EMPLOYMENT TRIBUNALS

Claimant: **Mr Z Farooqi**

Respondent: **East London Bus & Coach Company Limited**

Heard at: **East London Hearing Centre**

On: **27 and 28 January 2022**

Before: **Employment Judge Gardiner**

Members: **Ms R Hewitt**
Mrs G Forrest

Representation

Claimant: Mr A Sayyed (friend)

Respondent: Mr C Ludlow (counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant's claim for unfair dismissal is well founded and succeeds. A remedy hearing will be listed to determine the remedy to be awarded, if this cannot be agreed between the parties.**

2. **The Claimant was not a disabled person. Accordingly, his claims of disability discrimination are dismissed.**

REASONS

1. Following a meeting on 7 August 2020, the Claimant was dismissed from his employment with the Respondent as a Bus Driver. He had been employed in that

role since November 2015, although he had been off work on sick leave from 30 January 2020 onwards, when he suffered a stroke.

2. In these proceedings he argues that his dismissal was an unfair dismissal. He also argues that there has been a failure to make reasonable adjustments and that his dismissal was an act of discrimination arising from disability.

3. The Claimant has been represented at the Final Hearing by a friend, Mr Sayyed. The Respondent was represented by Mr Craig Ludlow of counsel. Reference was made to an agreed bundle of 160 pages. Further documents were added without objection on the second day of the two-day hearing. Oral evidence was provided by the Claimant, by the dismissing officer, Mr White, and by the appeal officer, Mrs Hannan. The Claimant relied on two witness statements – the first dealt with his disability, and the second dealt with events concerning his dismissal.

4. At the conclusion of the case, both parties made oral closing submissions. Mr Ludlow spoke to his detailed written submissions which had been provided to the Claimant and to the Tribunal on the morning of the second day of the hearing. There was insufficient time to announce our decision on liability at the conclusion of the Final Hearing. As a result, we told the parties we would use the remainder of the day to deliberate, and then would provide our decision in writing.

5. The issues to be decided, which were discussed at the start of the hearing, were set out in the Order of Employment Judge Burgher and are found at pages 34-36 of the Final Hearing bundle.

Factual findings

6. At the start of 2020, the Claimant was based at the West Ham Garage. His line manager was Mr White, who was the manager of the garage.

7. On 30 January 2020, the Claimant suffered a stroke. As a result, he was hospitalised for 13 days, before returning home to continue his recuperation. He was signed off work on sick leave by his GP in a series of Fit Notes. The most recent Fit Note, dated 9 April 2020, signed him off for six months until 9 October 2020.

8. As a result of the impact of the pandemic on the demand for public transport, the Respondent operated fewer bus services, and required fewer bus drivers during the second quarter of 2020. Those drivers based at the West Ham Garage who were considered vulnerable or extremely vulnerable were placed on furlough. This included the Claimant.

9. By June 2020, there was an increase in the need for bus drivers and all drivers including the Claimant who were on the furlough scheme were removed from furlough on 12 June 2020. The Claimant continued on long term sick leave and was in receipt of sick pay.

10. The day before, 11 June 2020, the Claimant had received a letter from the DVLA. This letter confirmed that the Claimant's PCV licence was being revoked in response to his stroke. He was told he would not be able to reapply for his licence until 12 months after the date of the stroke.

11. On 10 July 2020, the Claimant attended a long-term sick interview. It was conducted by Mr White. The Claimant was told that the purpose of the interview was to give him the opportunity to bring the Respondent up to date with his present medical condition. It was noted that his current medical certificate expired on 9 October 2020. The Claimant told Mr White that he had been doing physiotherapy by video and had a hospital appointment on 23 September 2020 with the stroke surgeon. The Claimant was referred to occupational health.

12. The occupational health consultation took place on 14 July 2020 by telephone. The Claimant told the occupational health practitioner that he had no problems with limb movement or balance, suffered no sensorineural deficits and he had no residual cognitive issues. The remaining symptom was of fatigue, requiring him to rest occasionally before resuming his activity. In answer to the question "Is the employee fit to undertake their current role?", the OH practitioner wrote "Mr Farooqi should be able to undertake any duty that does not require that he drives under a Group 2 entitlement". Although the Claimant had made a good recovery, the OH report stated he may require adjustments to accommodate his reduced stamina. The practitioner was unable to say how long this might last.

13. Mr White held a second meeting with the Claimant on 31 July 2020 to discuss the Claimant's health in the light of the Occupational Health report. The Claimant told Mr White he was getting better, and he had been discharged from rehabilitation. He asked if alternative work could be found for him. In the letter he sent to the Claimant following the meeting on that date, Mr White wrote "The report stated in general you suffer with fatigue very easily". This was not a fair or accurate summary of the contents of the Occupational Health report. Mr White promised to find about any other work available. That day he emailed Mr Owens, Recruitment & Training Manager. He asked him if there is any non-driving alternative employment available. He did not ask him if there were any driving jobs which did not require a PCV licence. Within an hour or so, Mr Owens responded to say that there was nothing available at present.

14. A final meeting was held with the Claimant on 7 August 2020. In advance of the meeting, he was warned by email that the outcome could be his dismissal. At this meeting, the Claimant was accompanied by Mr Stoller, his union representative. He again spoke positively about his state of health. He said that he felt good, although sometimes he did get tired. Mr White's decision was that the Claimant's employment was terminated on medical grounds, as recorded in his dismissal letter of the same date.

15. The Claimant chose to appeal against his dismissal. The appeal was conducted by Mrs Hannan, who was the Respondent's Operations Director. In advance of the appeal meeting a further check was carried out to see if there were any non-driving jobs available. Apparently, there were not. Mrs Hannan held the meeting on 24 August 2020, at which the Claimant was accompanied by a different union representative, Mr Plummer. She announced her decision at the conclusion of the meeting. Her decision was to uphold the original decision to terminate the contract on medical grounds. She set out her recollection of the meeting in an appeal outcome letter dated 1 September 2020, as well as the basis for her decision to refuse the appeal.

16. In response to a specific request from his union representative, Mrs Hannan offered the Claimant the opportunity to reapply for a role as a Bus Driver within six months of dismissal and return to his existing grade and rate of pay. This was applicable to the Claimant as a result of a general agreement reached with the union. In the Claimant's case, this offer meant that he needed to have his PCV licence reinstated by 7 February 2021. The standard six-month period agreed with the unions was not adjusted in his case to reflect the fact that he could not reapply for a PCV licence until 30 January 2021 – and therefore was most unlikely to have received his licence within a week of that application.

17. Under the Claimant's Main Statement of Terms and Conditions of Employment, it was an Employment Condition that:

> "You holding and continue to hold a current PCV driving licence"

18. The contract provided that "your employment may be terminated in the event that you lose your driving licence for any reason whatsoever".

Legal principles

Unfair dismissal

19. Section 98(1) Employment Rights Act 1996 provides as follows:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> a. The reason (or if more than one, the principal reason) for the dismissal; and
>
> b. That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

20. Section 98(2) lists potentially fair reasons. Two potentially fair reasons are relevant to the facts of the present case. The first is a reason which "relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do". The other is that "the employee could not

continue to work in the position which he held without contravention (either on his own part or that of his employer) of a duty or restriction imposed by or under an enactment".

21. Here, the work of a kind which the employee was employed to do is work as a bus driver. The restriction imposed by or under an enactment is that only those holding current PCV licences are entitled to drive buses on public roads.

22. If the dismissal was for a potentially fair reason, then the Tribunal must go on to consider the provisions of section 98(4), which provides as follows:

    (4) …. The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
    (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
    (b) shall be determined in accordance with equity and the substantial merits of the case.

23. The key legal principles to apply where the reason for dismissal is capability in a case of long-term sickness were established by *East Lindsay DC v Daubney* [1977] ICR 566 and *Spencer v Paragon Wallpapers Limited* [1977] ICR 301. Tribunals should consider:

    a. Whether in all the circumstances the employer can be expected to wait any longer and, if so, how much longer for the employee to return (*Spencer* at 307C-D)?

    b. A fair procedure generally requires, considering it as a whole: consultation with the employee; an investigation of the medical information (to establish what the illness is and its prognosis); consideration of other options in particular the possibility of alternative employment.

24. When considering whether the dismissal was fair, the Tribunal must consider whether the decision to dismiss, and the procedure which was followed, fell within the band of responses that a reasonable employer might take given its resources and given the particular situation of the Claimant. Defects earlier on in the process can be cured on appeal (*OCS Group Limited v A J Taylor* [2006] ICR 1602). The Tribunal is not to substitute its own view as to whether the Claimant should have been dismissed.

Definition of disability

25. To establish any of his complaints of disability discrimination, the Claimant needs to satisfy the statutory language in section 6, Equality Act 2010. This requires the Claimant to show that at the relevant time he had "a physical or mental impairment" and that the impairment "had a substantial and long-term adverse effect on [the

Claimant's] ability to carry out normal day-to-day activities". For the purposes of this definition, substantial means "more than trivial".

26. Further provisions as to the definition of disability are contained in Schedule 1 to the Equality Act 2010. So far as material, this provides that the effect of an impairment is long-term if it "is likely to last for at least 12 months". It also provides that "if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur". An impairment "is to be treated as having a substantial adverse effect on the ability of the person to carry out normal day-to-day activities if measures are being taken to treat or correct it, and but for that, it would be likely to have that effect". In both contexts, the word 'likely' has been held to mean "could well happen". It does not require that there is a 51% chance ie that it is more likely than not (*SCA Packaging v Boyle* [2009] ICR 1056).

27. There is statutory guidance issued under the Equality Act 2010 on matters to be taken into account in determining questions relating to the definition of disability. The Tribunal is to have regard to this statutory guidance. The Appendix contains an illustrative and non-exhaustive list of factors which would be reasonable to regard as having a substantial adverse effect on normal day to day activities, and those which it would not be reasonable to regard as having such an effect. In relation to fatigue, which was the symptom noted in the Occupational Health report, it states that "experiencing some tiredness or minor discomfort as a result of walking unaided for a distance of about a mile" was a factor which would not be reasonable to regard as satisfying the threshold for "substantial effect". By contrast, factors which it would be reasonable to regard as having a "substantial effect" include difficulty using transport, for example, because of physical restrictions, pain or fatigue; or difficulty going up and down stairs or a total inability to walk because of fatigue.

28. The burden is on a claimant to establish on the balance of probabilities that any impairment satisfies the statutory definition of disability.

Failure to make reasonable adjustments

29. The Tribunal needs to identify a provision criterion or practice (a PCP) of general application which places the Claimant at a substantial disadvantage as a result of his disability. If there is such a PCP, then the duty to make reasonable adjustments is engaged.

30. The Claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could be reasonably inferred – absent an explanation – that the duty has been breached.

31. If the duty is engaged, the Tribunal needs to consider whether there were reasonable steps that could have been taken to avoid the disadvantage. Once the

Claimant has established in broad terms the nature of the adjustment that would ameliorate the substantial disadvantage, the burden then shifts to the Respondent to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment. There must be a prospect or a real prospect that the step would be effective.

32. Paragraph 6.28 of the EHRC Employment Code of Practice sets out some of the factors that might be taken into account when deciding what is a reasonable step for an employer to take. This includes what the proposed adjustment might cost and the logistics of making the adjustment, as well as the likely effectiveness of the proposed step.

Discrimination arising from disability

33. Section 15 Equality Act 2010 is worded as follows :

(1) A person (A) discriminates against a disabled person (B) if-
   a. A treats B unfavourably because of something arising in consequence of B's disability; and
   b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

34. The first issue for the Tribunal to assess is whether the Claimant's dismissal was influenced to any significant extent by any consequences of the disability. This requires a focus on the reasoning in the mind of the dismissing officer, Mr White. The Tribunal needs to consider the conscious or unconscious thought processes of the alleged discriminator, keeping in mind that his actual motive in acting as he did is irrelevant.

35. In *York City Council v Grosset* [2018] ICR 1492, the Court of Appeal considered the extent of knowledge that was required under Section 15(1). In short, there is none. If there is a causal link between the consequences of the disability and the dismissal, it is not necessary that Mr White knew of that connection (see paragraph 39).

36. Section 15(2) provides a limited statutory defence. That is that there is no discrimination arising from disability if the Respondent shows that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability. However, as Sales LJ put it in *Grosset* "if the defendant does know that there is a disability, he would be wise to look into the matter more carefully before taking unfavourable action" (paragraph 47). By reference to an example at paragraph 5.9 of the EHRC Employment Code of Practice, he stated (at paragraph 51) that "it is not suggested that the employer has to be aware that the employee's loss of temper was due to her cancer, but only that the employer should be aware that she suffers from cancer (ie so that the employer cannot avail himself of the defence in subsection 15(2))".

37. If the dismissal decision was influenced by any consequences of the disability, then it is for the Respondent to show, under Section 15(1)(b) Equality Act 2010 on the balance of probabilities that the decision was justified. That requires that the Tribunal form its own assessment of whether the dismissal was a proportionate means of achieving a legitimate aim. This is a different analysis from the range of reasonable responses approach required when considering the unfair dismissal claim.

38. In assessing proportionality, the Tribunal must assess whether on a fair and detailed analysis of the working practices and business considerations involved, the decision was reasonably necessary in order to achieve the legitimate aim. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the business. The more serious the disparate adverse impact, the more cogent must be the justification for it. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweighs the latter. It is an appraisal requiring consideration, skill and insight (*Hardys & Hansons Plc v Lax* [2005] ICR 1565).

39. The severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject. What kind of evidence is appropriate will depend on the particular case. Often it will be so obvious that the impact is very severe that a general statement to that effect will suffice; but sometimes it will be less obvious, and the employer will need to provide more particularised evidence of the kinds of difficulty that the absence is causing. What kind of evidence is needed in a particular case must be primarily for the assessment of the Tribunal (*O'Brien v Bolton St Catherine's Academy* [2017] ICR 737).

40. Aiming solely to reduce costs cannot be a legitimate aim (paragraph 4.29 of the EHRC Code of Practice on Employment), but the need to operate within a budget or balance the books can be treated as a legitimate aim that is more than just saving costs (*HM Land Registry v Benson* [2012] ICR 627). Costs can only be taken into account as part of the employer's justification for the provision, criterion or practice if there are other good reasons for adopting it (paragraph 4.32 of the Code).

41. In *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160, Lord Justice Elias said (at paragraph 26):

> "An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment — say allowing him to work part-time — will necessarily have

> infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified.

42. The EHRC Employment Code of Practice states as follows (at para 5.21) :

> "If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."

Significance of Ahmed v East London Bus & Coach Company Limited

43. At the point when he handed the Tribunal his closing submissions, Mr Ludlow also handed the Tribunal the Reasons given by an Employment Tribunal panel sitting at East London, which was chaired by Employment Judge Moor. The case had been heard in early July 2021 and Judgment given shortly thereafter. Written reasons had been provided very recently. The case concerned a bus driver working for the same employer but based at a different bus garage. He was dismissed in May 2019, well over a year before the Claimant in the present case. Ms Hannan had dealt with that claimant's appeal, as here, and also gave evidence to the Tribunal in that case. Mr Ludlow had represented the Respondent. The Tribunal had rejected the disability discrimination complaint made by the Claimant in that case where he had been dismissed following a period of long-term sickness absence. Mr Ludlow argued that the effect of that decision, whilst not binding on this Tribunal, ought to be persuasive.

44. We treat the effect of that decision with caution. Factual findings in that case were based on the factual evidence before that Tribunal panel. That evidence may or may not be different from the evidence in the present case. We need to decide the present case in the light of the evidence before the Tribunal in this case. This includes considering only the business justifications advanced in the present case for dismissing this Claimant. We note, for instance, that the legitimate aim relied upon in the current case was formulated in a different way to the way in which it was formulated in that case. This became clear during closing submissions, when Mr Ludlow accepted that the Tribunal should assess the legitimate aim set out in the agreed List of Issues, rather than the legitimate aim included in his written closing submissions. He accepted that the latter had been borrowed from the *Ahmed* case.

Conclusions

Unfair dismissal

45. We first need to find the principal reason for the Claimant's dismissal. We find that the principal reason for his dismissal was his state of health. The dismissal letter stated the Claimant was being dismissed on medical grounds. This was also the

reason stated in the appeal outcome letter. We find that a subsidiary reason, though not the principal reason, was that the Claimant was not legally entitled to drive a bus, given his PCV licence had been revoked, and this was likely to continue to be the position until Spring 2021 at the earliest.

46. Next, we need to ask whether a reasonable employer would dismiss the Claimant on medical grounds, given the Claimant's state of health at the time of his dismissal, and whether a fair process had been followed before the dismissal decision was taken.

47. We conclude that a reasonable employer would not have dismissed the Claimant on medical grounds. The decision to do so fell outside the range of reasonable responses. It is true that the Claimant had been off work on sick leave since 30 January 2020, a period of over six months. His contractual entitlement to sick pay had ended at the six-month point. He had been signed off sick until 9 October 2020.

48. However, Mr White failed to make an important distinction. This was between, on the one hand, the Claimant's health as at the date of dismissal, 7 August 2020 and the potential for further improvement; and, on the other hand, the loss of his PCV licence, which had been caused by the state Claimant's health as it was at the end of January 2020 (ie the fact of the stroke). By the point of dismissal, the Claimant's health had made a significant recovery. On the medical evidence, his only symptoms were symptoms of fatigue. Those symptoms could well have continued improving for up to a year after the stroke. By 7 August 2020, the symptoms did not prevent him from carrying out any day-to-day activities. Nor did they prevent him from driving or carrying out other duties at work, if available. There was no medical evidence that the symptoms could well worsen or that the Claimant could suffer a further stroke. Whilst he had been signed off sick until 9 October 2020, this latest Fit Note had been issued in April. The more recent, and more detailed consideration in the Occupational Health report indicated that the Claimant's health did not prevent him from carrying out any work duties, including driving, although he may have required some adjustments given his fatigue levels. On medical grounds alone, the Claimant was fit to work. There was no evidence that it was not practicable to have made the necessary adjustments to cater for his symptoms of fatigue.

49. It was argued on behalf of the Respondent that it was reasonable to draw the line at the stage that the Respondent did, given the applicable business considerations. In particular, the Respondent argued that continuing his employment would lead to additional overtime payments and increased staff capacity to cover his duties. It is said that it would have led to lost mileage resulting in penalty fines, customer complaints and loss of work. In addition, it was said that continuing his employment meant that the Respondent could not have recruited to the Claimant's position and would have required the Respondent to incur additional costs of sick pay and holiday pay. In addition, it is argued that the Respondent would have had to increase spare staff capacity to enable it to cover the work.

50. We address the substance of these points later in these Reasons, when considering the complaint of discrimination arising from disability. The essential answer to all of these points is that in the view of the Respondent's Occupational Health provider the Claimant was medically fit to return to work as at 7 August 2020, albeit with some adjustments. Therefore, there was no medical need for his absence to be further prolonged.

51. It was also argued on behalf of the Claimant that it was procedurally unfair not to offer him the role of Resourcing Clerk/Administrator. This is a role that was vacant at the time, and was advertised on 31 July 2020, the same day that Mr White enquired about non-driving vacancies. We do not accept the argument that a reasonable employer would have invited the Claimant to apply for this role, still less would have offered it to him. The role was not similar in any way to roles that the Claimant had previously performed, which had all been driving roles. It was an administrative role that required as essential "evidenced experience in a high-volume resourcing department". The Claimant did not have this experience. Further it was desirable to have "a foundation understanding of UK Employment Legislation" as well as REC/IRP/CIPD accreditation. The Claimant had none of these desirable features. It was not realistic that he would have been able to perform that role with additional training.

52. In addition, it was argued that the Claimant should have been offered the General Hand role. This role was advertised on 21 July 2020. We accept the evidence of Mrs Hannan that this was a role that required the person to have a PCV licence as its main function was to move buses around. This was a role that the Claimant was unable to perform by 7 August 2020 as he did not have the required licence. Therefore, a reasonable employer was not bound to invite the Claimant to apply for this role, still less to offer it to him.

53. Therefore, although we found that the dismissal was substantively unfair, being a dismissal made on medical grounds where there was insufficient medical justification for any reasonable employer, we do not find that the dismissal was procedurally unfair. The Respondent held a series of meetings with the Claimant to discuss his health, as well as asking Occupational Health to consider his fitness to work.

54. In summary, we find that the Respondent's decision to dismiss the Claimant on medical grounds was an unfair dismissal. The Claimant will be entitled to recover a basic award, reflecting his four complete years' service.

55. So far as the compensatory award is concerned, the Tribunal needs to consider how this particular employer might have treated the Claimant if it had been acting reasonably. If acting reasonably, the Respondent could have fairly dismissed the Claimant on the ground that the Claimant was not legally entitled to drive buses, which was the role for which he had been employed. This was a potentially fair reason under Section 98(2) Employment Rights Act 1996. This legal restriction on

his ability to continue with his role would have continued until the Claimant had reapplied for his licence at the end of January 2021, and until it was subsequently established by medical evidence that he was safe to drive. Therefore, the legal restriction on his ability to drive was likely to continue for at least another six months and may have been a further eight or nine months.

56. In those circumstances, the Respondent may well have decided to dismiss the Claimant in August 2020, rather than delay in the hope that the Claimant remained free of subsequent sensorineural symptoms and was able to regain his licence swiftly after the end of January. We note the provision in the Claimant's Statement of Terms and Conditions of Employment set out above, which makes it a condition of his employment that he had a PCV licence. We find that the likelihood is that Mr White would have dismissed an employee in these circumstances. However, we find that there was a 30% chance that he would have delayed a dismissal decision. This is based on the following features:

    a. There was no necessary financial cost to the Respondent if the Claimant was kept on the books, given that the Claimant had exhausted his contractual entitlement to sick leave, apart from the need to continue to provide the Claimant with paid annual leave;

    b. There was no restriction on the Respondent recruiting for other bus drivers if the Claimant was kept on the books;

    c. There was a shortage of bus drivers generally, and retaining the Claimant on the books might ensure he returned to driving buses with the Respondent, rather than with another bus company;

    d. The Claimant had been trained to drive buses, and so retaining his services would avoid the retraining costs of training a driver from scratch.

    e. The legal restriction on the Claimant's driving was not the primary reason given for the Claimant's dismissal, thus suggesting that by itself this was not an inevitable basis for dismissal.

57. It will be for a Remedy Hearing to determine the compensatory award that the Claimant should receive as a result of his unfair dismissal. Given the 70% chance that he may have been dismissed in any event and given that he had exhausted his entitlement to sick leave by this point, future earnings in his role with the Respondent are likely to be limited. However, we do not decide the amount of any compensatory award at this stage, given that this ought to be a matter for further evidence and argument.

Was the Claimant a disabled person?

58. The date for assessing this issue is 7 August 2020, the date on which the Claimant was dismissed. This is the date on which the Claimant argues that the Respondent

ought to have made reasonable adjustments. The Tribunal is not to look at what happened subsequently in order to inform its view of the extent of the Claimant's impairment or how long it was likely to last.

59. The first question to address is whether the Respondent satisfied the definition of disability, as at 7 August 2020. By this date the only symptom was of fatigue. The Claimant accepted in evidence that the fatigue did not stop him carrying out any particular activity. He was still able to go for walks. He would be able to cook if this household task had not generally been carried out by his wife. He did not identify any particular respects in which specific activities were limited or restricted, apart from saying he got tired if he stood or sat for too long. In those circumstances, we do not consider that the ongoing symptoms had a substantial adverse effect on his normal day to day activities. This is for the Claimant to prove. The Claimant has failed to do so on the evidence before the Tribunal.

60. However, that is not the only issue to be considered when assessing the legal definition of disability. There was evidence that the Claimant had been prescribed two different types of medication following his stroke. These were Mebeverine, which the Claimant explained as designed to prevent blood clots; and Clopidogrel, which the Claimant explained was to stop bloating. We need to consider whether, but for this medication, the consequences of the Claimant's stroke were likely to have a substantial adverse effect on his normal day to day activities. The Claimant fairly accepted in evidence that he had always taken the prescribed medication. He was not able to say how his health would have been had he not been taking the medication. There is no medical evidence on this point. It is not for the Tribunal to speculate as to the effect on his health in the absence of medical evidence. Therefore, the Claimant has not established that, but for the medication, his symptoms would on the balance of probabilities have had a substantial adverse effect on normal day to day activities.

61. The final question to consider is whether the Claimant can establish he was a disabled person because the effect suffered following the stroke was "likely to recur". This requires us to consider whether it could well recur. This was not an issue specifically set out in the agreed list of issues. However, the Tribunal considered that it potentially arose for decision on the facts. Mr Ludlow, counsel for the Respondent, did not argue otherwise.

62. There was no specific medical evidence available to the Tribunal within the documents in the bundle as to the risk of recurrence. The only indirect indication within the evidence was the decision to revoke the Claimant's PCV licence. Even here, it was not wholly clear whether this step was taken based on the Claimant's particular circumstances, or as a general policy. Mr White's evidence was that this was a default response. The letter from DVLA dated 11 June 2020 stated: "We have received medical information as part of this enquiry that tells us you have had a stroke and due to the risk of recurrence you must not drive". The source of DVLC's medical information is not specified. If, as we consider likely, revoking a PCV licence for a period of 12 months following a stroke is general policy, we do

not consider that it is a sufficient evidential basis for concluding that there was a risk of recurrence in the Claimant's particular circumstances as at the date of dismissal. We note that the Claimant apparently continued to hold his driving licence for ordinary vehicles – there is no evidence that this was revoked. In a letter dated 11 June 2020, DVLA stated that they needed to "write to your doctor/consultant to ensure that they do not have any concerns that your medical condition affects your ability to safely control your vehicle at all times".

63. According to the Occupational Health report, fatigue aside, the Claimant had made a good recovery. The report did not suggest that there was a risk that the stroke might recur, with associated ongoing medical symptoms. By the time of the dismissal, over six months had passed since the stroke and the Claimant's sensorineural symptoms had ceased.

64. Finally, we need to consider whether the Claimant's condition was 'long-term'. If we are wrong in concluding that the extent of the Claimant's symptoms did not have a significant adverse effect on normal day to day activities as at 7 August 2020, then there is insufficient evidence that these symptoms could well remain at a sufficient level of severity to have a substantial adverse effect on normal day to day activities for 12 months or more from the date of the stroke. The Occupational Health report notes that recovery from a stroke has been known to continue for at least a year post-incident. Therefore, we do not find that the Claimant's condition was 'long-term'.

65. For all those reasons, we do not find that the Claimant satisfied the definition of disability as at the date of his dismissal. The result is that his claims of disability discrimination must fail. In those circumstances, we do not need to go on and consider whether there was a failure to make reasonable adjustments or whether there was discrimination arising from disability. However, because these points were fully argued, and in case we are wrong about whether the Claimant was a disabled person, we do address the different complaints of disability discrimination.

Failure to make reasonable adjustments

66. In the agreed List of Issues, the provision, criterion or practice (PCP) was identified as follows: "the requirement to attend work and work as a bus driver". We consider that this alleged PCP is an amalgam of two different PCPs. The first, which applies to all bus drivers, is that bus drivers need to be legally entitled to drive buses. To put the matter another way, they need to have a current PCV licence. The second, again which applies to all bus drivers, is that bus drivers should be sufficiently medically fit to be able to drive buses.

<u>First PCP – requirement to have a current PCV licence</u>

67. The Claimant's alleged disability based on the symptoms as they were at 7 August 2020 did not place the Claimant at a substantial disadvantage in complying with the first PCP. It was the DVLA's decision that the Claimant should lose his licence given the fact of the stroke that placed the Claimant at a substantial disadvantage.

In any event, none of the proposed reasonable adjustments would have avoided the disadvantage. Until the Claimant had successfully applied for his PCV licence to be reinstated, he could not comply with the PCP that he must have a PCV licence. The suggested steps, namely allocating him alternative employment on a phased return basis; extending his period of sick leave; allowing him a period of unpaid leave; and putting the Claimant on furlough would not have removed this legal restriction.

Second PCP – requirement of sufficient medical fitness to drive buses

68. This PCP did not place the Claimant at a substantial disadvantage by the point of the meeting on 7 August 2020. By that point, there was insufficient medical evidence that he was unfit to drive. It was a legal rather than a medical restriction that prevented him from driving buses.

69. Therefore, even if the Claimant had satisfied the definition of disability, we would have rejected the complaint that there was a failure to make reasonable adjustments.

70. In relation to the particular reasonable adjustments suggested by the Claimant:

    a. Allocating him alternative employment - The Claimant accepted that the role of General Hand would not have been suitable. Further, we have already found that it would not have been reasonable to expect an employer to have allocated him the Administrator role, because he did not have the necessary skillset or experience to perform this role. There was some reference in the evidence to the potential role of “Oiler and Greaser” but no specific vacancy available at the time. At this point, the Claimant was still signed off work by his GP as unfit for all duties.

    b. Extending his period of sick leave – the suggested adjustment assumes that the Claimant would have continued on sick leave on the same basis as he was by the time of the meeting at which he was dismissed. This would not have required the Respondent to pay him further sick pay, given that by then he had already exhausted his contractual entitlement. It would, though, have enabled him to continue to acquire annual leave. This could have been taken as normal contractual pay during employment or paid at the conclusion of his employment. There was discussion during the Final Hearing as to how much this would have costed the Respondent. We discuss this option further in relation to the complaint of discrimination arising from disability under Section 15 Equality Act 2010. However, as already stated, we do not need to decide this issue as a complaint of failure to make reasonable adjustment, for the reasons already given.

    c. Allow him a period of unpaid leave – this appears to assume that the Claimant would have remained an employee but would not have been entitled to any holiday pay. Although we did not hear full argument on the point, we assume for the purposes of this issue, that the Claimant would not

be able to waive his statutory entitlement to paid annual leave under the Working Time Regulations 1998. Normally employees are not able to give up their legal rights unless they have done so on independent legal advice as part of a settlement agreement. As a result, we do not consider that this proposed reasonable adjustment adds anything to the previous reasonable adjustment.

d. Putting the Claimant on furlough – There is a factual dispute as to whether the Claimant raised this possibility at the dismissal meeting or at the appeal meeting. On balance we find that he did not. It was not recorded in the subsequent letters written by the Respondent, nor did the Claimant challenge this omission at the time. The possibility of furlough was only raised by Citizen Advice on his behalf obliquely on 19 October 2020 [127], and then directly in an email on 2 November 2020 [135]. By August 2020, employers would have been required to contribute the employer national insurance contributions and the employer pension contributions to the furlough pay. Thereafter in successive months, it was anticipated that employers would pay 10% of employee's furlough pay in September 2020, and 20% of furlough pay in October 2020. We do not consider that this would have been an appropriate reasonable adjustment. The purpose of the coronavirus job retention scheme, commonly known as the furlough scheme, was to preserve jobs that otherwise would be lost as a result of the downturn in demand for services given the impact of the pandemic. It was not to preserve the employment on paid sick leave, at the Government's whole or partial expense, of those employees who would otherwise have been fairly dismissed because of their own particular medical incapability to work. By 7 August 2020, the Claimant's colleagues who had been initially furloughed had been taken off furlough and restored to their normal pay and duties – apart from pregnant staff and a taxi driver who did not have a PCV licence. The Respondent was still running a full service. It would not have been reasonable to have treated the Claimant as an exceptional case and uniquely re-furloughed him, in circumstances where none of his colleagues in the same role had been re-furloughed.

Discrimination arising from disability

71. We have found that the Claimant was dismissed on medical grounds. Therefore, if the Claimant's medical condition had amounted to a disability, then this would have amounted to treating the Claimant unfavourably because of something arising in consequence of his disability.

72. The issue at that point would have been whether the decision to dismiss the Claimant was a proportionate means of achieving a legitimate aim. The legitimate aim relied upon by the Respondent was the "effective operation of a 24/7 bus garage and bus service. The Respondent tightly budgets for work and contracts with TfL. It cannot maintain sickness absence for long periods".

73. We need to consider the potential impact on the effective operation of the Respondent's bus garage and bus service of keeping the Claimant on the books, albeit not receiving any sick pay. The Respondent's argument is that the Tribunal must consider the bigger picture beyond the Claimant's individual case. It is said that the Tribunal must see the dismissal decision as part of the Respondent's general approach to absence management. In essence, the Respondent argues that extending the Claimant's full-time employment would set a precedent requiring the Respondent to act in a similar way for other disabled drivers in the same or similar situations. Mrs Hannon speculated that there might be ten drivers from a pool of 40-50 drivers on long term sickness absence at any one time, who satisfied the definition of disability. She speculated that the annual costs of retaining the Claimant's role would be £3,300 and therefore the annual costs to the business of retaining ten disabled drivers on long term sickness even if they had exhausted their contractual entitlement to sick pay would be £33,000.

74. We do not consider that the decision taken in a particular case necessarily sets a precedent for other disabled employees where the medical condition is different and the prospects of returning are necessarily different. Each case needs to be considered on its own facts. In any event, Mr Ludlow accepts that the figure of 10 disabled drivers is a hypothetical assumption (Closing Submissions paragraph 74), rather than a figure based on an analysis of the particular sickness records at the time of the Claimant's dismissal.

75. Therefore, we do not consider that the annual cost of the additional accrued annual leave in the Claimant's case should be increased by a factor of 10 as the Respondent contends. Furthermore, it is more realistic to take a monthly figure as the additional cost of continuing to engage the Claimant for a further month. Deciding to delay the Claimant's dismissal would not necessarily require the Respondent to continue to employ the Claimant for a further year. We do not consider that there would have been other costs in practice directly resulting from his continued absence in the form of additional training costs for others, or additional uniform costs.

76. So analysed, we consider that the ongoing costs of retaining the Claimant as an employee to an organisation of the Respondent's size would be comparatively modest. It would be of the order of around £225 - £275 per month. We do not consider it has been shown that there would be indirect costs of retaining the Claimant in his role. The Respondent argues that there would have been additional overtime payments made to other employees. We do not accept this. There was an additional pool of drivers employed by the Respondent to cover sickness and holiday absence. It was only when all drivers in this pool were fully committed that it would be necessary to ask drivers to work overtime at higher pay rates. There is no evidence that the need for overtime would be any higher if the Claimant was retained on the pay roll but not working on a temporary basis, rather than dismissed. Mrs Hannan argued that the Respondent was under significant budgetary pressure in order to win tenders. We do not consider that the modest additional costs shown by the Respondent are likely to have significantly impacted

on the Respondent's budgets or threatened its competitive position. No such detailed analysis has been produced.

77. Furthermore, we do not accept that the Respondent's service would necessarily have been disrupted if it retained the Claimant on the books. Mrs Hannan accepted in evidence that retaining the Claimant on the payroll did not stop the Respondent from recruiting other drivers. Indeed, there was apparently a significant driver shortage at the time of the Claimant's dismissal such that the Respondent would have been looking to recruit further drivers regardless of whether the Claimant's sick leave continued, or he was dismissed. It was that general shortage that threatened to create gaps in the service, rather than continuing the Claimant's employment on unpaid sick leave. The Respondent has not established that the Claimant's long term sickness absence directly or indirectly led to lost mileage leading to penalty fines, customer complaints or loss of work.

78. Dismissing the Claimant potentially had a significant effect on the Claimant. It deprived him of a role he had performed for five years, in circumstances where he was the sole breadwinner for his family, where he did not have a ready alternative source of employment or income, and where the stress caused by dismissal could conceivably have had an adverse impact on his health, given his previous stroke and the resulting symptoms. However, given his health recovery to date, there was the prospect that by January 2021 he could be on the path to having his licence returned at some point in the months afterwards. The Tribunal should not use the benefit of hindsight when assessing how long such a licence application would have taken. If in the following months the Claimant's health had deteriorated such that it appeared that the Claimant would not be able to apply for his PCV licence on the first anniversary of his stroke, then the viability of his continued employment could be revisited.

79. Although there was no suitable alternative employment available for the Claimant by 7 August 2020, it was always possible that this position might change. Mrs Hannan described this as a slim possibility. Although there were others on sick leave potentially waiting for a non-driving role, it was not inconceivable that the Claimant could have been slotted into a non-driving vacancy, if only on a temporary basis, within a month or two of the dismissal meeting. The Occupational Health evidence was that he was fit for work, albeit there might need to be some adjustment in the duties to cater for his fatigue levels.

80. Therefore, the discriminatory effect on the Claimant of dismissing him on 7 August 2020 outweighs the impact on the Respondent's business. We are not persuaded that the decision to dismiss the Claimant was a proportionate means of achieving a legitimate aim, such that it was justified notwithstanding its potentially discriminatory impact. It was not reasonably required in order to enable the effective operation of a 24/7 bus garage and bus service.

81. We are not persuaded that we are precluded from reaching this conclusion by the decision of the East London Employment Tribunal in the case brought against the

Respondent by Mr Ahmed. In that case the legitimate aim was framed in a different way; the focus was on a point in time over a year before the Claimant's dismissal; and the situation of Mr Ahmed was different from the situation of the Claimant. The decision of one Employment Tribunal is not binding on another Employment Tribunal where one of the parties is different in each case.

82. Had the Claimant established that he was a disabled person at the relevant time, we would have upheld his claim for discrimination arising from disability, under Section 15 Equality Act 2010. Because he was not a disabled person, this claim necessarily fails.

Employment Judge Gardiner
11 February 2022