for Piotr Bajon and was not looking where he was going, but went on to say something like: "*that week was a bad week for me as I was off my medication due to the side effects and other things going on and I was not focussed*"; that he had not been taken off his medication by his doctor but had "*stopped taking them myself … because I wasn't happy with them … due to side effects*"; and that, "*When I'm low I hear voices in my head and when I drove into the stanchion I heard*

someone shouting [at] *me and that's why I looked away and didn't see where I was going but obviously no one was there. It was the voices in my head*"; that he knew what he was saying was different from what he told Rachel Wilson during the investigation, but that, "*I don't like talking with anyone about my issues really. I just wasn't thinking right at the time. I was very low.*"

52. Around February / March 2017, the respondent looked into how much non-driving work there was in warehouse B and whether there was enough to provide a job for the claimant to do if he was not going to be driving forklifts. The conclusion was that there was not. We find the respondent was entitled to reach that conclusion and reached it in good faith. The fact that work in warehouse B had been found for the claimant in 2015 when he had been taken off driving duties is a bit of a red-herring, in our view: finding something different for someone to do while they are temporarily unable to carry out their full duties is not remotely the same as giving them a job permanently doing something different; the claimant himself, through Mrs Hassall, complained at least once, in August 2015, about the alternative duties that had been found for him.

53. Mr Barratt gave his decision by a letter of 14 February 2017. He imposed a final written warning and transferred the claimant to a role in production, but with his pay ring-fenced. The claimant started in production around 20 to 22 February 2017. His new role as a Production Operative was confirmed in a letter of 23 February 2017.

54. The claimant appealed against Mr Barratt's decision. The substantive letter of appeal was dated 1 March 2017. It concluded, "*I … agree that I should not be driving a forklift at present. However there are roles that as a warehouse operative I can do in the warehouse. If this is not possible then I would like an assessment from the 'company Dr' as to the suitability of the move to the present job and its negative impact on my mental illness which the company is more than aware of.*"

55. The claimant was invited to an appeal hearing with Mr Brown on 28 March 2017 by a letter of 10 March 2017. It was sent by recorded delivery and unfortunately was not received and read until 17 March 2017 as a result. A further letter relating to the appeal was sent to Mr Brown by the claimant or on his behalf on 21 March 2017. It included this: "*Within my letter requesting an appeal I had also asked for a referral to the Company Dr. .. my Psychiatrist … will happily offer a letter explaining my illness, the implications of this on concentration and the impact of the current role on my illness and health. … In light of the time frame for submitting papers to ACAS, this needs to be actioned as soon as possible as last time this took several weeks.*" In light of that letter, and of the fact that Mr Brown was not in a position to respond to it before 28 March 2017, the appeal hearing was postponed. The claimant was given a choice of dates, and subsequently chose 11 April 2017.

56. In the letter to the claimant of 28 March 2017 postponing the appeal hearing, Mr Brown stated, "*I am happy to make a further referral to occupational health … however, feel this will be more meaningful after the hearing as I will then have a clear understanding of your appeal which will enable me to provide specific instructions in obtaining … advice*".

57. The appeal hearing on 11 April 2017 was very brief and did not follow the normal format of these things, with consideration of grounds of appeal and evidence, at all. The claimant was accompanied by his father-in-law, Mr Andrews (wrongly referred to as "*Edwards*" in the hearing notes), who at times spoke on the claimant's behalf. Amongst the things that Mr Andrews said to Mr Brown was that the claimant, "*does not like his current job role and would like to be considered for an alternative position where he can interact with other people*" and that he and the claimant understood why returning to forklift driving was, "*not an option*". The claimant told Mr Brown that he admitted he was not safe to drive a forklift truck and, in relation to the accident in November 2016, that: "*The week leading up to it I was having a bad week. My mother was ill, my son was having problems in the army, as well as my medication being changed and it all got too much.*"

58. With Mr Brown's permission, the claimant took the rest of 11 April 2017 off. He was due back in work on the 14th, but went off work sick from then until Thursday 20th.

59. During the appeal meeting on 11 April 2017, Mr Brown had told the claimant that he would inform him of the outcome of the appeal "*next week*", i.e. during the week commencing Monday, 17 April 2017. However, having taken advice, Mr Brown decided that in light of the claimant going off sick (Mrs Hassall had emailed on 13 April 2017 to say he was "*unwell and back under the care of the crisis team*"), he ought not to provide the claimant with the appeal outcome until he was better. Mr Brown then went abroad on business, meaning he was not in a position to authorise the sending of his appeal outcome letter as soon as the claimant returned to work on 24 April 2017.

60. Mr Brown had an email exchange about this with Mrs Hassall on 27 April 2017. He asked her whether the claimant would prefer the appeal outcome letter to be handed to him when he was next in work, which would be the usual process, or whether he would prefer to get it immediately by email. Mrs Hassall asked for it to be emailed and it was emailed later that afternoon.

61. The appeal outcome was that the final written warning was downgraded to a written warning but that, "*A full time, non-driving role in the Warehouse is not available and … therefore you should transfer into production on a permanent basis. Unfortunately, at this present time we are not able to offer you any other alternative work. You have intimated that if we are unable to accommodate you with an alternative role in which you are happier then you shall resign … This is not the outcome I wish for and can only offer my assurances that if something becomes available, then we shall discuss this with you directly.*"

62. Everyone working in production had to wear earplugs, for health and safety reasons. On 27 April 2017, immediately following receipt of the appeal outcome letter, Mrs Hassall emailed Mr Brown. She told him, "*Previously you were asked to make a referral to OH due to the inappropriateness of the redeployment to production where someone with a diagnosed mental illness is subject to sensory deprivation through the use of ear defenders that are worn for 11 hours each shift. You have refused this.*" In fact, this was the first time the respondent was made aware what the claimant's problem with working in production was.

63. 27 April 2017 was also the date the early conciliation process relating to these proceedings started.

64. On 28 April 2017, the respondent made an appointment for the claimant on 3 May 2017 with an occupational health doctor. In part of his oral evidence that was not substantively challenged, Mr Brown told us that if he had known about the claimant's issue with earplugs sooner, he would have made an occupational health referral sooner.

65. Also on 28 April 2017:

    65.1 the claimant had his return to work interview. This was four days after he had actually returned to work from sickness absence;

    65.2 a hard copy of the appeal decision letter that had been emailed to Mrs Hassall the previous afternoon was handed to the claimant (in an envelope), part of the way through his shift, by Mr Downing.

66. The claimant saw an occupational health doctor on 3 May 2017 as planned. The doctor's report, dated 10 May 2017, stated that the claimant was struggling to cope with being a Production Operator, "*particularly with the requirement to wear earplugs*" and that, "*it is my opinion … that a reasonable adjustment would be to move him back to the familiar surroundings of the warehouse where he wouldn't have to be wearing earplugs and can carry out warehouse operative duties that do not involve driving forklift trucks … if you can possibly arrange this*".

67. On 18 May 2017, Jon Shirley drove a forklift truck into the same stanchion the claimant had driven into in warehouse B. During May 2017, this accident was investigated, Mr Shirley was retrained and retested, he was permitted to return to driving duties, and the respondent ultimately decided he should not be disciplined.

68. From around the end of May 2017 and into June, there was correspondence between the parties about the respondent's appeal hearing notes. Mrs Hassall challenged their accuracy. She was and is concerned that the handwritten notes taken at the appeal hearing by Emma Holden were destroyed as soon as they were typed up.

69. During May and early June 2017, there were discussions between the parties through ACAS as part of early conciliation. Presumably because those discussions were without prejudice, we don't have detailed evidence about what they consisted of. One thing we do know was discussed, however, was what alternative roles the claimant could do. The respondent was evidently giving at least some thought to whether the claimant could be accommodated back in warehouse B doing non-driving duties. On or about 30 May 2017, Mrs Drummond spoke to a man called Adrian Rudd who was doing a non-driving job in warehouse B that had been offered to and refused by the claimant in Autumn 2015. She asked Mr Rudd whether he would be willing to step down from his role to allow someone else (meaning the claimant, although Mr Rudd was not told this) to do it. He said no.

70. Sometime in early June 2017, the parties agreed (through ACAS) that the claimant would do a two month trial in a non-driving role, working as a 'blader', in warehouse A. Although it was not in warehouse B, it was in a warehouse rather than in production and the claimant would not have to wear earplugs. He began working in that role on 14 June 2017, but went off sick from 25 June 2017. Mrs Hassall sent an email to Mr Downing on 25 June 2017 referring to, "*the deterioration in his mental health since returning to work*" and two days later stated in a further email to Mr Downing that the claimant was, "*unfit for work due to the current redeployment and actions of*" the respondent.

71. Early conciliation having ended on 10 June 2017, the claim form was presented on the 28th. Mrs Hassall had emailed Mrs Drummond and the respondent's solicitors on 27 June 2017 with a letter asking for information and documents. On 29 June 2017, the respondent's solicitors emailed a letter back. They copied Mrs Drummond into their response and she sent them an email, which she accidently copied Mrs Hassall into, stating, "*This letter has made my week :-)*".

72. On 24 July 2017, the claimant resigned by a letter that was emailed to the respondent. He did not give reasons.

Decision on the issues

73. Before we go through each of the complaints / sets of allegations, we shall deal with one or two matters that are relevant to several of them.

74. At the start of cross-examination, the Employment Judge explained to Mrs Hassall what putting the claimant's case was and about the need to do it. In particular, he told her that she would need to go through all relevant parts of the claimant's complaints and sets of allegations with the relevant witnesses of the respondent. This was reinforced during cross-examination of the respondent's first few witnesses, particularly at the end of cross-examination of the respondent's second witness, Rachel Wilson. We adjourned for 10 minutes specifically to enable Mrs Hassall to go through the list of complaints to make sure that everything that needed to be put to Mrs Wilson had been put to her.

75. Not everything that needed to be put to witnesses if the claimant wished to pursue all his complaints was put. The failure to put the claimant's case was not determinative of any issue, in that there were a number of reasons why each of the claimant's complaints has not succeeded. But it is one of the reasons why some complaints failed.

76. Something else forming one of a number of reasons why some discrimination complaints have failed is time limits.

77. The relevant 'cut-off date' is 28 January 2017, in that any discrimination complaint about something that happened before then potentially has a time limits problem.

78. In our view, all of discrimination complaints 1 to 11 are out of time, even taking the claimant's case on paper at its reasonable highest.

    78.1 These complaints concern things that happened between late 2013 and 24 June 2016.

78.2 There is no relevant "*conduct extending over a period*" under EQA section 123. There is no substantial connection between the alleged events complained about in complaints 1 to 11 and the later complaints.

78.3 Although complaints 12 to 16 relate to things that happened before the cut-off date, there would potentially have been a course of conduct extending over a period in relation to these complaints had we decided them in the claimant's favour on their merits. They are part of what could be described as an overarching allegation against Mrs Wilson to the effect that she wanted the claimant out of warehouse B because she was prejudiced against him because of his disability.

78.4 No evidence has been put before us supporting an extension of time on a "*just and equitable*" basis. There weren't even any submissions made on the claimant's behalf on this point. We have no idea why a claim was not put in earlier. It certainly does not seem to have been because the claimant and Mrs Hassall were ignorant of his employment rights and how to enforce them; Mrs Hassall was threatening and gearing up for a Tribunal claim as early as January / February 2015. It is for the claimant to persuade us that it would be just and equitable to permit otherwise out of time complaints to proceed and absolutely nothing of any substance has been put before us in this respect.

78.5 So far as concerns complaints dating from 2013 to 2015, at least, the lapse of time has caused prejudice to the respondent in terms of people not being able to remember things. But even if this were not so, although it may be just and equitable to extend time even if there is no good reason for the delay in bringing the claim, the Tribunal should not extend time just because that delay has not caused any great prejudice to the respondent. If that were enough to justify an extension of time, then: it would mean that the respondent had to justify not extending time, rather than the burden being on the claimant; it would in practice mean that an extension of time would be made in almost every case where the delay in bringing proceedings was months rather than several years, because it will be a rare case where significant prejudice is caused by such a relatively short delay.

79. The constructive unfair dismissal complaint has no time limits problems. In theory, the trust and confidence term could be breached by a sequence of events that began many years before the claimant's resignation.

80. We shall now go through the complaints and allegations, one by one, adopting the wording used in the list of complaints in the written record of the preliminary hearing of December 2017 and explaining why each complaint fails.

1. November 2013 to November 2014 – the claimant's shift pattern; reasonable adjustments, as set out in the middle of the 3rd page of the schedule[3] (immediately under the heading "Reasonable adjustments …")

81. The discrimination complaint is out of time. As just explained, that goes for each of complaints 1 to 11. We won't repeat it in relation to complaints 2 to 11.

82. We accept the respondent had a PCP along the lines of that identified at the top of page 66D of the hearing bundle. However, the claimant gave no real evidence relating to this complaint and we are not satisfied, on the evidence, of any relevant substantial disadvantage. In addition, although we are prepared to give the claimant the benefit of the doubt so far as concerns the defence of lack of knowledge of disability, we accept that the respondent at no relevant time knew or could reasonably have been expected to know of any relevant substantial disadvantage. We note that, as explained above, the claimant accepted the job knowing he was going to be doing nights and did not, on the evidence, raise a problem with the respondent about doing nights until around November 2014.

83. The law requires us to assess objectively whether these matters contributed significantly to any breach of the trust and confidence term at the point of resignation. Our assessment is that they did not. Unless otherwise indicated, this applies to every other complaint and set of allegations.

2. 1 November 2014 – requiring the claimant to work in warehouse A for 12 hours on his own without supervision or company on his return from a month's sickness; reasonable adjustments, the PCP being this requirement, the disadvantage being causing a deterioration in mental health and the adjustment being not imposing this requirement

84. There is no PCP here as a matter of law because this was a 'one-off' that was not a "*provision*" or "*criterion*". We are not satisfied on the evidence of the alleged substantial disadvantage and even if we were, the respondent did not know and could not reasonably have been expected to know of any such substantial disadvantage, particular given that the claimant's return to work from a month's sickness absence was more than 6 months' earlier.

[3] The version of the Schedule that was before the Tribunal in December 2017 was formatted slightly differently from the version in the hearing bundle, so these references to particular pages of it are not entirely right when applied to the latter version. The substantive contents of the two versions of the Schedule are the same.

3. 3 December 2014 – accepting a resignation by text; reasonable adjustments; the PCP is doing as alleged; the disadvantage is that the claimant, because of his disability, would be more likely to have resigned without prior full and proper consideration; the adjustment would be to have asked the claimant to confirm his resignation in a letter and/or to have checked with him as to whether he really meant it and/or to have given him a cooling off period

85. Again, we don't think there was a relevant PCP here, because this was a one-off. Even if there was, we are not satisfied on the evidence that those with the claimant's disability are more likely to resign by text and therefore that any such PCP caused the claimant substantial disadvantage, "*in comparison with persons who are not disabled*".

86. We also don't think it would have been reasonable, in the particular circumstances, for the respondent to have to take the steps suggested as reasonable adjustments. This was the claimant's second resignation quick succession. At the time of the second resignation, the respondent had only just sorted out the claimant's problem with working night shifts that had partly led to the first. The respondent had had nothing from claimant himself saying he wished to retract the resignation and had made clear in Mrs Drummond's email to Mrs Hassall of 8 November 2014 that it needed something from him, or clearly sent with his authority. Even in her email of the same date, Mrs Hassall had not suggested there was any doubt the claimant had resigned, nor did she suggest that he wanted to retract his resignation. What she was saying that she thought he lacked capacity to make the decision to resign. It was not until 28 January 2015 that the respondent was written to with authority from the claimant asking for retraction to be considered, or casting doubt on whether he had actually resigned. We think the respondent acted reasonably in all the circumstances at the time.

there is no discrimination complaint in relation to the alleged refusal to discuss reinstatement in February 2015; allegedly part of the breach of the trust and confidence term

87. This occurred 2 ½ years before the claimant resigned. Its impact on the trust and confidence term at the point of resignation, if any, would be negligible. In any event, the respondent had reasonable and proper cause for acting in this way and we see nothing wrong with what the respondent did. As we have just explained in relation to the previous complaint, Mrs Hassall's email of 8 November 2014 suggested there was no doubt about whether the claimant had resigned and her request for the respondent to reconsider its stance was not made until 2 ½ to 3 months later. Further, what was being debated between the parties in January / February 2015 was not whether the respondent would re-employ the claimant – the respondent had made clear in November 2014 that it would be happy to consider doing so. Instead, the debate was effectively about whether the claimant's continuity of employment would be preserved. Moreover, the respondent gave Mrs Hassall what she wanted in her email of 28 January 2015 less than three weeks' later.

4. April to August 2015 – not allowing the claimant to drive a forklift; direct discrimination; alternatively harassment

88. This complaint fails on the facts. Even on his own case, as set out in paragraph 5 of his witness statement, the claimant was not prevented from driving a forklift at this time. There is no factual basis for this complaint in the evidence before us. On the evidence, the claimant was not prevented from driving a forklift until August 2015. This was done, understandably and justifiably, on occupational health advice and that advice was given because of the claimant's alcohol dependency problem. Alcohol dependency is not the claimant's disability and it cannot as a matter of law be a disability under the EQA – see regulation 3 of the Equality Act 2010 (Disability) Regulations 2010.

5. around August 2015 – not allowing a reduction in working hours; direct discrimination; alternatively reasonable adjustments, based on a PCP of doing as alleged, the disadvantage being that the claimant, because of his disability, found it difficult to do the shifts and the hours required of him

89. There is no factual basis for this complaint in the evidence before us, in particular nothing in the claimant's witness statement or his oral evidence.

6. August 2015 – [the complaint set out at the bottom of the 4th page of the schedule] requiring the claimant to choose between doing menial tasks or taking annual leave; section 15, relying on the ban on driving the forklift as the "something arising"

90. As with the previous complaint, we had nothing from the claimant in relation to this. If and to the extent this complaint concerns the subject matter of Mrs Hassall's email complaint of 17 August 2015:

90.1 what happened was that the claimant, on one occasion, after he complained about having to do cleaning, was told that an alternative would be to take the day off. We don't think that even qualifies as unfavourable treatment under section 15;

90.2 even if it does, we have already decided that the ban on driving did not arise in consequence of the claimant's disability but of his alcohol dependency problems.

7. September to November 2015 – [this is a combination of the first two complaints set out at the top of the 5th page of the schedule] giving the claimant a choice between 6 and 12 hour shifts; reasonable adjustments, based on 12 hour shifts being bad for his health as the disadvantage and offering 8 or 10 hours shifts as the adjustment

91. As with many other complaints, we had no evidence from the claimant about this. Further, the precise allegations – whatever they are – were not put to the respondent's witnesses. The picture painted by the contemporaneous documents is a little confused. A potential problem with the claimant working 12 hour shifts was actually identified at the start of August 2015, in an occupational health report. And the problem was resolved in November 2015, apparently to the claimant's satisfaction, with him deciding he would continue to do the same

hours in the same job. Because nothing clear was in the claimant's witness evidence or was put to the respondent's witnesses, we aren't even sure what the alleged PCP is. This complaint fails on the facts.

9. 7 June 2016 – breathalysing the claimant in the staff canteen; direct discrimination

92. There was no less favourable treatment; a valid comparator under EQA section 23 would have been treated the same. Mr Shirley is not valid comparator in that: he had not had treatment for alcohol dependency in the relatively recent past; his accident occurred at a time when the respondent had no one on site qualified to administer a breathalyser test (and we note that the claimant was not breathalysed in November 2016 for the same reason). To the extent this complaint is about breathalysing the claimant in the canteen rather than elsewhere, the evidence before us was that one or more others, not suffering from a mental health disability, had been breathalysed there in the past.

93. Further, the reason the claimant was breathalysed in the staff canteen was nothing to do with his disability. The reasons for the treatment were: that he had had an accident that could not readily be explained by normal inattention; his history of alcohol dependency; and that the canteen, which the respondent took steps to ensure was a private area at the time of the breathalyser test, was the best place in warehouse B that could practicably be used for doing a breathalyser test in private.

94. We should like to add that we don't think the respondent did anything wrong or unreasonable in breathalysing the claimant in the canteen. It had reasonable and proper cause for doing so; no one was there other than person doing the test and the person overseeing it; the respondent took steps to ensure that no one came into the canteen while the test was being carried out.

10. 7 June 2016 – requiring the claimant to stay at work after the accident; reasonable adjustments, the PCP being this requirement and the disadvantage being adversely affecting the state of the claimant's mental health

95. The claimant was not required to stay at work after the accident, so this fails on the facts. On the evidence: the claimant seemed shaken, but not tearful or unduly upset; he was offered the opportunity to go home, but declined; there was nothing to tell respondent at the time that the accident had had anything to do with disability (and to this day there is no evidence to that effect), nor that the claimant was particularly upset because of anything to do with his disability.

96. In addition: this was a one-off act and not a PCP; we are not satisfied on the evidence of the alleged substantial disadvantage; even if we were satisfied of that, we don't see how the respondent could reasonably have known – or been expected to know – of that substantial disadvantage; the only adjustment that might have been effective would have been forcing the claimant to go home when he apparently didn't want to, and that would not have been a reasonable step for the respondent to have to take.

11. 24 June 2016 – Rachel Wilson's alleged comment about the effect of his medication on his ability to do his job [towards the bottom of the 6th page of the schedule]; harassment

97. This complaint fails for the reasons set out in paragraph 39 of Mr Sadiq's final skeleton argument, which would not be improved by us putting it into our own words.

12. 8 November 2016 – taking a statement; direct discrimination, relying on Jon Shirley as the only actual [i.e. non-hypothetical] comparator;

98. The reason a statement (of a very limited kind) was taken from the claimant on 8 November 2016 was that: he had had an accident driving the forklift; he was available on 8 November 2016 to have a statement taken; he didn't object to giving one. There is no basis whatsoever in the evidence to suggest it had anything to do with his disability, nor with disability more generally.

99. Rachel Wilson has been put forward on the claimant's behalf as the main alleged 'villain of the piece'. We detected nothing in the evidence suggesting to us that at any relevant time she was consciously or unconsciously prejudiced against the claimant because of his disability, still less that she ever acted on any such prejudice. All complaints of direct discrimination relating to her fail for that reason, amongst others. It is regrettable that such serious allegations should have been levelled against her without evidence to support them and that they should have been left hanging over her for such a long time.

13. 11 November 2016 – asking about a substandard pallet; reasonable adjustments; the PCP is asking about something as alleged; the "substantial disadvantage" is causing mental distress; the adjustment would be not asking about this at the alleged time and in the alleged circumstances

100. This complaint fails because: there was no PCP, merely a one-off act; the alleged substantial disadvantage is unproven on the evidence; the respondent could not reasonably have been expected to know of the alleged substantial disadvantage; there was nothing unreasonable in asking about the pallet at this time and in these circumstances; it isn't clear what the proposed reasonable adjustment was in practice.

14. November 2016 – the contents of the investigation report, in particular the conclusions reached, the language used, the reference to financial damage and alleged factual inaccuracies about damage caused and the claimant being responsible for checking a pallet; direct discrimination, alternatively harassment

101. This complaint or set of complaints is detailed in the Schedule, at the top of page 66B of the hearing bundle.

102. The first part appears to concern the comments in the investigation report that it was "*too much of a risk to leave SH with a licen*[c]e", that he had "*caused massive damage and cost*", and that he was "*not looking where he was going*".

103. In relation to these comments:

103.1 there was no less favourable treatment and these comments were not made because of anything to do with the claimant's disability;

103.2 Mr Shirley is not a valid comparator because when he had his accident in May 2017, he had not, like the claimant, had another serious accident in the previous 6 months. Mr Shirley was treated similarly to the way in which the claimant was treated in relation to the claimant's 'first offence';

103.3 the reason for these comments was that –

103.3.1 the claimant had had two forklift truck accidents in relatively quick succession, both (at the time these comments were written) thought to have been caused by his carelessness and not thought to have anything to do with his disability;

103.3.2 at the time the comments were made, Mrs Wilson genuinely thought the claimant had had a third accident;

103.3.3 the accident in June 2016 had indeed caused significant damage and cost;

103.3.4 the claimant himself had suggested he was not looking where he was going and after the event agreed with the assessment that he was not safe to drive;

103.4 in relation to the harassment complaint, the comments don't have the necessary "*purpose or effect*" under EQA section 26.

104. The second part of this complaint seems to relate to the comment in the report of 10 November 2016 that the pallet, "*was placed there by SH on 24/10/16 at 12:08*". It fails because: there was no less favourable treatment – a valid comparator in a comparable situation would have been treated just the same; the reason for this comment was nothing to do with disability – it was that that was what the respondent's records showed.

15. 30 November 2016 – Rachel Wilson allegedly asking Michal Chabros to give paperwork to the claimant [second complaint at top of 7th page of schedule]; direct discrimination

105. The factual basis of this complaint is not made out in the evidence; there is no evidence before us that this actually happened. Further, the relevant allegations were not put to Mrs Wilson in cross-examination.

16. November 2016 onwards – treating the accident of 8 November 2016 as a disciplinary matter and potentially gross misconduct; direct discrimination (by and through Rachel Wilson, who allegedly 'drove' the process); alternatively section 15, because the accident allegedly arose in consequence of disability; alternatively reasonable adjustments, relying on a PCP of treating the matter in this way, a disadvantage [similarly to the section 15 complaint] based on the accident being the result of the claimant's disability, and the

adjustment being to treat it sympathetically, as an accident that arose as a result of an employee's ill health would be treated

106. The direct discrimination complaint fails because there was no less favourable treatment and the reason for the treatment was nothing to do with disability. Mr Shirley is, once again, not a valid comparator, in that: he had had only one accident; in his case, there was nothing comparable to the pallet incident; Mrs Wilson did not genuinely but mistakenly think Mr Shirley had previously driven into a stanchion. Further, the allegation that Mrs Wilson drove the process is unsupported by any substantial evidence.

107. Turning to the section 15 complaint, the complaint requires us to identify a "*something*" arising in consequence of the claimant's disability. The alleged something is the accident itself. Without some adjustment, the section 15 complaint does not work, because the accident of November 2016 was not treated as a disciplinary matter rather than a health matter because of the accident; a complaint along those lines would make no sense.

108. The respondent decided in November 2016 that the accident should be treated as a disciplinary matter: because it was the second accident in relatively quick succession; because there was the pallet issue as well; because Mrs Wilson wrongly believed there to have been a third accident; because Mrs Wilson believed that, in effect, the claimant had demonstrated a pattern of careless driving and of carelessness in the execution of his duties generally; and because the claimant did not suggest at the time that the accident had anything to do with disability. None of these things arose in consequence of the claimant's disability.

109. If we were to change this complaint slightly from how it was put by the Employment Judge in the list of complaints, and were to assume that it is about the disciplining of the claimant in 2017, this could be said to have happened because of the accident (at least in part), and we would then have to ask ourselves: was the accident something arising in consequence of disability?

110. This issue is very finely balanced.

111. The factor's supporting the claimant's case include:

111.1 the evidence the claimant gave at the disciplinary hearing, which he appears to have given spontaneously, without anyone prompting him;

111.2 the fact the respondent appears to have accepted the claimant's case at the time, in that Mr Barratt told us in his oral evidence that he accepted, when he made his decision, that the claimant had indeed heard a voice that distracted him;

111.3 the claimant was clearly acutely ill immediately after the accident – although the evidence does not tell us what the causal relationship was, if any, between the accident and his illness (or vice versa);

111.4 it is perfectly plausible that the claimant would not have told the respondent in November 2016 about having heard voices because he found it embarrassing and/or upsetting to discuss it and/or because he

was concerned as to what the respondent's reaction might be (although the respondent had already been told that hearing voices was part of the claimant's disability, in the occupational health report of 3 August 2015).

112. The factors pointing the other way include:

112.1 the claimant did not give a consistent account, in that what he told the respondent in November 2016 was different from what he told the respondent at the disciplinary hearing in January 2017, which in turn was slightly different from what he told the respondent at the appeal hearing in April 2017;

112.2 there was quite a lot of correspondence between the respondent and Mr / Mrs Hassall between the November accident and the disciplinary hearing. Although the claimant's ongoing mental health problems are referred to many times in that correspondence, there is no suggestion in any of it that the accident had happened because of anything to do with disability;

112.3 during his oral evidence, the claimant could not remember the accident at all. He cannot now say how it happened;

112.4 there is no medical / psychiatric evidence before us to the effect that this accident happened because of the claimant's disability. However, no health care professional could say with any certainty why a particular accident happened on a particular day and they would necessarily to a large extent be basing any opinion they gave on what the claimant told them.

113. We accept without reservation that at the disciplinary hearing on 30 January 2017, the claimant told the truth as he – at that point in time – genuinely believed it to be. But it does not follow that his recollection was necessarily accurate. Human memory is fallible and pliable. The period between the accident and the disciplinary hearing was very difficult for the claimant, for a number of reasons, and he seems at times to have been in mental turmoil. Even without this, human psychology being as it is, it would be entirely possible for the claimant to have convinced himself that the accident had happened completely differently from how it actually happened over the period of 2 to 3 months between 8 November 2016 and 30 January 2017.

114. It will be cold comfort to the claimant, but this is the issue we found most difficult and on which we spent most time during our deliberations. However, we have to come down on one side or the other. By the narrowest of margins, we have decided we are not satisfied that this accident did happen because of the claimant's disability. The two main reasons we have come down on the respondent's side on this issue are: the burden of proof being on the claimant; the fact that the account he gave on 11 November 2016 didn't just omit mentioning the voices, it positively contradicted the account given at the disciplinary, in that at the disciplinary, he said he was distracted looking for a person who wasn't there, whereas at the time he said that he was distracted looking for Mr Bajon and that when the collision occurred, he was actually looking at Mr Bajon.

115. The section 15 complaint therefore fails.

116. The reasonable adjustments complaint is based on the same premise as the section 15 complaint and therefore fails for the same reason.

17. 30 January 2017 – the outcome of the disciplinary hearing, namely that the claimant was guilty of misconduct and should be redeployed; essentially the same section 15 and reasonable adjustments complaints as are identified in [16] above

117. These complaints fail because they are based on the premise that the accident was a result of the claimant's disability and we are not satisfied that it was.

there is no discrimination complaint about threatening the claimant with a charge of insubordination or about inaccurate hearing notes or about Adrian Barratt's and/or Vane Downing's alleged comments of 22 February 2017; these are said to be part of the alleged breach of the trust and confidence term

118. The allegation about a charge of "*insubordination*" relates to what was stated in the final invitation to a disciplinary hearing. As explained above, this was standard wording in a standard letter; it was the third such letter and the use of the word "*insubordination*" had not previously been commented on. Objectively assessed, this had no impact on the trust and confidence term at the point of resignation.

119. The allegation about inaccurate hearing notes relates to the notes of the appeal hearing. The only inaccuracy in them that is proved on the evidence before us is getting Mr Andrews's name wrong. That was unfortunate, but did nothing to damage trust and confidence at the point of resignation. In addition, we don't think it formed any part of the claimant's reasons for resigning.

120. It may be that part of this is an allegation about the destruction of Mrs Holden's handwritten notes. Given that those notes were typed up almost immediately, and given that we have no reason to think that what was typed up was materially different from what was in the handwritten notes (the chances are that any mistakes Mrs Holden made were made when she was doing the handwritten notes), we see nothing untoward in the respondent destroying the handwritten notes. Again, we are anyway not satisfied that this was part of the claimant's reasons for resigning.

121. The allegation about comments Mr Downing supposedly made is not proven on the evidence before us. There was no evidence from the claimant or anyone else that they were made and Mr Downing denied making them.

18. February / March 2017 – Vance Downing requiring the claimant to run a particular machine despite the claimant raising concerns about doing this; reasonable adjustments, the PCP being this requirement, the disadvantage being the [alleged] fact that it was significantly more difficult for the claimant to run that machine because of his anxiety and/or the requirement making his anxiety worse, and the adjustment being not requiring him to run that machine (and instead, potentially, permitting him to return to his previous role)

122. As for complaint 17, there is no substantial evidence supporting this complaint and the factual basis for it is unproven.

19. April 2017 – Adrian Brown not informing the claimant of the outcome of his appeal against dismissal "next week" as promised at the appeal hearing; reasonable adjustments, based on a PCP of not doing as he had said, a disadvantage of adversely affecting the claimant's mental health, and an adjustment of doing as he had said

123. This was a one-off and there is no PCP.

124. Further:

124.1 it was a difficult judgement call and Mr Brown reasonably decided to do as he did;

124.2 maybe with hindsight it was the wrong judgement call, but we are not satisfied that Mr Brown delaying until the claimant's return for work was actually worse for the claimant's mental health than giving him the result of the appeal when the claimant was off sick would have been;

124.3 we are therefore not satisfied of the alleged "*substantial disadvantage*";

124.4 in the circumstances, we don't think it would have been reasonable for the respondent to have to take the step of sending the letter to the claimant when he was off sick when there were legitimate concerns that doing so might exacerbate his condition.

20. April 2017 – the outcome of the appeal; essentially the same section 15 and reasonable adjustments complaints as are identified in 17 above

125. This complaint stands or falls with complaint 17 and fails because that complaint fails, for essentially the same reasons.

21. 24 April 2017 – not having a return to work meeting; direct discrimination

126. It was unfortunate that the claimant did not have a return to work meeting on 24 April 2017, but this was, on the evidence, just one of those things; it was not a deliberate act aimed at the claimant, still less was it anything to do with disability.

22. 28 April 2017 – handing the claimant a copy of the appeal decision letter; direct discrimination

127. As for complaint 21. This happened because a regrettable but honest mistake was made.

23. 2017 [date unclear; possibly May] – redeployment as a blader; reasonable adjustments, as set out in the schedule in relation to the last [complete] complaint on the 5th page

128. As above, this happened in June and not May 2017. The complaint fails for a number of reasons. There is no PCP – no general practice; this was a one-off decision particular to the claimant and his circumstances at a particular point in time. We are also not satisfied that redeployment as a blader caused him substantial disadvantage in comparison with persons who are not disabled; he gave next to no evidence about this. We were left unclear, even by the end of his evidence, what his difficulty with the blader role was. It may well be that the problem was simply not being in the familiar surroundings of warehouse B, but that is not proved on the evidence we have.

129. In addition, even if every other part of this complaint were made out, it was not unreasonable for the respondent to have him doing the blader role as a trial, given that the respondent had made a reasoned, business assessment that there was insufficient non-driving work in warehouse B and that the respondent was, reasonably, unwilling to force someone else out of their job to make way for the claimant.

24. 10 to 23 May 2017 – requiring the claimant to move to a production role in which he had to wear ear defenders; direct discrimination (the claimant's case being that he was not permitted to return to the warehouse because Rachel Wilson was prejudiced against him because of his diagnosis of psychotic depression); alternatively reasonable adjustments based on a PCP of having this requirement, and a disadvantage and adjustment as alleged in the 4th claim on the 5th page of the schedule

130. The dates put on this are wrong. The claimant started in production on 20 February 2017 and went off sick on or around 13 April 2017.

131. Direct discrimination is a non-starter. This was Adrian Barratt's decision, not Rachel Wilson's. To the extent it is being suggested that Mr Barratt was motivated by prejudice towards the claimant because of his mental health, we reject that suggestion. The reason he made this decision was because the claimant was (by the claimant's own admission) unfit to drive a forklift truck and Mr Barratt believed that there were no suitable alternative roles in warehouse B for the claimant to do, but that there were vacancies in production.

132. The reasonable adjustments complaint fails because, even if we were to amend the PCP and construct one that was not a one-off act, and even if we assume in the claimant's favour that moving him to the production role did cause him substantial disadvantage in comparison with persons who are not disabled, at no relevant time: did the respondent know or could it reasonably have been expected to know of any substantial disadvantage; would it have been

reasonable for the respondent to have to keep the claimant in warehouse B and not move him into production.

133. We note that although there is a complaint about the redeployment into the production role, there is no complaint (either in the claim form or in the Schedule) about an alleged failure to move the claimant out of the production role sooner than he was in fact moved out. And any such reasonable adjustments complaint would fail for at least one reason: it would relate to a one-off act, particular to the claimant, and there would therefore be no relevant PCP.

134. We are moreover not satisfied on the evidence that the respondent was clearly told that actually doing the job in production was exacerbating the claimant's condition until 21 March 2017. By then the appeal hearing was imminent and it was reasonable for Mr Brown to defer any occupational health referral until after the appeal hearing. The claimant's letter of 1 March 2017 referred to "*the suitability of the move to the present job*", but, in the context, we read that as an assertion that moving the claimant had had a negative impact on his health, rather than that any particular aspect of the role in production was having a negative impact on his health. We also note that at the appeal hearing itself, almost nothing was said about why the production role was a problem from the claimant's point of view.

25. 14 June 2017 – failing to meet and welcome the claimant on his return to work; reasonable adjustments, based on the PCP being this failure and the disadvantage being an adverse effect on the state of the claimant's mental health

135. This allegation is not proven on the evidence. There is no identifiable PCP in any event, i.e. no suggestion of any relevant "*practice*".

26. the complaint about Sarah Drummond and 16 June 2017 [second last complaint on the 7th page of the schedule] is part of the alleged breach of the trust and confidence term but is not a discrimination complaint

136. We think this allegation relates to an email at page 446 of the hearing bundle that was sent to Mrs Hassall. There is no evidence that the claimant even saw it before he resigned, still less that, it he did, it formed any part of his reasons for resigning. And we can't see anything objectively 'wrong' with the contents of the email anyway.

27. 29 June 2017 – the final complaint on the 7th page of the schedule; is a harassment complaint

137. This complaint concerns the email sent by Mrs Drummond to the respondent's solicitors into which she accidentally copied Mrs Hassall.

138. The claimant confirmed in his oral evidence that he didn't see this email at the time. This was one of the few occasions during cross-examination where he gave an answer to a question that was not to the effect that he could not remember. It follows that what he says about it in paragraph 19 of his witness statement – to the effect that it was the final straw that caused him to resign – is

incorrect. It also follows that it cannot have formed any part of his reasons for resigning. There is no evidence before us (other than the evidence in the statement that the claimant confirmed was not accurate) about it having a harassing effect on him.

139. In any event, neither the sending nor the contents of the email have anything to do with disability, nor do they have the requisite purpose or effect under EQA section 26.

28. July 2017 – Sarah Drummond and Vance Downing not contacting the claimant during a 3 week period of sickness absence up to 25 July 2017 and not referring him to occupational health; direct discrimination; also reasonable adjustments, the PCP being not contacting the claimant, the disadvantage being causing the claimant to believe that the duty to make reasonable adjustments was not going to be complied with and that he would have no alternative other than to work as a 'blader' (a job that was making him unwell), and the adjustment being contacting the claimant to inform him that he was being referred to occupational health to consider whether adjustments needed to be made to his role in the interests of his health

140. Other than the undisputed fact that there was very little contact from the respondent over this period, there is no evidence before us to support this as an allegation of discrimination.

141. The respondent was not asked to re-refer the claimant to occupational health. It was not even being asserted by him or on his behalf, at least not with any clarity, that the blader role was making him ill. And as the claimant was off sick, we would not expect a referral to occupational health to have been made before the claimant resigned.

142. There is no basis in the evidence to support the notion that anyone deliberately omitted to make an occupational health referral or to contact the claimant because of his disability. And that allegation was not put to any of the respondent's witnesses, in particular Vance Downing or Sarah Drummond.

143. So far as concerns the reasonable adjustments allegation: there is no identifiable potentially valid PCP; there is no evidence of the alleged substantial disadvantage; there is no discernible reason why the respondent could have been expected to know of any substantial disadvantage.

Constructive unfair dismissal

144. Our first question relating to the allegation that the claimant was constructively dismissed is: what was the final straw? We know it was not Mrs Drummond's email of 29 June 2017, which is what the claimant suggested it was in his witness statement.

145. In his oral evidence, the claimant said he thought the final straw was the blader job the respondent put him in, in which he felt isolated. The respondent had reasonable and proper cause for putting him in that job. And whatever he felt about it, putting him in it contributed nothing to any breach of the trust and

confidence term. The blader job therefore cannot have been the final straw as a matter of law, in accordance with Omilaju.

146. If it was not the blader job and was not Mrs Drummond's email of 29 June 2017, we have no idea what the final straw was. Moreover, we have been unable to identify any conduct or course of conduct of the respondent that was without reasonable and proper cause and that, at the point of resignation, was calculated or likely to destroy or seriously to damage the relationship of trust and confidence.

147. Accordingly, the claimant was not constructively dismissed and he therefore cannot bring a complaint of unfair dismissal.

Conclusion

148. The claimant's mental health deteriorated significantly during his employment with the respondent. He and Mrs Hassall blame the respondent for this and allege that the respondent failed to take reasonable care for his health and well-being.

149. This is not, however, a personal injury claim in the County or High Court about alleged breaches of a duty of care; nor is it about whether the respondent was, in a general sense, a good or a bad employer; nor about whether, generally, the respondent treated the claimant well or badly; nor about fairness and justice in some abstract sense. Instead, it is about particular Tribunal complaints and about whether or not we are satisfied of all of the things we have to be satisfied of as a matter of law for the claimant to win those particular complaints. Unfortunately for him, we are not.

150. For these reasons, our unanimous decision is that the claimant's entire claim fails.

Signed by Employment Judge Camp
21 September 2018