EMPLOYMENT TRIBUNALS

Claimant: Mr N. Turner

Respondent: National Highways Limited

Heard at: Watford ET

On: 26, 27, 28 and 29 February 2024

Before: **Judge:** Employment Judge G. King
Members: Mrs D. Ballard
Mrs S. Laurence-Doig

Representation
Claimant: Mr D. Renton
Respondent: Ms E. Hodgetts

RESERVED JUDGMENT

1. The Claimant's claim in respect of failure to make reasonable adjustments contrary to sections 20 & 21 of the Equality Act 2010 is not well founded and is dismissed.

2. The Claimant's claim in respect of constructive unfair dismissal is not well founded and is dismissed.

REASONS

Procedure

1. This is the hearing of the claim of Mr Neil Turner ("the Claimant") against his former employer National Highways Limited ("the Respondent"). His complaints are of constructive unfair dismissal and disability discrimination The claim was received by the Employment Tribunal on 10 November 2022.

2. The Tribunal heard live evidence from the Claimant. The Tribunal also heard live evidence from Mr Alex Bunce and Ms Bekki Penn (née Olah) on behalf of the Respondent. Relevant parts of witness statements are

referred to in [square brackets] preceded by the initials of the witness, i.e. [NT1] for the first paragraph of the Claimant's witness statement.

3. The Tribunal had the benefit of a bundle of 555 pages. Documents in the bundle are referred to by their page number in [square brackets]. There was also a supplemental bundle of 58 pages, which was prepared by the Claimant. The Respondent did not object to these documents being included and they were of assistance to the Tribunal. The supplemental bundle was therefore admitted into evidence. Pages referred to from the supplemental bundle are also noted in [square brackets] prefixed by the letter S.

Preliminary Issues

4. The Tribunal had to deal with two preliminary issues.

5. The first was that one of the panel members, Mrs F. Betts, was known to and had worked with the Claimant's trade union representative, Ms J. Stevenson.

6. In order to remove any suggestion of perceived bias, Mrs Betts recused herself from the hearing. Mrs Laurence-Doig was able to join the hearing so that the Tribunal could proceed with two members.

7. Secondly, the Claimant made an application under Rule 50 for the names of three other employees of the Respondent, of which one of whom had a flexible working arrangement approved and two of which had a flexible working arrangement refused, to be anonymised. The application was made because the reasons for requesting flexible working arrangements related to health conditions or personal circumstances.

8. The application was initially opposed by the Claimant, but after the grounds for the application had been set out in more detail, the Claimant did not oppose the application.

9. The Tribunal accepted that health conditions or personal circumstances would be information that a person would have a reasonable expectation of such information being kept private. The Tribunal was satisfied that there was no impact on the interests of justice by either granting or refusing the application. There would, however, be an infringement of the employees Article 8 Rights if the application was refused. The Tribunal therefore granted the application.

10. The Tribunal then set out the issues that the Tribunal would be considering as part of the hearing.

The Issues

11. The list of issues for the Tribunal to determine at this hearing were therefore as recorded in the Case Management Order of 8 December 2021, and are repeated here. This hearing was to determine liability only.

12. Disability discrimination: Failure to make reasonable adjustments

a. Existence and knowledge of disability

It is agreed that the Claimant is a disabled person by reason of him suffering from atrial fibrillation (the Respondent had knowledge from 2012) and Tachy-Brady syndrome (the Respondent had knowledge from May 2021).

b. Existence of a PCP

A *"PCP"* is a provision, criterion or practice. Did the Respondent have the following PCPs and apply them to the Claimant:

> a requirement that he work full-time on a shift pattern comprising 6 days on, 3 days off?

c. Existence and knowledge of substantial disadvantage

Was the Claimant put at a substantial disadvantage by the PCP relied upon compared to persons without his disabilities?

The Claimant contends the PCP puts people sharing the Claimant's disabilities at a substantial disadvantage compared to others due the level of fatigue caused by working the longer hours.

d. From 6 October 2021, did the Respondent have relevant knowledge of the substantial disadvantage relied on?

e. Adjustment contended for

Did the Respondent fail to take a step that it would be reasonable for it to have to take to avoid such disadvantage, by failing to allow the Claimant to work part-time on a shift pattern comprising 4 days on, 5 days off?

13. Constructive unfair dismissal

a. Conduct relied upon

Did the Respondent fail to allow the Claimant to continue working part-time on a shift pattern comprising 4 days on, 5 days off?

b. If so, did that constitute a fundamental breach of the implied term of mutual trust and confidence?

c. Causation of resignation

If so, did the Claimant resign in response to the fundamental breach?

d. Delay or affirmation

If so, had he unduly delayed or affirmed the contract following the fundamental breach, before resignation?

Findings of Fact

14. The below is intended to be a brief summary of the facts of this case where they are not in dispute, and the Tribunal's findings where facts are in dispute.

15. The Claimant was employed by the Respondent as a Traffic Officer between 13 May 2008 and 14 July 2022. After Early Conciliation between 7 August and 18 September 2022, he issued these proceedings on 10 November 2022. His complaints are of constructive unfair dismissal and disability discrimination.

16. Traffic officers are frontline employees who work on the strategic road network ("SRN"), which comprises of England's motorways and major A roads.

17. Traffic Officers are rostered to work across a varying shift pattern of six days on, three days off to provide the necessary operational coverage 24 hours a day, seven days a week, all year round. The relevant shifts that the Respondent operates are as per the witness statement of Ms Penn [BP7 – 9]:

> Early shift ("E"): 06:00 – 14:24
> Late shift ("L"): 14:00 – 22:24
> Night shift ("N"): 22:00 – 06:24
> With 3 rest breaks at the end of 6 working days ("R")

18. In addition to three core shifts above, the Respondent also requires employees to work a variable shift ("V"), which means that they can be rostered to work any of the three shifts, subject to resourcing requirements.

19. The Respondent's standard roster pattern involves employees working rotating shifts over a 36-day reference period of [BP9]:

> E1, E2, E3, L4, L5, L6, R7, R8, R9, V10, V11, V12, N13, N14, N15, R16, R17, R18, E19, E20, E21, L22, L23, L24, R25, R26, R27, V28, V29, V30, N31, N32, N33, R34, R35, R36

20. Around 2007, the Claimant was diagnosed with atrial fibrillation and was treated with ablation [480].

21. On 3 March 2010, the Claimant sustained an accident at work where he fell into a collapsed manhole. According to an Occupational Health report of 27 January 2012, this accident *"resulted in problems with his leg, pelvis and back I understand that a subsequent MRI scan revealed that he had a prolapsed disc in his lower back and this resulted in some significant pain"* [480].

22. On 16 January 2013, the Claimant emailed his manager, David Lovell, to request a reasonable adjustment [120]. The adjustments requested was *"that I be allowed to work permanently early turn"*. This was followed up by an email on 7 March 2013 [122 – 123], in which the Claimant reiterated his request of *"working 6 early is on and 3 days off as my shift pattern"*.

23. Due to the overlap between findings of fact about the reasons for this request and the Respondent's knowledge of any substantial disadvantage in relation to the Claimant's current claim, the Tribunal's findings on the reasons for this request are set out in the "Deliberation" section of this Judgment.

24. This request for a reason adjustment was granted by the Respondent on 13 March 2013 and the Claimant worked the early shift only from that date onwards.

25. The Claimant had a further ablation at Coventry Hospital in October 2020 [488].

26. In May 2021, the Claimant was seen at Northampton General Hospital, following an episode of dizziness with loss of consciousness. On 21 May 2021, Dr Sharman, Consultant Cardiologist, wrote the Claimant's GP [510]. Dr Sharman was of the view that the Claimant was suffering from Tachy-Brady syndrome. Dr Sharman was of the view that the best way forward was the insertion of a dual chamber permanent pacemaker. The procedure for the insertion of this pacemaker took place on 7 July 2021 [514 – 518].

27. It was planned that the Claimant would return to work on 25 August 2021.

28. Between May and November 2021, the Claimant worked from home because he was unable to drive and was awaiting clearance from Occupational Health to return to full duty [NT9]. This was because the Claimant, on 3 August 2021, emailed Mr Lovell [139] and raised two issues, which were using booster packs to start vehicles and deals with incidents involving electric vehicles ("EV"s), and how these could affect his pacemaker.

29. Following the questions regarding booster packs and dealing with EVs, the Respondent made a referral to Occupational Health [142] on 3 August 2021. There was a consultation between Occupational Health and the Claimant on 4 August 2021, where the Claimant was referred for an assessment by the Occupational Physician [144]. The Occupational Physician responded on 31 August 2021, recommending that clarification was obtained in relation to how these issues could affect the Claimant's pacemaker [153]. There were significant delays with this, and the Claimant was not seen again by Occupational Health until November 2021 [183].

30. As Mr Lovell was on long term sickness absence, Mr Bunce became the Claimant's line manager from 5 October 2021 in an acting up capacity (internally referred to as a 'TRA' role) [BP12] [AB3].

31. On 6 October 2021, the Claimant emailed Mr Bunce, his line manager, requesting a change in his working pattern [164]. The Tribunal's findings on this email are set out in the "Deliberation" section of this Judgment.

32. The Claimant's request for part-time hours was approved by Ms Penn on 11 October 2021 on a six-month trial basis. This was communicated to Mr Bunce by Ms Penn by email [167] and the Claimant was copied into this email, as was Mr Lovell.

33. On 14 October 2021, the Claimant emailed Ms Penn [166] and offered to postpone the start of his part-time working until January 2022. This offer was accepted by Ms Penn and it was agreed the part-time working would start from the week commencing 3 January 2022 [166].

34. Mr Bunce had to be stood down from operational duties on medical grounds on 23 October 2021. Mr Bunce was still available online and answering emails but could not return to work until he had been assessed by Occupational Health [BP22]. Mr Marty Frost took over the Claimant's line management from 5 November 2021 [182] [AB13].

35. Due to the delays with Occupational Health, the Claimant did not return to work until 14 November 2021, when he resumed full duties [NT14], [185]. The Claimant completed an Individual Needs Analysis for on-road staff with Mr Frost [188 – 213], completed a training needs analysis and had a single crew check test with a coach [188 – 213]. Three days were allocated for the check test, but it was completed in a day and a half, and the Claimant was found to be safe and competent.

36. Mr Lovell returned to work on 5 December 2021 and was reinstated as the Claimant's line manager from this date [BP26].

37. On 17 December 2021 the Claimant was copied into an email from HR to Mr Lovell, asking him to fill out a flexible working agreement application form [219 – 231]. On 23 December 2021 the Claimant emailed Mr Lovell querying the need for the flexible working agreement application form. The Tribunal's findings in relation to this email are set out in the "Deliberation" section of this Judgment.

38. The Claimant completed the flexible working agreement application form, but this was rejected by HR. The Claimant emailed Mr Lovell on 10 January 2022 to explain this [225] and to explain that he wasn't sure why it had been rejected, and included a screenshot of what he had added by way of additional comments to his flexible working agreement application form.

39. The Claimant's part-time working arrangement was put in place from 11 January 2022.

40. On 1 February 2022, the Respondent's HR department sent an email [424] to the Claimant, which said:

> *"Further to your request to increase your hours effective 11 January 2022, please find attached a confirmation letter.*
>
> *Please do not hesitate to contact me should you have any questions."*

41. The attached letter is at [426]. The letter contained an error, in that it stated that the Claimant would be working five days on, four days off; whereas the Claimant's working pattern was actually working four days on, five days off.

42. The Claimant stated he did not receive the attached letter. The Claimant accepted in cross-examination that he would expect a letter to be attached to an email that says words the effect of *"please find attached a letter"*. He also accepted that he did not chase HR for a confirmation letter or query where the attached letter was. He disagreed that he should have expected a confirmation letter and said *"this is all just paperwork"*.

43. There is no email from the Claimant's back to HR querying what the attachment mentioned should have been if it was not attached. Lack of actions such as this on the part of the Claimant seem to contradict his evidence that he would have expected a letter to be attached. In any event, to contact HR to chase up the letter if it were not attached to the email would have been a reasonable step for the Claimant to take.

44. The Tribunal does not accept the Claimant's evidence that he did not receive the Respondent's HR letter of 1 February 2022. The Tribunal finds that it is more likely that the Claimant did receive this letter.

45. On 11 May 2022, the decision was taken to end the Claimant's part-time working arrangements. Ms Payne communicated this decision and to Mr Lovell in an email dated 11 May 2022 [247 – 248]. Ms Penn asked Mr Lovell to inform the Claimant that the flexible working arrangements trial was going to be brought to an end at the end of June 2022. Mr Lovell did so, by email on the same day [251]. A meeting between Mr Lovell and the Claimant was set up for 16 May to discuss this.

46. On 12 May, the Claimant was advised that the Respondent would be referring to HR for the issue that he had raised regarding new work trousers, which caused irritation to his skin complaint. The Claimant was informed of the referral by Ms Penn via email [257].

47. On 13 May, the Claimant called in sick with work-related stress [261]. He returned to work, to a rest day, on 17 May.

48. On 1 June 2022, an email was sent from the Respondent's HR department to Mr Lovell. The HR Department had been looking into the Claimant's annual leave [311]. It was during investigations into the Claimant annual leave entitlement that the error in the letter of 1 February 2022 was discovered. The Respondent's HR department informed Mr Lovell that a revised letter with the correct working pattern would be issued to the Claimant.

49. Accordingly, the Claimant received an email from the Respondent's HR department [343, also 424] which attached a revised letter regarding his part-time working arrangement. The revised letter corrected the error in relation to the five on, four off working pattern which had been described in the initial letter of 1 February 2022. The Claimant sent a copy of this letter to Mr Lovell on 3 June.

50. For reasons that are unclear, Mr Lovell then contacted the National Roster Team and asked them to extend the Claimant's part-time working pattern until 10 January 2023 [320]. The National Roster Team could not do this without managers approval, and so Mr Lovell asked Ms Penn by email for her approval to extend the Claimant's part-time working [319]. Ms Penn

told Mr Lovell that she could not do this, as the arrangement had not been extended [319]. On 4 June Mr Lovell sent a copy of the revised confirmation letter that the Claimant had shared with him to Ms Penn, saying he believed that *"HR have signed Neil's 4 on 5 off agreement off, and we can only ask him if he's able to change (not force)".*

51. Ms Penn made enquiries with HR [339 – 341] and it was explained that the letter of 1 June was a revised version of the one that had been issued on 1 February 2022. Ms Penn emailed the Claimant on 9 June to explain what the letter meant [336]. Ms Penn offered to send the Claimant for additional Occupational Health referral as *"you had mentioned you wanted these changes due to health reasons"*. She confirmed that the Claimant should pattern would revert to what it had been previously: *"earlies on a 6 on 3 off basis*".

52. The Claimant resigned by email on 13 June 2022 at 08:05 [348].

53. Mr Lovell replied the Claimant on the same day at 08:29, asking the Claimant not to resign. Mr Lovell explained that Ms Penn would call the Claimant. No telephone call took place, but on 14 June Ms Penn emailed the Claimant and offered to authorise his part-time working arrangement with immediate effect if it meant that he would not resign. The Claimant did not reply to this email.

54. The Claimant's last day of work was 14 July 2022.

The Law

55. The law relevant to the issues before the Tribunal is set out below.

Disability discrimination: Failure to make reasonable adjustments

56. Sections 20 and 21 provide the law on reasonable adjustments.

S.20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable *Schedule apply; and for those purposes, a person on whom the duty* is imposed is referred to as A.
(2)...
(3) The first requirement isa requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

S.21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

57. A failure to make reasonable adjustment involves considering:

1. the provision, criteria or practice applied by or on behalf of an employer;
2. the identity of non-disabled comparators (where appropriate); and
3. the nature and extent of the substantial disadvantage suffered by the Claimant.
   (See *Environment Agency v Rowan* [2008] IRLR 20, [2008] ICR 218)

58. In *Newham Sixth Form College v Sanders* [2014] EWCA Civ 734 is was confirmed that *"the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot ... make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP"*.

59. A 'provision, criterion or practice' is a concept which is not to be approached in too restrictive a manner; as HHJ Eady QC stated in *Carrera v United First Partners Research* UKEAT/0266/15 (7 April 2016, unreported), *"the protective nature of the legislation meant a liberal, rather than an overly technical approach should be adopted'. In this case the ET were found to have correctly identified the PCP as 'a requirement for a consistent attendance at work"*

60. The Tribunal will need to consider a pool of comparators; has there been a substantial disadvantage to the disabled person in comparison to a non-disabled comparator? *Archibald v Fife Council* [2004] UKHL 32, [2004] IRLR 651, [2004] ICR 954: the proper comparators were the other employees of the council who were not disabled, were able to carry out the essential functions of their jobs and were, therefore, not liable to be dismissed.

61. While it is not a breach of the duty to make reasonable adjustments to fail to undertake a consultation or assessment with the employee (*Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664), it is best practice so to do. The provision of managerial support or an enhanced level of supervision may, in accordance with the Code of Practice, amount to reasonable adjustments (*Watkins v HSBC Bank Plc* [2018] IRLR 1015)

62. The adjustment contended for need not remove entirely the disadvantage; the DDA says that the adjustment should 'prevent' the PCP having the effect of placing the disabled person at a substantial disadvantage *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10, [2011] EqLR 1075: when considering whether an adjustment is reasonable it is sufficient for a Tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring. *Cumbria Probation Board v Collingwood* [2008] All ER (D) 04 (Sep) – *"it is not a requirement in a reasonable adjustment case that the Claimant prove that the suggestion made will remove the substantial disadvantage"*

63. The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. *Lincolnshire Police v Weaver* [2008] All ER (D) 291 (Mar): it is proper to examine the

question not only from the perspective of a Claimant, but that a Tribunal must also take into account *"wider implications"* including *"operational objectives"* of the employer.

64. Regarding employer's knowledge, *Gallop v Newport City Council* [2013] EWCA Civ 1583, [2014] IRLR 211 confirms that a reasonable employer must consider whether an employee is disabled, and form their own judgment. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the Tribunal (*Jennings v Barts and The London NHS Trust* UKEAT/0056/12, [2013] EqLR 326).

65. When considering whether a Respondent to a claim *"could reasonably be expected to know"* of a disability, it is best practice to use the statutory words rather than a shorthand such as *"constructive knowledge"* as this might imply an erroneous test (*Donelien v Liberata UK Ltd* UKEAT/0297/14). The burden, given the way the statute is expressed, is on the employer to show it was unreasonable to have the required knowledge.

66. The EHRC Code gives examples of adjustments which may be reasonable, which include:

    4. making adjustments to premises;
    5. allocating some of the disabled person's duties to another worker;
    6. transferring the worker to fill an existing vacancy;
    7. altering the worker's hours of working or training;
    8. assigning the worker to a different place of work or training or arranging home working;
    9. allowing the worker to be absent during working or training hours for rehabilitation, assessment or treatment;
    10. acquiring or modifying equipment;
    11. providing supervision or other support

<u>Constructive Unfair Dismissal</u>

67. A termination of the contract by the employee will constitute a dismissal within the ERA 1996 if he or she is entitled to so terminate it because of the employer's conduct. The employer's conduct must amount to a fundamental breach of contract, i.e. it must be a significant breach going to the root of the contact.

68. A constructive dismissal is *not* necessarily unfair. The Tribunal needs to make findings on the reason for the dismissal and whether the employer has acted reasonably in all the circumstances.

69. In order for the employee to be able to claim constructive dismissal, three conditions must be met.

70. First, there must be a repudiatory breach of contract by the employer. In this case, the Claimant is relying on a breach of the implied term that *"the employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"*

(*Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462). Due to the nature of the trust and confidence term, every breach of it goes to the root of the contract and is therefore repudiatory (*Morrow v Safeway Stores* [2002] IRLR 9).

71. To establish a breach, it is not enough for an employee to show that the employer's actions have destroyed or seriously damaged trust and confidence or were calculated or likely to do so. The employer must have had no *"reasonable and proper cause"* for the actions in question (*Amnesty International v Ahmed* UKEAT/0447/08). An employee has the burden of proving that the employer had no reasonable and proper cause (*RDF Media Group plc and RDF Media Limited v Clements* [2007] EWHC 2892).

72. The term can extend to extremely inconsiderate or thoughtless behaviour. For example, refusing to investigate complaints promptly and reasonably is capable of falling into this category (*British Aircraft Corporation v Austin* [1978] IRLR 332).

73. Importantly, there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach, then the employee's claim will fail (*Omilaju v Waltham Forest London Borough Council* [2005] EWCA Civ 1493, [2005] IRLR 35).

74. In *Tullet Prebon plc v BGC Brokers LP* [2010] IRLR 648, Jack J, sitting in the High Court, also said:

> *"It is in a sense circular to say that the employer's conduct must be serious enough to entitle the employee to leave. However, in considering what gravity of conduct by the employer is required, it is helpful to say that it must be such as so to damage the employee's trust in the employer, that he should not be expected to continue to work for the employer. Conduct which is mildly or moderately objectionable will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough."*

75. In *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] IRLR 487 it was affirmed that if the Claimant is objecting to is the way that the employer exercised a discretion under the contract (to the Claimant's detriment), it is not enough for the latter just to argue that the decision was unreasonable. In order to restrict the Tribunal to consideration of the process adopted by the employer, rather than remaking the decision judicially. the Claimant must show that it was irrational under the administrative law Wednesbury principles. This is a much tougher test to satisfy.

76. In *IBM United Kingdom Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] IRLR 4 the Court of Appeal extended this principle to applications of the T & C term. The case arose in the specific context of changes to a pension scheme but the judgment considered the term generally and made an important distinction – if the alleged breach of the term arises from generally bad behaviour by the employer, then the normal rules above apply but if the term is being used to attack what is fundamentally

an exercise of a discretion given to the employer by the contract of employment, then the Claimant must establish Wednesbury unreasonableness / irrationality as mandated by Braganza.

77. Second, the Claimant must leave in response to the breach, it must be an effective cause. The employee should leave because of the breach and this should demonstrably be the case. It is not sufficient if he merely leaves; nor is it sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him (*Walker v Josiah Wedgwood & Sons Ltd* [1978] IRLR 105).

78. Each case will turn on its own facts, and it is for the Tribunal to *"reach its own conclusion, based on the acts and conduct of the party, as to the true reason"* (*Weathersfield Ltd v Sargent* [1999] IRLR 94).

79. Third, the employee must not affirm the contract - an employee must make up his mind soon after the conduct of which he complains; for, if he continues his employment for any length of time without leaving, he will lose his right to treat himself as discharged (*Western Excavating (ECC) Ltd v Sharp* [1978] QB 761).

Deliberation

80. Applying the law to the facts as set out above, the Tribunal has reached the following conclusions:

Disability discrimination: Failure to make reasonable adjustments

81. Existence of PCP
Did the Respondent apply to the Claimant a requirement that he work full-time on a shift pattern comprising six days on, three days off?

82. The Tribunal finds that this is the working pattern of the business, however it is a working pattern that can be varied. It was variable by mutual agreement between staff and management, had been varied for other staff previously [533]. The question for the Tribunal is therefore *"was this PCP applied to the Claimant?"*

83. The Claimant returned to full duties on Sunday, 14 November 2021 [NT14] [185, 186]. It was planned that the Claimant would work his reduced hours four on, five off shift pattern immediately on his return to work, and this was communicated to the Claimant by email [166] on 14 October 2021. The Claimant then offered to leave the start of his trial of part-time working until January 2022 [166]. The Respondent had therefore offered the chance of part-time working to the Claimant from 14 November 2021 but the Claimant had elected to continue working full-time until the New Year. The PCP that the Claimant was required to work a full-time shift pattern comprising six days on, three days off was not therefore applied to the Claimant after 14 October 2021. It was the Claimant's own choice to work full-time hours when he returned to work in November.

84. From January 2022, the Claimant accepts that he did work part-time, on the four on, five off pattern [416]. The PCP that the Claimant was required to work a full-time shift pattern comprising six days on, three days off

therefore continued not to be applied to the Claimant. This continued up to June 2022, when the Respondent (having informed the Claimant about this in May 2022) required the Claimant to return to his previous six days on, three days off work pattern. The PCP that the Claimant was required to work a full-time shift pattern comprising six days on, three days off was therefore applied to the Claimant in June 2022.

85. The Tribunal therefore finds that the Respondent did apply the PCP to the Claimant from June 2022. The Respondent has sought to argue that the PCP was not applied from June 2022 onwards, because it was only applied *"subject to the OH report"* and only if the staffing did not enable the PT working to be accommodated. The Tribunal notes that the words of Ms Penn's email were *"The only thing I'd said to Neil is we would try and let him work 4 days where the roster allowed it and we would manage it locally"* [319] and *"where we can accommodate the 4 on 5 off, then we will endeavour to do so but this will be where the required staffing levels are in place"*. The Tribunal's view is that merely attempting to manage the Claimant's part-time working locally is insufficient to say that the PCP was not applied to the Claimant.

86. Existence and knowledge of substantial disadvantage
Was C put at a substantial disadvantage by the PCP relied upon compared to persons without his disabilities? The Claimant contends the PCP puts people sharing the Claimant's disabilities at a substantial disadvantage compared to others due the level of fatigue caused by working the longer hours.

87. The Tribunal considered the available medical evidence when considering this issue. The Claimant has not adduced any new medical evidence to support his case. The Tribunal has therefore based its conclusions on the contemporaneous medical evidence before it.

88. The Tribunal finds that the Occupational Health report from 27 January 2012 at [480] confirms that the Claimant's heart rate is *"extremely stable"*. It states he has no symptoms from his atrial fibrillation and that he exercises rigorously. It also states that *"from a functional perspective Mr Turner describes that he can manage his job without any particular problem"* and *"he is able to carry out his full range of duties and the only adjustment I recommend is that he is given the opportunity to avoid any prolonged static postures"*. The Claimant was asked, in cross-examination, if he had any issues with that medical view, and he replied *"not at the time"*.

89. The Claimant's email of 16 January 2013 [120] cites that the reason for the for the reasonable adjustment in 2013 is due to *"increasing levels of pain caused by my peripheral neuropathy"* which is made worse by tiredness. The Claimant does go on to say *"I wish to remind you that the peripheral neuropathy occurred following my accident at work on 3 March 2010".* The Claimant's email is a very considered, precise, and eloquent email that sets out his request for a reasonable adjustment, citing the Equality Act 2010, and gives the reasons why this adjustment is requested. There is no mention of atrial fibrillation.

90. The Claimant accepted in cross-examination that this email does not mention atrial fibrillation, but he said that this was discussed at the time

with Mr Lovell. There is no evidence to support this assertion. The Claimant also wrote a long email to Mr Lovell on 7 March 2023 [122], setting out what he's looking for as part of his reasonable adjustment as well as raising some other issues. Again, there is no mention of atrial fibrillation being part of the reason for the reasonable adjustment request. The Claimant actually asserts *"this change is requested following an injury whilst working for the Highways Agency on 10.03.2010. The accident has caused my condition".*

91. The Tribunal is of the view that the Claimant's email at [120] is a carefully considered and logical request for a reasonable adjustment. The Claimant had experience of representing others as a Trade Union representative, and the Tribunal finds it unlikely that, if atrial fibrillation was a part of the Claimant's request for the reasonable adjustment, he would have neglected to have mentioned it in his email.

92. In cross-examination, the evidence of Mr Bunce was that he thought the Claimant's existing reasonable adjustment was due to fatigue and atrial fibrillation, but he confirmed in re-examination that this belief was only from conversations he had had with the Claimant and not based on any documentary evidence. Mr Bunce stated that he had no access to documents that related to the Claimant's reasonable adjustment made in 2013 and the Tribunal accepts that evidence as correct.

93. The Tribunal is satisfied that the Claimant's reasonable adjustment in 2013 was put in place due to his peripheral neuropathy and that his atrial fibrillation was not a factor in granting this reasonable adjustment. The Tribunal is satisfied that the Claimant did not raise the issue of his atrial fibrillation when making his request for a reasonable adjustment in 2013.

94. On 23 July 2021, it is documented [138] in an email that *"Neil rang this morning he will be fit to return to work 25th Aug"*. The Claimant also emailed Mr Lovell on 3 August 2021 [139] stating *"I'm looking forward to getting back to work proper on Wednesday 25 August"*. The Claimant also says: *"There are two things which may cause me issue which are"* and he then lists *"Using booster packs to start vehicles"* and *"Dealing with RTC involving EV's"*. At no point did the Claimant raise any issues with atrial fibrillation or fatigue.

95. The questions regarding booster packs and dealing with EVs prompted a referral to Occupational Health. This was made by the Respondent [142] on 3 August 2021, and the Claimant was informed on the same day [141]. There was a consultation between Occupational Health and the Claimant on 4 August 2021, where the Claimant was referred for an assessment by the Occupational Physician [144]. The Occupational Physician responded on 31 August 2021, recommending that clarification was obtained in relation to how these issues could affect the Claimant's pacemaker [153]. There were significant delays with this, and the Claimant was not seen again by Occupational Health until November 2021. The health assessment dated 11 November 2021 [183] concluded that *"Mr Neil Turner is currently at work on full duties. Neil is now medically fit to resume full operational duties, subject to his Needs Analysis"*.

96. For clarification, the Needs Analysis is a requirement contained in the Respondent's 'Single Crewing Policy' and needs to be completed if an individual has not been deployed as single crewed for over 90 days.

97. The Claimant did not raise any issues with atrial fibrillation or fatigue during his consultations with Occupational Health on 4 August, 31 August or 11 November. When asked about this in cross-examination, the Claimant said that he did not mention it at this time, as these consultations were to talk about his pacemaker and how it could be affected by booster packs and electric vehicles. It was put to the Claimant that it would be appropriate for him to have raised issues of atrial fibrillation and fatigue with Occupational Health at this stage, as the Claimant's case is that these issues both relate to him driving and working on a full-time basis. The Claimant disagreed with this and said that the policy was he should raise these issues with his manager. When asked why he did not raise these issues with his manager, the Claimant's answer was that he had an *"endless succession of acting managers".*

98. The Tribunal finds that the Claimant's assertion that he could not raise the issue of atrial fibrillation and fatigue with Occupational Health because the focus of these consultations was to do with his pacemaker to be ludicrous. Occupational Health was asked to look at issues regarding the Claimant's pacemaker, but this was part of a wider remit to look at his return to work, and there is no good reason why the Claimant could not even mention issues with atrial fibrillation and fatigue, especially if he was concerned that these were issues that would prevent him from working full-time.

99. The Tribunal also rejects the argument that the Claimant could not raise such issues with his manager due to having many acting managers. The emails at [141] and [142] show that the Claimant was in regular and friendly contact with Mr Lovell. Once Mr Lovell went on long-term sick the Claimant still had managers to whom he could have raised any issues.

100. The Claimant also said in cross-examination that he did not raise the issue part-time working in August, as the issue didn't arise until later in the year. In re-examination, however, the Claimant contradicted this when he was asked *"as it was at this time* (4 August 2021)*, had it occurred to you that you might need to move to part-time duties?"* to which he replied *"it had"*. The Tribunal finds the Claimant's evidence on this point to be confusing, contradictory, and unreliable.

101. In any event, the Claimant's (contradicted) assertion that the issue of part-time working due to his atrial fibrillation and fatigue had not arisen in August 2021 does not explain why he could not have raised it in his consultation on 11 November, which is after he has made his request for part-time working.

102. The documents at [144] and [153] show that the 11 November Occupational Health consultation arose out of the referral made in August 2021. The Claimant accepted in cross-examination that he did not make the referral himself. He stated *"I didn't make any request for Occupational Health referral"*. This is at odds with his ET1 at paragraphs 17 and 18, in which the Claimant says:

17) By 14 October 2021, it was agreed that the Claimant's new working pattern would begin in January 2022, so long as there were no issues flagged by an OH assessment that the Claimant was due to undertake in November.

18) The OH referral was at the request of the Claimant, as he had two specific questions about the potential risks to his health and whether (1) booster packs used to start vehicles or (2) damaged electric vehicles could have an adverse impact on the Claimant's pacemaker.

This obvious fallacy is a further reason why the Claimant's evidence is considered by the Tribunal to be unreliable on this point.

103. The Occupational Health report of 11 November 2021 [183] confirms that the Claimant is *"now medically fit to resume full operational duties, subject to his Needs Analysis"*. The Claimant did complete the needs analysis on or around 9 December 2021 and he also confirmed in an email on 21 October 2021 [169] that he had no needs.

104. The Claimant accepted in cross-examination that if he was not fit to work, he would have a duty of care to report this to the Respondent. He did not raise any issues about his fitness to work during his Needs Assessment in early December. This is inconsistent with the Claimant's case that he needed to work part-time due to his own medical reasons.

105. The Claimant also offered to postpone the start of his part-time working. In his email of 14 October 2021 [166] the Claimant said *"I'm happy to leave the start of my trial till January 22".* The Tribunal finds this is also inconsistent with someone who is worried about their state of health, and also that the Claimant was fully aware that this was a trial period of a flexible working arrangement.

106. The presence of a substantial disadvantage is not borne out in the contemporaneous evidence, which shows the opposite; that the Claimant was saying he was able to return to full-time work. This is also confirmed by the Occupational Health report, and there remains no medical evidence that says the Claimant was or is unable to work full-time. The Claimant has therefore failed to establish that the Respondent's PCP, which was applied from June 2022 (or, even if it did exist and it was applied to him at times before June 2022) put him at a substantial disadvantage.

From 6 October 2021, did the Respondent have relevant knowledge of the substantial disadvantage relied on?

107. The Tribunal's findings above are that there was no substantial disadvantage to the Claimant, but for completeness this Judgment will also consider whether the Respondent could have knowledge of any such substantial disadvantage.

108. The Claimant requested part-time working by an email to Mr Lovell dated 6 October 2021 [164]. The Tribunal considers the wording of this email is important, and so it is repeated here in its entirety:

"Alex

Please accept this as my request to work part-time. I ask that I be able to reduce my working hours by a third to work a four on five off pattern. For health reasons and care responsibilities for my wife I need to continue to work early turns only as I have done for some time.

Regards

Neil"

109. In the Claimant's witness statement at [NT10], he states that he asked Alex Bunce *"first by email and then verbally"* to reduce his working hours *"due to health and caring issues for my wife"*. The Claimant's evidence is he did this *"as required by NH Reasonable Adjustment Policy"*. During questioning, however, the Claimant stated that his request for reasonable adjustments only arose when he discussed this with Mr Lovell in November. The Claimant's evidence was *"this was when I made my request for reasonable adjustments"*. This is at odds with his witness evidence and how the Claimant's case has been pleaded from the outset.

110. The Claimant's oral evidence to the Tribunal, which contradicts his own witness statement, is therefore that this email was not a request for a reasonable adjustment.

111. The Tribunal has considered this email and any event and does not consider it to be a request for a reasonable adjustment. The first sentence in the email asked that the Claimant be allowed to work part-time. No reason is given for this request. The second sentence sets out what work pattern the Claimant is looking for. The third and final sentence is *"For health reasons and care responsibilities for my wife I need to continue to work early turns only as I have done for some time"*. The Tribunal finds that the correct reading of this sentence is that the Claimant explains that he still needs to work early shifts only, and the reason that he needs to work early shifts only is *"For health reasons and care responsibilities for my wife"*. The Tribunal finds that the mention of *"health reasons"* relates only to his request that the early shifts only work pattern continues and is not in relation to the request for part-time working. The Tribunal also finds it is entirely reasonable to read the mention of *"health reasons"* as referring to the Claimant's wife's health, not his own.

112. The Tribunal accepts the evidence of Mrs Penn that Mr Lovell was signed off from work until 5 December 2021, so that Tribunal finds it is not possible that a conversation took place between Mr Lovell and the Claimant in November. If the Claimant's evidence is that he only raised the issue of reasonable adjustments when he had his discussion with Mr Lovell, this could only after 5 December 2021. Regardless of whether this conversation was in November or December, the Claimant's evidence during cross-examination was that he in fact did not request a reasonable adjustment in October.

113. The Tribunal finds that the Claimant's evidence as to whether this email was or was not a request for a reasonable adjustment was unclear and

contradictory, but the Tribunal is satisfied in any event that the Claimant's email of 6 October 2021 [164] was not a request for a reasonable adjustment under the Equality Act 2010.

114. The Claimant also argues that the Respondent should have checked whether or not he needed a reasonable adjustment, citing the Respondent's Reasonable Adjustment Policy and Guidance [96 – 119] and specifically the responsibilities of managers that it contains [101 – 102]. The Claimant argues that the mere mention of health reasons should have been enough to trigger this policy and for the Claimant's managers to have investigated whether he needed a reasonable adjustment or not.

115. The Tribunal rejects this argument. The contemporaneous evidence shows that Mr Bunce clarified the reasons for the Claimant's part-time working request in a conversation with the Claimant and reported this to Ms Penn [164]. Mr Bunce reported the reason for the part-time working request as *"due to care for his wife"*. The Claimant was copied into this email, and so had every opportunity to disagree or point out any errors or omissions. He did not do so. As per the Tribunal's findings above, it is entirely reasonable for the Respondent to read the reference to *"health reasons"* as pertaining to the health of the Claimant's wife, and in any event this is what Mr Bunce says the Claimant told him.

116. The Tribunal found Mr Bunce to be an honest and reliable witness. The Tribunal accepts his evidence that the conversation regarding part-time working related to the Claimant's wife's conditions. Mr Bunce was credible in his answers during cross-examination when he said *"to be clear, atrial fibrillation was not mentioned in the conversation on the phone"*. This is in contrast to the Claimant's evidence, which was confusing, contradictory and unreliable. The Tribunal therefore prefers the evidence of Mr Bunce.

117. The Tribunal is satisfied that the Respondent investigated the reasons for part-time working reasonably and is further satisfied that Ms Penn did not make 'assumptions', as the Claimant suggests.

118. This is further supported by the documentary evidence. The Occupational Health report of 4 August 2021 [144] and 31 August 2021 do not report any reason why the Claimant is unlikely to be able to return to full-time work. The Claimant also confirmed on 20 August 2021 that he did not need a phased return to work [150].

119. The Claimant's evidence is that *"On 17th December 2021 I was copied into an email from HR to David Lovell requiring me to fill out a flexible working agreement application form (pages 219 - 231). On 23rd December 2021 I emailed Dave Lovell to ask why I had to apply for an FWA when further reasonable adjustment was more appropriate"* [NT15].

120. The exact wording of the Claimant email of 23 December 2021 [215] is:

> *"David*
>
> *Whilst worksuite may show me as an FWA I think a reasonable adjustment is more appropriate as that is what my current working pattern is. Can you have an FWA of a reasonable adjustment or is it*

just a further reasonable adjustment. I'm not being pedantic, its just that I don't want to loose sight or even my adjustment with an FWA that can be removed. Happy to try and cover this in the form we need to do if that is appropriate.

Regards

Neil"

121. The Tribunal finds that in this email the Claimant was asking that his flexible working arrangement and his reasonable adjustments (put in place in 2013) be treated as two separate things (which they were). The Claimant says *"its just that I don't want to loose sight or even my adjustment with an FWA that can be removed"* [sic] and the Tribunal concludes that the Claimant was trying to guard against a situation where HR would remove the reasonable adjustment when/if the trial of the flexible work arrangement ended. The Tribunal finds that this was not a request that the part-time flexible working should be viewed as a reasonable adjustment, because the Claimant refers to *"my current working pattern"*. This is how Ms Penn said in cross-examination that she understood this email to mean, and the Tribunal prefers her evidence to that of the Claimant. The Tribunal found Ms Penn's evidence to be credible and consistent throughout, whereas the Tribunal found that the Claimant cherry picks bits that support his case and ignores evidence that does not.

122. The Tribunal is satisfied that the OH report at [183] was an accurate description of the Claimant's health and there was no suggestion this changed between November 2021 and May 2022. The Tribunal is satisfied that, if any substantial disadvantage did exist, the Respondent could not reasonably have had knowledge of it during that time.

123. The Tribunal rejects the Claimant's argument that Ms Penn would only consider the reasonable adjustment request if the words 'reasonable adjustment' were used in the title or email. The Tribunal is satisfied that this is not what Ms Penn said when she was cross examined. Ms Penn's evidence was that in 2013 the Claimant used all the elements needed for a reasonable adjustment request, and that the Claimant did not do this in this email of 6 October 2021 [164].

124. The Tribunal is satisfied that the facts of this case are substantially different from that of *AECOM v Mallon* [2023] EAT 104, where a Claimant with dyspraxia did not tell a prospective employer why he could not complete an online form for employment, but on the facts of the case the employer ought to have known about his difficulties.

125. In this case, whilst the Claimant had a long-term heart condition and the Respondent knew of this, the Respondents were also aware, from all the available medical evidence, that the condition was being managed and was stable. The Claimant has argued that he suffered from fainting and collapses and this proves that his condition had deteriorated, and the Respondent should have been aware of this. There is, however, no evidence of any deterioration in the Claimant's condition which impacted his work. The medical evidence available at the time, which remains the only medical evidence has been put forward, shows that the fitting of a

pacemaker stabilised the Claimant's condition, and that he remained fit for full-time work. There is no evidence that, despite the pacemaker, the Claimant still had ongoing irregular heartbeat.

126. The Tribunal finds that the Respondent only became aware that there may have been a medical reason for the Claimant's part-time working request during the Claimant's discussion with Ms Penn which took place at the late May 2022 / beginning of June 2022 and is recorded in her email of June 2022 [333]. The Tribunal repeats its findings above that the Claimant was not at a substantial disadvantage. The Tribunal finds that, having been made aware of the possibility of a health reason for the part-time working at the beginning of June 2022, the Respondent acted reasonably by arranging an immediate referral to Occupational Health.

127. Adjustment contended for
Did the Respondent fail to take a step that it would be reasonable for it to have to take to avoid such disadvantage, by failing to allow C to work part-time on a shift pattern comprising 4 days on, 5 days off?

128. The Claimant has failed to establish that there was any possibility of his part-time working request being due to health reasons prior to late May / beginning of June 2022, nor does the medical evidence available show any health reason needs to work part-time as a reasonable adjustment.

129. The Tribunal has nonetheless considered the above question in any event. The Tribunal's views of the Respondent did not fail to take a step that it would be reasonable for it of taken to avoid such disadvantage (if the disadvantage had existed). It was entirely reasonable of the Respondent to refer the Claimant Occupational Health to, as Ms Penn says in her email to the Claimant of 9 June 2022 [336] *"ask some questions about what you can/can't work and let them advise us"*.

130. At this point, the Claimant ignores Ms Penn and does not engage with the Occupational Health referral. Ms Penn said in cross-examination that the Claimant would not reply to her emails or take her calls. The Tribunal accepts Ms Penn's evidence on this point. It is corroborated by the lack of evidence of any email replies from the Claimant, and the comment *"I would have liked to have talked to you on the phone"* in Ms Penn's email to the Claimant of 14 June [349].

131. Ms Penn said she would try to reinstate the flexible working arrangement if at all possible. The Tribunal also accepts Ms Penn's evidence that, if Occupational Health supported the reasonable adjustment, then the Respondent would have duty to implement part-time working for the Claimant, as it would be obliged to do so under the Equality Act, so long as the adjustment was reasonable.

132. The Tribunal further accepts the argument put forward by the Respondent regarding balancing the needs of the staff. The evidence of Ms Penn was very clear that the Toddington outstation was very short-staffed in spring/summer 2022 [BP29]. The evidence regarding leavers [255], [BP supplemental statement 4] was very clear, detailed, and believable. The Tribunal accepts that the Toddington outstation was in a worse position in May 2022 than in November / December 2021. The Claimant was also not

the only employee affected by the worsening staffing levels. The Respondent also had to end another employee's secondment to the Heston outstation around the same time so that he could be return to the Toddington outstation and work as a Traffic Officer [525] due to further members of staff leaving the Toddington outstation [442].

133. The Tribunal does not accept the Claimant's argument that, given the offer by the Respondent to allow his part-time working made on 14 June 2022, it must have been reasonable to have offered this previously. The Tribunal does not accept that this is the case. The Respondent acted reasonably when it stopped the trial of the Claimant's part-time working due to the staff shortages. The Respondent was in an even more disadvantageous position once the Claimant handed in his resignation. The Tribunal accepts the evidence of Ms Penn that *"the needs of the business and the other staff is why I couldn't accommodate it. I said I will do it if he won't leave".* When faced with the choice of having the Claimant on part-time flexible working or not having the Claimant working at all, the Respondent acted reasonably when offering to continue the Claimant part-time working if it meant he would not resign.

Constructive unfair dismissal

134. Conduct relied upon
Did the Respondent fail to allow the Claimant to continue working part-time on a shift pattern comprising four days on, five days off?

135. It is agreed between the parties that the Claimant did work a four on, five off shift pattern between January 2022 until his resignation. This was as a six-month trial of the flexible working arrangement. In an email dated 11 May 2022 [247-248], Ms Penn asked Mr Lovell to inform the Claimant that the trial was going to be brought to an end at the end of June 2022. The Respondent did say *"where we can accommodate the 4 on 5 off, then we will endeavour to do so but this will be where the required staffing levels are in place"* [336].

136. The Claimant resigned on 13 June 2022 [348]. The following day, Ms Penn emailed the Claimant and offered to reinstate his lecture working pattern with immediate effect [349]. The Claimant did not reply to this email.

137. The Tribunal finds that the Respondent did initially look to end the Claimant's part-time working, but then offered to reinstate that with immediate effect on 14 June 2022. The Tribunal finds that, in doing so, the Respondent did not fail to allow the Claimant to continue part-time working on a shift pattern comprising four days on, five days off.

138. If so, did that constitute a fundamental breach of the implied term of mutual trust and confidence?

139. Given the findings above, the Respondent did not do the conduct relied upon by the Claimant in support of his claim for constructive unfair dismissal. The Claimant's claim therefore fails at this hurdle, but the Tribunal has gone on to consider the other issues in this claim in any event.

140. The Tribunal is satisfied that the Claimant's contract with the Respondent was for full-time employment. This is what the Claimant had done prior to his sick leave in 2021, and what he did on his return to work on 14 November 2021, even though the Respondent had offered part-time working from that date.

141. The Tribunal also accepts that the Respondent gave the Claimant as much warning as possible that the flexible working arrangement would come to an end. The Respondent took this decision on 11 May 2022 [247] and this was communicated to the Claimant by Mr Lovell on the same day [251]. The Respondent also made it clear that would try to accommodate flexible working arrangement if at all possible.

142. The Claimant knew by 13 October 2021 that his flexible working arrangement was a trial [167] and that it could only be continued if it had a neutral or positive outcome. Ms Penn also told the Claimant by email on 14 October 2021 [166] that his flexible working arrangement may not be viable in long term. The Tribunal is satisfied that the Claimant was fully aware of terms of his flexible working arrangement trial, as he responded and discussed this with Ms Penn [166 – 167].

143. The Claimant also knew that the requirement to work full-time from the start of July 2022 would be to cover the difficult position at the Toddington outstation until the new starters were in place, as per Mr Lovell's email of 11 May 2022 [251] and Ms Penn's email of 9 June 2022 [336]. The Claimant had no automatic right to part-time working, and so even if the Respondent did fail to offer this, the decision was not likely or designed to seriously damage or destroy the relationship, and so the Tribunal does not find this would amount to a fundamental breach of the implied term of mutual trust and confidence.

144. As per the findings above, the Claimant's part-time working between January 2022 and May 2022 was not due to his health. The Claimant has argued that a failure to make a reasonable adjustment is a fundamental breach of the implied term of mutual trust and confidence, and while the Tribunal accepts that that would be likely, it is not applicable to this case, as the Respondent did not fail to make a reasonable adjustment.

145. The Claimant also relies on the conduct of Ms Penn as a fundamental breach of the implied term of mutual trust and confidence. At [NT24], the Claimant says: *"I found Ms Olah's behaviour as the manager responsible for Toddington, and that of National Highways to be bullying, harassing and victimising and I believed this was contrary to National Highways' Respect at Work Policy (pages 85 - 95). Ignoring me was a deliberate, offensive and malicious act…"*

146. The Respondent's Respect at Work Policy [85-95] covers *"Bullying, Harassment, Victimisation or Discrimination in the Workplace"* [85]. The Claimant accepted in cross-examination that he is not bringing a claim for harassment or victimisation. The only part of the Respondent's Respect at Work Policy that could be relevant to the Claimant's claim is therefore what it says about bullying.

147. The Respondent's Respect at Work Policy defines bullying as:

"Bullying can be threatening, aggressive, offensive, intimidating, malicious, abusive, cruel, vindictive or insulting behaviour. It can also be an abuse or misuse of power that is meant to undermine confidence, humiliate, denigrate or demean the intended recipient. This includes making unreasonable demands of people in their work, and negative behaviours that are repeated and persistent, and deliberately targeted at an individual."

148. The Claimant's case is that Ms Penn misused her power as a manager and deliberately ignored the Claimant, and this is the fundamental breach of the implied term of mutual trust and confidence. The Tribunal rejects this argument in its entirety. It is clear to the Tribunal that Ms Penn was trying to engage with and support the Claimant. In her email of 11 May 2022 to Mr Lovell, Ms Penn says *"I would like to speak to Neil too ideally to apologise because I'd never want to do this but we are on thin ice right now"* [248]. The Tribunal accepts this as a genuine indication of Ms Penn's intentions at the time and is satisfied that it shows she did not intend to ignore the Claimant.

149. This is further supported by the evidence of Ms Penn's actions after the Claimant has resigned. In her email to the Claimant of 13 June 2022 [349], Ms Penn says to the Claimant *"Please call me back when you're able to so we can have a chat"*. Ms Penn stated in her oral evidence that the Claimant did not take up on her request to talk to him on the phone. This is supported by Ms Penn's email to the Claimant of 14 June [349] in which she says *"I would have liked to have talked to you on the phone ideally however, we really don't want to lose you."* The Tribunal is satisfied that the Claimant deliberately chose not to speak to Ms Penn by telephone. There is also no evidence that the Claimant replied to Ms Penn's email of 14 June and Ms Penn's oral evidence was that the Claimant did not reply to her. The Tribunal is satisfied that the Claimant chose not to reply to Ms Penn even when she offered him the shift pattern that he wanted with immediate effect.

150. On 9 June 2022, Ms Penn emailed the Claimant [336] and offered an additional OH referral, as the Claimant had said that he wanted the changes in his work pattern for health reasons. Again, there is no evidence that the Claimant replied to Ms Penn and her oral evidence was that the Claimant did not reply to her. The evidence shows that the Claimant would only speak to Mr Lovell. Ms Penn even sent the Claimant a text message [285] to ask him to call her, but he did not call or reply to the text. The Tribunal is entirely satisfied that Ms Penn did not ignore the Claimant. Rather, the contrary is true. It is the Claimant who deliberately ignored Ms Penn when she was trying to contact him. The Claimant's conduct was unreasonable. The Tribunal is satisfied that the Claimant's evidence at [NT24] is wholly incorrect and disingenuous to Ms Penn. The Tribunal finds that Ms Penn's conduct cannot be a fundamental breach of the implied term of mutual trust and confidence.

151. Causation of resignation
If so, did C resign in response to the fundamental breach?

152. In order for a claim of constructive unfair dismissal to succeed, the Claimant must have resigned in response to a fundamental breach. As per the findings above, there was no fundamental breach, but the Tribunal has considered this question in any event.

153. The Tribunal is satisfied that there are a variety of factors which caused the Claimant to resign. The Tribunal is persuaded by the contemporaneous evidence of the email from Mr Lovell to Mrs Penn on 14 June 2022 [349] which states *"there are many reasons from many work issues to health concerns with his wife"*. The Tribunal finds that the Claimant still had issues with the Respondent that he was not happy with. These include disputes over his annual leave and an issue with his work trousers.

154. The Claimant's evidence was that his managers had supported him with these issues and that they were resolved. The Tribunal, however, does not accept this evidence, as it is not supported by the documentation. The email chain at [362] is from 14 June 2022 and the Tribunal accepts it as a genuine account of discussions that took place. The Tribunal accepts that the Claimant told Mr Lovell that he still has problems with the work trousers and the Tribunal finds that the Claimant still did not view the issue with the work trousers as resolved.

155. The Tribunal further accepts the email at [371], dated 5 July 2022, shows that the Claimant's issues regarding his annual leave entitlement were not resolved prior to his resignation.

156. The decision of the Respondent to bring the Claimant's flexible working agreement trial to an end may also have contributed to the Claimant's overall dissatisfaction and his decision to leave, however, as noted above, the Tribunal does not find that this amounted to a fundamental breach of contract, and this was also at most one of many factors that cause the Claimant to resign.

157. Delay or affirmation
If so, had he unduly delayed or affirmed the contract following the fundamental breach, before resignation?

158. Even if the Respondent's decision to end the Claimants flexible working arrangement trial amounted to a fundamental breach of contract (and it is the view of the Tribunal that it does not constitute such a breach), the Claimant was aware on 11 May 2022 that is flexible working arrangement trial would be ending at the end of June. He was given notice that this would be happening in an email from Mr Lovell to him on 11 May 2022 [251] which said *"I would like to pre warn you as part of this chat we need to ask your support with your trial and going back to your 6 day shift due to our staffing issues temporarily and new amount of leavers coming up in the months ahead"*. The Tribunal notes that the email does contain the offer of reinstating the arrangement when the business is able to accommodate it.

159. A meeting was put in place for this to be discussed with the Claimant, and this took place on 16 May 2022.

160. Claimant then received an email with an attached letter from the Respondent's HR [424]. This letter corrected a mistake in the letter of 1 February 2022. The Claimant's evidence was that he understood this letter meant that his flexible working arrangements had been extended beyond June.

161. The wording of the Respondent's email from HR to the Claimant of 1 June 2022, at [316], was states *"please find attached your revised FWA confirmation letter, which has been amended to correctly record your or on, five off work pattern."*

162. The email specifically says *"revised"* letter, and that the letter has been *"amended"*. There is nothing in the email about the FWA continuing, nor is there any mention of a date in January 2023.

163. Looking at the attached letter, which the Claimant confirms he did receive, it is identical to the letter sent on 1 February 2022, other than the four on, five off work pattern has been corrected. There is again nothing to suggest that a flexible working arrangement has been extended to January 2023.

164. The Tribunal finds there is nothing in the letter of 1 June 2022 to suggest that the Claimant now had a permanent flexible working arrangement, nor that the temporary flexible working arrangement had been extended. The letter simply confirms the existing arrangements. It may well be that the Claimant did not read the letter. This is supported by the Claimant's general attitude towards the HR correspondence, which he described in cross-examination as *"just paperwork"* and *"all nonsense"*. The Tribunal finds that any attempt by the Claimant to use this letter to argue to the Respondent that he now had a permanent flexible working arrangements was unreasonable on the part of the Claimant, and fundamentally flawed.

165. As noted above, the letter of 1 June 2022 confirms the existing arrangements, and was issued as an amendment of the letter of 1 February 2022. The Tribunal notes, as per [302], that the error in the letter of 1 February 2022 came to light during investigations by HR into the Claimant's annual leave queries. This is what prompted the amended letter to be sent on 1 June 2022. Sending this amended letter cannot be construed as a breach of a fundamental term of the contract. Nor does it mean that the Respondent's decision to bring the Claimants flexible working arrangement trial to an end can be construed as a breach of a fundamental term of the contract. The Respondent remained entitled to bring the trial to an end if the business was not able to accommodate it, just as the Respondent had been entitled to do so before the letter of 1 June 2022 was sent.

166. The Claimant forwarded a copy of this letter to Mr Lovell, and Mr Lovell then asked the National Roster Team to extend the Claimants flexible working arrangement until 10 January 2023. When asked about this in cross-examination, the Claimant said he could not comment on Mr Lovell's actions. In any event, Mr Lovell was quite wrong to assume that the letter meant that the Claimant's flexible working arrangement had been extended till 10 January 2023.

167. Mrs Penn then emailed the Claimant on 9 June 2022. She reiterated that the Claimant's flexible working arrangement trial would come to an end at the end of June, but also reiterated that the Respondent would try to accommodate the Claimant's previous shift pattern when possible, and that it was hoped that it could be reinstated when *"the required staffing levels are in place"*. This email is 28 days after the Claimant had initially been told that his flexible working arrangement trial would be coming to an end at the end of June 2022.

168. The Claimant's evidence is that he showed Mrs Penn's email to his wife on Saturday 11 June 2022. He says they *"spent the weekend talking"*. Following this, the Claimant resigned by email [348] at 8:05 AM on Monday 13 June. The Claimant therefore resigned over one month from the date that he had been told that his flexible working arrangement trial would come to an end. As per *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761, if an employee continues his employment for any length of time without leaving, he will affirm the contract and lose his right to treat himself as discharged.

169. The Claimant argues that waiting a month before resigning is not long enough to constitute affirmation of the contractual breach (*Leaney v Loughborough University* [2023] EAT 155). The Claimant argues that there must be something else present if there is to be a finding that the Claimant affirmed the contract after he knew on 11 May 2024 that his flexible working arrangement was coming to an end.

170. The Tribunal finds that the Claimant continued to discuss and try to resolve the trouser issue [286]. On 19 May, the Claimant agreed to bring in his old and new trousers to take to seamstress [295]. The email at [296] confirms that the Claimant is aware of the plan and is engaging with it. This includes an Occupational Health referral regarding the trousers, and dates are given for this. The Tribunal is satisfied that the Claimant was engaging with the Respondent's plans to sort the trouser issue [265 – 266] and this, combined with the month's delay in resigning, amounts to affirming the contract if there had been a fundamental breach.

171. The Claimant therefore did not resign in consequence of what he says is the fundamental breach.

172. The reasons given above, the Claimant's claims fail.

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Employment Judge G. King

Date: 5 April 2024

RESERVED JUDGMENT &
REASONS SENT TO THE PARTIES ON
9 April 2024

FOR THE TRIBUNAL OFFICE

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