EMPLOYMENT TRIBUNALS

Claimant: Mr R S Driver

Respondents: G&R Newcastle Ltd

Heard: Remotely (by video link) **On:** 18, 19 and 20 January 2021

Before: Employment Judge S Shore
NLM Mr R Dobson
NLM Mr I Curtis

Appearances
For the claimant: Ms M Craven, Solicitor
For the respondent: Mr J McHugh, Counsel

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claim of unfair dismissal was well-founded. The respondent unfairly dismissed the claimant. The reason for the claimant's dismissal was redundancy, so he was entitled to a statutory redundancy payment based on our finding that his period of continuous service began on 15 August 2015 and ended on 29 September 2019.

2. The claimant's dismissal was not caused or contributed to by him to any extent, so no reduction in compensation under section 123 of the Employment Rights Act 1996 should apply.

3. There shall be no reduction of compensation under the principle in **Polkey v AE Dayton services Limited** [1987] UKHL 8.

4. The claimant's claim of breach of contract (failure to pay notice pay) is well-founded and succeeds. The claimant was entitled to six weeks' notice, but was only paid one week's notice.

5. The claimant's claim of discrimination arising from disability succeeds.

6. The claimant's claim that the respondent failed to make reasonable adjustments succeeds to the following extent only:

6.1. The respondent should have obtained Occupational Health and/or GP reports.

6.2. The respondent should have facilitated a phased return to work.

6.3. The respondent took the claimant's disability-related absence into account when dismissing the claimant (PCP1).

6.4. There was a requirement to attend work on a regular basis (PCP 2).

6.5. The respondent applied a policy of failing to pay for an occupational health report and/or GP records, while requiring a GP letter confirming the claimant's fitness for work (PCP 3).

6.6. The dismissal letter clearly indicated that the claimant's absences from work was a factor in the decision to make his post redundant. He was placed in a pool of one. This placed him at a substantial disadvantage when compared to colleagues without a disability, as the claimant was more likely to have time off.

7. All other claims of failure to make reasonable adjustments fail.

8. Remedy will be decided at a CVP hearing on 8 April 2021

REASONS

Introduction

1. The claimant was employed as a Removals Porter by the respondent from either 15 August 2015 (claimant's case) or 20 November 2017 (respondent's case) to 29 September 2019, which was the effective date of termination of his employment. The claimant started early conciliation with ACAS on 23 December 2019 and obtained a conciliation certificate dated 23 January 2020. The claimant's ET1 was presented on 6 February 2020. The respondent is a removals company that has a particular specialism in moving pianos.

2. The claimant presented claims of:

2.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996), and;
2.2. Breach of contract (failure to pay notice pay) contrary to Article 4 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
2.3. Failure to pay a statutory redundancy payment.
2.4. Discrimination arising from disability contrary to section 15 of the Equality Act 2010.
2.5. Failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010.

3. The claimant's case is that he began to work as a Removal Porter for David Tenniswood Snr, who traded as "Tenniswood Removals", on 15 August 2015. The respondent's case is that Tenniswood Removals ceased trading on 28 February 2018 and that it began trading on 20 November 2017. It says that the claimant was told that he could stay with Tenniswood Removals and be made redundant, or accept a new position with G&R Newcastle Ltd (the respondent). The claimant chose the second option and the respondent denied that the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") applied to the claimant's move to the respondent.

4. The claimant had a long period of absence from work due to ill health from 21 January 2019 to the date of his dismissal on 29 September 2019. That continuous absence was broken by two periods when he returned to work: 4 March to 8 March 2019 and 6 May to 10 May 2019. He was then dismissed on 29 September 2019 for the stated reason of redundancy.

5. Because the respondent did not accept that his employment with Tenniswood Removals counted towards his period of continuous employment, no payment of a statutory redundancy payment was made to him. He was only paid one week's notice, rather than the six weeks' he says he is entitled to by virtue of clause 4 of his contract of employment dated 20 November 2017 [50]. We note that the agreed list of issues agreed by the parties suggests that the notice options for the claimant were either one week or four weeks, but we find that his contract clearly stated that after his probationary period (which we find he had completed), either party had to give the other six weeks' notice to terminate his employment. This point was put to the representatives during the hearing and neither suggested that we had misread the contract.

6. The claimant says that if the reason for dismissal was redundancy, then he is entitled to a statutory redundancy payment. The claimant says that at all material times, he was a 'disabled person' as defined by section 6 of the Equality Act 2010. He initially said that he had a physical impairment, namely "stomach abscess and diverticulitis" (which was referred to as 'diverticular disease' in places in the papers) diagnosed on 6 February 2019 and "small bowel fistula" diagnosed on 7 September 2019. He says he has recently been diagnosed with Crohn's disease.

7. He says that he was discriminated against because of something arising from his disability and that the respondent failed to make reasonable adjustments for his disability.

8. A private preliminary hearing was held on 27 April 2020 at which Employment Judge Sweeney discussed the case with the representatives of the parties and made case management orders, including listing the case for this video final hearing by CVP with a time estimate of three days, to include remedy.

9. The parties submitted a draft list of issues, which we read on the evening before the hearing. We discussed them with the representatives on the first morning of the hearing and it became clear that some matters had not been finalised. Mr McHugh raised a number of matters and sought some clarity:

9.1. When was the claimant saying that the respondent had actual or constructive knowledge of his disability?

9.2. In respect of the section 15 claim, it was accepted by the respondent that dismissal could amount to unfavourable treatment and that the 'something' could be the decision to dismiss, so the issue would be whether the dismissal arose in consequence of disability.

9.3. In paragraph 14.6 of the claimant's attachment to his ET1 titled "ET1 Narrative", it was pleaded that a PCP was the requirement of the respondent for employees to attend work on a regular basis. It was accepted that this could be a PCP, but the argument would be whether it placed the claimant at a substantial disadvantage. What was the disadvantage? In cases where an employer operated an absence management policy that had trigger points, the disadvantage could be the operation of those trigger points, but that was not the case here.

9.4. When did the claimant say that the duty to make reasonable adjustments arose? On Mr McHugh's reading of the case, it appeared to have been in July 2019.

10. The representatives had not had the opportunity to discuss these matters, so we adjourned to allow them to do so. On the resumption, Mr McHugh advised us of the outcome of his deliberations with Ms Craven. She did not disagree with the following points that were put by Mr McHugh:

10.1. The claimant would allege that the respondent had actual knowledge that he was a disabled person from receipt of his fit note/MED3 in March 2019;

10.2. In the alternative, it had constructive knowledge from July 2019;

10.3. The unfavourable treatment under section 15 could be the dismissal or selecting the claimant for redundancy on the basis of his sickness absence (although there would be a factual dispute as to whether the claimant was selected because of his sickness/absence). It was accepted by the respondent that the claimant's sickness absence could be the 'something' arising;

10.4. It was accepted by the respondent that if the Tribunal found that the claimant was selected for redundancy because of sickness absence, it would struggle to say that it was not related to disability;

10.5. The claimant's position on the PCPs was more complicated than had been anticipated and included two PCPs that had not been in his ET1. The PCPs were alleged to be:

10.5.1. Taking disability absence into account when selecting for redundancy;

10.5.2. A requirement for employees to attend work on a regular basis, and;

10.5.3. Failing to pay for an OH or GP report whilst requiring the claimant to prove that he was fit for work.

11. Mr McHugh submitted that the first and third PCPs (paragraphs 10.5.1 and 10.5.3) above were not in the claimant's ET1 and had not been alluded to in the list of issues produced by the parties. He accepted that "taking disability absence into account when selecting for redundancy" could put the claimant at a disadvantage.

12. We were asked to note that he would be submitting that "a requirement for employees to attend work on a regular basis" would not put the claimant at a substantial disadvantage.

13. Mr Mc Hugh also submitted that "failing to pay for an OH or GP report whilst requiring the claimant to prove that he was fit for work" may produce a dispute as to whether it is capable of amounting to a PCP. If it was found that it can, it would be submitted that it would not have placed the claimant at a substantial disadvantage when compared to colleagues without a disability.

14. With the caveats listed above, Mr McHugh indicated that he was "broadly happy" to deal with all three PCPs listed in paragraph 10 above, but would need a short period to review his cross-examination plan because the two new PCPs had not been aired before the hearing. We were happy to grant him some time to prepare.

15. We should note that when we were hearing closing submissions, there was a point of difference between the representatives about the second of the PCPs above. Ms Craven said that she thought she had made it clear that the second PCP was "A requirement for employees to attend work on a regular basis **and be able to drive a heavy goods vehicle**" (our emphasis). At the time that she raised the point, we checked our notes and could not see that she had made the point at the place in the notes that dealt with the revised PCPs.

16. However, on writing these reasons, we can see that she did raise the point that the grounds of resistance (at paragraph 18 [31]) had indicated that "…the respondent will argue that the requirement to attend work on a regular basis and be able to drive a heavy goods vehicle was a proportionate means of achieving a legitimate aim. The legitimate aim was to be able to drive long distances to remove pianos and other furniture items in a decreasing market." Ms Craven had raised this point on the resumption after we had given Mr McHugh time to revise his cross-examination plan. We apologise unreservedly to Ms Craven for missing the note of the point she made during the hearing.

17. This gave us some difficulty. When we indicated that we could not see the reference to the requirement to drive an HGV in our notes of the hearing, Ms Craven indicated that she would proceed on that basis. We therefore proceeded with the hearing on the basis that the second PCP was *the requirement for employees to attend work on a regular basis*. As the overriding objective requires the Tribunal to deal with cases fairly and justly, which includes ensuring that the parties are on an equal footing, we considered it necessary to raise the matter with the representatives and ask if they wished to agree which of the two versions of the second PCP was correct. If an agreement could be reached, then the representatives were invited to amend their skeleton arguments to deal with the agreed position. If no agreement could be

reached, then we proposed to add Ms Craven's version of PCP 2 as a fourth PCP and invited the representatives to amend their closing submissions accordingly.

18. We emailed Ms Craven and Mr McHugh on 20 January and advised them of the position. We set out how we proposed to deal with the issue per paragraphs 15, 16 and 17 above.

19. We are grateful to both representatives for their swift responses and for co-operating with one another and the Tribunal on how we should deal with the problem. It was agreed between the parties that Ms Craven's version of PCP 2 should become a new PCP4. Mr McHugh submitted an addendum to his previously filed skeleton argument and Ms Craven submitted revised submissions on the basis of the 4 agreed PCPs.

Issues

20. The final list of issues is:

Continuity of Employment & TUPE

1. What date did the claimant commence employment with Tenniswood; was it 16 September 2014, 15 August 2015 or another date?

   The claimant concedes that employment with Tenniswood commenced on, or around, 15 August 2015.

2. Was there a relevant transfer on, or around, 27 November 2017 in accordance with Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")?
3. Did the claimant's employment transfer to G&R Newcastle Ltd (the respondent) on, or around, 27 November 2017 upon that transfer in accordance with Regulation 4(a) of TUPE?
4. Does the claimant have continuity of employment from the date he started working for Tenniswood?

Disability Discrimination

5. Does the claimant have a long term, physical impairment that has a substantial adverse effect on his ability to carry out normal day to day activities? (s.6 Equality Act 2010 ("EA"))

   The respondent has conceded that the claimant is disabled for the purposes of the Equality Act 2010 (page 47 of the bundle). The claimant's disability is a stomach abscess, together with diverticulitis and a small bowel fistula.

6. Did the respondent know or could it reasonably have been expected to know that the claimant was suffering from a disability? (s.15(c) EA)

Discrimination arising from disability (s.15 EA)

7. Did the respondent treat the claimant unfavourably because of something arising in consequence of his disability? (s.15 (1)(a) EA)

   If so;

   (a) what was the unfavourable treatment complained of?
   (b) what was the 'something arising' in consequence of the claimant's disability?

8. Was the respondent's treatment in dismissing the claimant a proportionate means of achieving a legitimate aim? (s.15 (1)(b) EA)

   If so;

   8.1. What was the respondent's aim?

   8.2. Was it legitimate?

   8.3. What means did the respondent use to achieve that aim?

   8.4. Were those means proportionate?

Failure to Make Reasonable Adjustments (s.20 EA)

9. Was the respondent under a duty to make reasonable adjustments of the kind described at paragraph 14 (a) – (e) of the Grounds of Claim, namely:

   9.1. The Respondent should have obtained Occupational Health and/or GP reports;

   9.2. The Respondent should have facilitated a phased return to work;

   9.3. The Respondent should have adjusted the Claimant's role to permit regular toilet breaks;

   9.4. The Respondent should have facilitated access to a portable toilet for adults whilst the claimant was in the removal van. This is available from Amazon for £20 and can be stored in the back of a lorry, and/or;

   9.5. The Claimant could have swapped jobs either with an office-based employee or warehouse employee, both employed by the Respondent.

10. Did the respondent apply any provisions, criteria or practices (PCPs) which put the claimant at a substantial disadvantage compared to a person who is not disabled? (s.20 (3) EA) The PCPs are:

    10.1. Taking disability-related absence into account when dismissing the claimant (whether by a genuine redundancy situation of otherwise) (PCP 1);

    10.2. A requirement to attend work on a regular basis (PCP 2);

    10.3. Failing to pay for an occupational health report and/or GP records, while requiring a GP letter confirming the claimant's fitness for work (PCP 3); and

10.4. A requirement to attend work on a regular basis and be able to drive a heavy goods vehicle (PCP 4).

11. Did the respondent know, or ought reasonably to be expected to have known, that the claimant was suffering from a disability and that that PCP would have put the claimant at a substantial disadvantage because of it?

12. Did the respondent take such steps as it was reasonable to have taken to avoid the disadvantage?

12.1. Did it take any steps?

12.2. If so, was it reasonable to have taken those steps?

13. Was the claimant, but for the provision of an auxiliary aid, namely an adult portable toilet, put at a substantial disadvantage in comparison to people who are not disabled? (s.20 (5) EA)

14. Did the respondent take such steps as it is reasonable to have taken to provide the auxiliary aid (an adult portable toilet)?

14.1. Did the respondent take any steps?

14.2. If so, was it reasonable to have taken those steps?

Unfair Dismissal

15. Does the claimant have continuity of service to bring a claim for unfair dismissal?

16. What was the reason for the claimant's dismissal?

Redundancy

16.1. Did the respondent's requirements for a Removals Porter, cease or diminish? (s.139 (1) ERA 1996)

16.2. Did the respondent define a selection pool and fairly apply objective selection criteria when deciding to dismiss the claimant?

16.3. Did the respondent adequately inform and consult with the claimant?

16.4. Would it have been 'futile' to enter into a consultation process with the claimant?

16.5. Would the claimant have undertaken the necessary training as an HGV vehicle driver, had he known that his job was at risk of redundancy?

16.6. Should the claimant have been offered a right of appeal against his redundancy?

16.7. Was the Claimant entitled to a redundancy payment?

SOSR s.98 (1) (b) ERA 1996

16.8. Does the respondent's purported "restructure carried out in the interests of economy and efficiency" constitute "some other substantial reason"?

16.9. If it does, was the dismissal procedurally fair?

Notice Pay

17. Was the claimant entitled to one week's notice or four weeks' (or six weeks') notice pay?

18. Was the respondent entitled to pay the claimant SSP during his notice period?

Remedy

19. Is the claimant entitled to either a basic and a compensatory award and/or a redundancy award taking into account his length of service? If so, how much should be awarded?

20. Would it be just an equitable to award the claimant compensation for injury to feelings and if so how much?

Mitigation

21. Has the claimant mitigated his loss in full or in part by either finding a new job or claiming state benefits?

22. If the claimant has not found a new job, has he made sufficient efforts to find a new job?

23. If he has failed to mitigate his loss, should his compensation be reduced and if so by how much?

Polkey

24. Would the claimant's employment have terminated had consultation and due process been followed?

25. If yes, when would that have been?

26. Should the claimant's compensation be reduced and if so by how much?

Failure to follow ACAS Code of Practice on Disciplinary and Grievance Procedures.

27. Has either party failed to follow the ACAS Code of Practice; if so how?

28. In so far as one party has failed to follow the ACAS Code of Practice, should the compensation awarded be increased or decreased and, if so, by how much?

29. In the case of the claimant should compensation awarded be decreased to reflect the fact he did not appeal against his dismissal and, if so, by how much?

Housekeeping

21. All the witnesses gave evidence on affirmation. The claimant gave evidence in support of his claim and submitted a witness statement dated 4 January 2021 that ran to 128 paragraphs upon which he was cross-examined.

22. The respondent called three witnesses. David Tenniswood Junior is the current managing director of the respondent. He was appointed to that position in May 2020. He says he wrote to the claimant to terminate his employment. His witness statement dated 7 January 2021 ran to 12 paragraphs. David Tenniswood Senior previously traded as "Tenniswood Removals" and is currently a director of the respondent. His statement dated 7 January 2021 consisted of 13 paragraphs. James Nicholson is employed as a Warehouseman by the respondent. His statement dated 7 January 2021 consisted of 5 paragraphs. The representatives agreed that in order to minimise duplication and wasted time and costs, the claimant's cross-examination of Mr Tenniswood Junior would focus on the claimant's claims of unfair dismissal and discrimination, whilst cross-examination of Mr Tenniswood Senior would focus on the TUPE issues.

23. The parties produced an agreed bundle of 259 pages. If we refer to a pages in the bundle, the page number(s) will be in square brackets.

24. At the end of the evidence, we heard closing submissions from Mr McHugh and Ms Craven. Both produced helpful skeleton arguments/written submissions, which we considered. They both submitted supplemental documents dealing with the issue of the PCPs after the hearing, which we considered. The hearing was conducted by video on the CVP application and mostly ran smoothly, with some technical issues. We are grateful to all who attended the hearing for their patience and good humour in the face of some technical glitches.

25. We ran through the claims and issues with the representatives as detailed above.

26. After we had announced that we would be making a reserved judgment on liability, we listed a remedy hearing with the parties for one day by CVP on Thursday 8 April 2021. That date is active and we will issue case management orders with this reserved judgment.

Findings of Fact

27. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. Our findings are:

28. The claimant was employed by David Tenniswood Senior, trading as Tenniswood Removals, from 15 August 2015. We make that finding because it was agreed between the parties.

29. The claimant's employment transferred from Tenniswood Removals to the respondent on or around 27 November 2017 in accordance with regulation 4(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006. There was a relevant transfer on or around 27 November 2017 between Tenniswood Removals and the respondent. This issue was very much in dispute, but we prefer the evidence and submissions made by the claimant to those from the respondent because:

    29.1. Mr Tenniswood Senior's evidence was that Tenniswood Removals dealt with moving and storing pianos as well as other furniture, whether locally, nationally or internationally;

    29.2. We find that the evidence of the witnesses was broadly consistent in describing the business purpose or service of the respondent as being largely the same;

    29.3. We find that the respondent deals with moving and storing pianos as well as other furniture, whether locally, nationally or internationally. There is a significant degree of similarity between the activities carried on by Tenniswood Removals and the respondent;

    29.4. We attach very little weight to the cessation accounts of Tenniswood Removals [57-61] that were produced as evidence that there had been no payment of goodwill or transfer of assets between Mr Tenniswood Senior and the respondent. Tenniswood Removals and Mr Tenniswood Senior are inseparable as legal entities. He confirmed he retained ownership of vehicles used by Tenniswood Removals, yet no value for those vehicles appeared in the cessation accounts as at 28 February 2018, when he said he still owned them;

    29.5. The respondent inherited Tenniswood Removals' telephone number;

    29.6. Mr Tenniswood Senior contacted his customers to tell them about the creation of the respondent;

    29.7. All the employees of Tenniswood Removals ended up working for the respondent. They all joined at the same time (Including the claimant);

    29.8. Customers of Tenniswood Removals who stored items at its premises moved their items to the respondent's premises;

    29.9. Some of the customers of Tenniswood Removals moved their business to the respondent (it is acknowledged that some did not);

    29.10. Whilst there was no evidence of any contractual relationship between Tenniswood Removals and the respondent, that is not determinative;

    29.11. Vehicles owned an operated by Tenniswood Removals were used by the respondent for months after the respondent started trading;

    29.12. Mr Tenniswood Senior announced the "merger" of Tenniswood Removals and the respondent on social media on 26 March 2018 [64];

29.13. The respondent announced its "acquisition" of Tenniswood Removals on social media on 9 April 2019 [65]; and

29.14. Mr Tenniswood Senior posted photographs of on social media showing Tenniswood Removals vans with the respondent's vans in the respondent's premises on 26 March 2019.

30. The claimant had continuity of employment from 15 August 2015 until 29 September 2019 by virtue of his TUPE transfer from Tenniswood Removals to the respondent.

31. The claimant had a long-term physical impairment that had a substantial adverse effect on his ability to carry out normal day to day activities at all material times. This was conceded by the respondent. The question of exactly what the medical diagnosis of the physical impairment was is complex. We find that the claimant first visited his GP with symptoms of the condition that it is now possible to identify as a physical impairment on 25 January 2019. We make this finding because:

31.1. The claimant's impact statement dated 6 July 2020 [115-117] said as much and was not challenged; and

31.2. The claimant's GP notes of the appointment [134] notes abdominal pain as a symptom (although the main issued appeared to be back pain).

32. The claimant's medical history shows that he had a further GP appointment on 5 February 2019 with symptoms that appear to be related to a bowel condition. The GP notes include the statement "Diagnosis? diverticulitis."

33. The claimant was admitted to hospital for surgery on a perforated diverticulum and pelvic abscess on 6 February 2019. He gave unchallenged evidence that he has recently had a diagnosis of Crohn's disease. We do not feel that it is necessary to set out every step of the claimant's diagnostic journey, as the fact of his disability is not in dispute. The Equality Act 2010 does not require a single precise medical diagnosis of the physical or mental impairment that a claimant relies upon. The issue in this case is whether the respondent knew, or ought to have known that the claimant was a disabled person, and if so, from what date did it have express or constructive knowledge.

34. The claimant's case is that the respondent had actual knowledge of his disability from the end of March 2019. In the alternative, he says that the respondent had constructive knowledge from July 2019. We find that the respondent did not have actual knowledge of the claimant's disability at any time during the period 25 January 2019 to 29 September 2020. We make that finding because:

34.1. The claimant's case at its highest is that the first symptoms of his disability appeared in January 2019. Between that time and the end of March 2019:

34.1.1. He submitted a MED3 for one week that had a diagnosis of "back pain" dated 25 January 2019;

34.1.2. He submitted a MED3 for one week dated 5 February 2019 that had a diagnosis of "abdominal pain for investigation";

34.1.3. He had undergone surgery on 6 February 2019;

34.1.4. He says he spoke to Mr Tenniswood Senior by telephone on 8 February 2019. We find that this conversation happened because the claimant's account at paragraph 46 of his witness statement is broadly consistent with paragraph 7 of the witness statement of Mr Tenniswood Senior. However, we find that the evidence of the conversation does not demonstrate to the required standard of proof that the claimant gave information to Mr Tenniswood Senior that amounts to actual knowledge that the claimant was a disabled person;

34.1.5. He returned to work for a week beginning on 4 March 2019, but was unable to remain; and

34.1.6. He submitted a MED 3 stating he may be fit for work for the period 11 March 2019 to 31 March 2019 [136] with a diagnosis of "recovering from bowel infection".

35. On assessing the evidence and documents relating to the period 25 January 2019 to 31 March 2019, we find that the claimant's evidence has not met the required standard of proof to show that his employer at the time, Tenniswood Removals, had actual or constructive knowledge that he was a disabled person. We find that there was insufficient information available for anyone to have made that actual determination or to be deemed to have had constructive knowledge in that time period.

36. In respect of the claimant's alternative position; that the respondent had constructive knowledge from July 2019, we make the following findings:

36.1. By July 2019, the respondent had knowledge of all the matters listed in paragraphs 34.1.1. to 34.1.6. above;

36.2. The claimant had submitted a series of MED3 certificates as follows:

36.2.1. On 1 April 2019, he submitted a MED3 stating that he was unfit for work until 28 April 2019 because of "ongoing bowel issues requiring follow up" [136-137];

36.2.2. He submitted a MED3 for the period 25 April 2019 to 4 May 2019 stating he may be fit for work with a diagnosis of "recovering from bowel condition" [137];

36.2.3. He submitted a MED3 stating that he may be fit for work for the period 3 June 2019 to 9 June 2019 [138], but we did not see a copy of the form itself, so cannot determine

if a reference to reduced hours in the GP notes appeared on the form itself; and

36.2.4. He submitted a MED3 stating that he was not fit for work for the period 10 June 2019 to 9 August 2019.

37. In addition to the documentary evidence of the MED3 forms, we make the following findings of fact:

37.1. The respondent is a small employer, employing fewer than 10 people at all material times;

37.2. At all material times, the de facto running of the respondent after November 2017 was in the hands of Victoria Murphy, who was a director of the respondent from 10 February 2017 to 30 January 2020. Her control of the day to day running of the business only became apparent during Mr Tenniswood Junior's oral evidence, in which he made it clear that he and his father made few decisions after the respondent acquired the business of Tenniswood's Removals and deferred all decisions about the claimant's ill health and subsequent redundancy to Ms Murphy.

37.3. In addition to Messrs Tenniswood Senior and Junior and Ms Murphy, the only other director of the respondent has been Lance Green, who was appointed on 10 February 2017 and remains a director to the date of this hearing. He did not give evidence.

37.4. One of the respondent's employees is the claimant's brother in law – Gary Gordon. We find it highly unlikely that the management of the respondent would not speak to Mr Gordon about the claimant's health or vice-versa. We can make no further findings on Mr Gordon's part in the claim, because neither side called him to give evidence;

37.5. We find that a small employer would miss an employee off on long-term sickness absence because such absence would represent a substantial percentage of its available workforce;

37.6. We find it very unlikely that an employer such as the respondent would be disinterested as to what might be the medical issue that was causing the absence of a significant part of its workforce. This would become increasingly likely as time passed. By 1 July 2019, the claimant had worked for less than two weeks in the whole of the calendar year and had a MED3 certifying his absence until 9 August 2019;

37.7. The respondent had received a series of MED3 forms that consistently referred to issues with the claimant's bowel;

37.8. The claimant had attempted to return to work in March 2019, but could not continue because of his health;

37.9. He attempted to return to work on 9 May, but left work after a day. This was the oral evidence of Mr Tenniswood Junior, who noted that the claimant looked grey and sweaty on his second day back at work. The claimant had looked like he had some form of infection and was holding his midriff. Mr Tenniswood Junior said he told the claimant to go home and see his doctor;

37.10. The claimant did not attend the respondent's premises on or about 6 June 2019 and put his phone on speaker mode whilst receiving a call from his doctor that was heard by Mr Tenniswood Junior, as he asserted. We make that finding because the GP notes do not corroborate the evidence and there was no stated reason as to why the claimant would have attended to respondent's premises, as he was signed off work and no new MED3 had been issued;

37.11. The claimant repeatedly asked his GP to certify him as fit to return, including on 3 June 2019, and was told by his GP that he could only certify the claimant as unfit to work, or may be fit to work. We make this finding because it is corroborated by the GP notes [138];

37.12. Mr Tenniswood Senior's evidence in chief (§8) stated that the claimant's father had informed the respondent that the claimant "had refused to have operations time and again";

37.13. We do not find it implausible or inconsistent for the claimant to be seeking a return to work when he had ongoing symptoms, as his evidence was that his symptoms were intermittent. His evidence on the point was unchallenged. We accept his evidence that he had good weeks and bad weeks. He was concerned about his finances (this evidence was also unchallenged), which would have been impacted by his lengthy absence. We note that whilst it may be uncertain as to whether any MED3 carried a recommendation for amended hours or duties, the GP notes for 3 June 2019 [138] contain a reference to "reduced hours initially";

37.14. The claimant also repeatedly asked Mr Tenniswood Senior about a return to work, but was repeatedly told that he needed a certificate from his GP before he would be allowed to return. We make this finding because:

37.14.1. We find the claimant's evidence on the point to be credible;

37.14.2. His evidence is corroborated by the GP notes;

37.14.3. The respondent made a request for the claimant's medical records on or about 11 June 2019. We make this finding because Mr Tenniswood's evidence in chief (§8) confirms that he asked the claimant for permission to approach his GP;

37.14.4. Although neither of the Tenniswoods addressed the issue in any detail in their evidence in chief, Mr Tenniswood said in his oral evidence that he had concerns about the claimant's wish to return to work because "one minute we were getting sick notes. The next, he was saying that he was ready to return. Mixed messages. I wanted to know what was going on"; and

37.14.5. Mr Tenniswood Junior accepted that he had tried to obtain the claimant's medical records, but had baulked at being told by the GP practice that there would be a cost of £80 for the records.

37.15. The respondent's concerns about the claimant's medical condition is illustrated by its request to see his medical records;

37.16. The last MED3 referred to at paragraph 36.2.4. above was for a period of approximately two months; so

37.17. Taking all the findings in this paragraph together, we find that no reasonable employer who had an employee who had been absent for nearly six months with the same condition after having an operation for a bowel condition that had not been resolved, and who had a further MED3 for another month, and who had not made any meaningful enquiries as to the medical position could legitimately maintain that it should not have been aware that the employee had a physical impairment that brought them within section 6 of the Equality Act 2010.

38. The respondent's actions in addressing the claimant's ill health absence from June 2019 onwards were not the actions of a reasonable employer. Mr Tenniswood Junior's evidence that the respondent did not pursue the GP surgery for copies of the claimant's medical records because of the prohibitive cost of the records (£80) was simply not credible or reasonable. He also confirmed in oral evidence that this decision was Ms Murphy's.

39. Mr Tenniswood Junior's evidence was that he then tried to telephone the claimant's GP practice to speak to a doctor about the claimant, but could not get past the receptionist. We find that his evidence that he gave up on seeking the medical records because he realised that they would not be of any use in any event appears to the panel to be implausible and manufactured after the event to try and justify what we find to be an unreasonable failure to act. We make this finding as the point is a key point in the issues to be determined in this case, but the evidence in chief produced by the respondent was almost completely silent on the matter.

40. There was no attempt by the respondent to ask for a medical report from the claimant's GP or seek a report from an occupational health specialist in June or July 2019. The claimant was asked for permission to approach his GP in both months, but the respondent did no more than we have described above. Mr Tenniswood repeatedly stated that he had no medical knowledge, which we find to be the best reason for him to have sought expert advice from the claimant's GP or an OH specialist before making decisions about the claimant's employment. Such a course

of action would also have enabled the respondent to address the claimant's absence, desire to return to work and the question of any adjustments that would be necessary to facilitate such return.

41. The claimant remained absent from work and pushing for a return. That was his evidence, which we find to be credible, and is corroborated by the undated letter from one of the directors of the respondent, Lance Green, that it was agreed by the parties to have been sent in August 2019 [249]. The letter asked for permission to approach the claimant's GP for "…confirmation in writing that [the claimant was] fit and ready for work…". We agree with Ms Craven's submission that this letter, when taken in the context of the history we have set out above, is a clear indication that the respondent saw the claimant's health condition as serious and long term. We therefore make an alternative finding that if the respondent did not have constructive knowledge of the claimant's status as a disabled person before August 2019, it had it on the date that Mr Green wrote the letter at page 249.

43. Having found that the respondent had constructive knowledge of the claimant's disability by July 2019, we move on to his claim of discrimination arising from disability. We find that the respondent treated the claimant unfavourably because of something arising from his disability. We find that the 'something arising' was the claimant's long-term sickness absence. We find that the absence arose in consequence of the claimant's disability. The unfavourable treatment was the claimant's dismissal for the stated reason of redundancy. We make these findings for the following reasons:

    43.1. We find that the respondent's evidence in chief, that the claimant was in a justifiable pool of one, fell apart under cross-examination. We find that a reasonable employer would not have put the claimant in such a selection pool, as he undertook duties that other employees (including, for example, Gary Gordon and Peter Reed) undertook. The fact that no other employees were pooled with the claimant and no selection criteria were discussed or agreed upon is indicative of a failure to properly consider the redundancy situation and a pre-judgment of the claimant's selection for redundancy;

    43.2. We have found that the respondent clearly had concerns about the claimant's long-term fitness for work from June 2019 onwards, as it began to request GP records;

    43.3. The letter of August 2019 signed by Lance Green, [249] made clear and specific reference to the Claimant's health: *"…what happened to you recently with your bowel problem and subsequent surgery…"*;

    43.4. The letter of dismissal dated September 2019 [97] also made clear and specific reference to the Claimant's health, and his absence:

    > *"Since you have been absent we have not needed to replace your position within the company…the work we do is no longer viable for you to continue as you could risk further issues…this notice now gives you time to continue with your recovery and find a job that will suit your needs without damaging your health".*

43.5. The claimant had received MED3s stating he was not fit for work covering approximately 88 days and had only attended work for a couple of days between 25 January 2019 and September 2019;

43.6. At the time that the decision to dismiss him was made, the claimant also had a current MED3 certifying him as unfit for work due to his "bowel problem" from 7 August 2019 to 6 November 2019 [139 and 140]. We find this to be a clear indication that the claimant's health issues were likely to be long-term. We also did not hear from Ms Murphy, who the respondent's witnesses confirmed made all the decisions; so

43.7. We find that the evidence and documents lead us to a finding that an employer who had made references to the claimant's health in a letter in August 2019 and the dismissal letter itself, made the decision to dismiss an employee because of his absence record. The absences arose from his disability of which the respondent had constructive knowledge.

44. In its Grounds of Resistance, the respondent had stated that (§18):

> *"If, which is denied, it is found that the Respondent did know, or should reasonably have known, of the Claimant's disability, the Respondent will argue that the requirement to attend work on a regular basis and be able to drive a heavy goods vehicle was a proportionate means of achieving a legitimate aim. The legitimate aim was to be able to drive long distances to remove pianos and other furniture items in a decreasing market."*

45. We find that the respondent's aims were legitimate, as Ms Craven conceded in her written submissions. However, we agree with her submission that the dismissal of the claimant for the stated reason of redundancy was not a proportionate means of addressing the legitimate aims. We do not embrace all of her arguments, however, and make our finding for the following reasons:

45.1. The respondent failed to take any expert medical advice as to what the claimant was able to do;

45.2. The respondent appears to have made its decision that the claimant could not do his former work because he had been absent for a long period;

45.3. The respondent failed to consider what it could have done to enable the claimant to return to work; and

45.4. The respondent failed to consult with the claimant to any meaningful extent.

46. In considering the claimant's claim that the respondent failed to make reasonable adjustments, we make the following findings of fact:

46.1. We repeat our finding that the respondent had constructive knowledge of the claimant's disability from July 2019;

46.2. The respondent should have obtained the claimant's GP records and/or a report from the claimant's GP. We make this finding because we consider that it is the very least that a reasonable employer would do to address the long-term absence of an employee with consistent symptoms of ill health. We find that respondent's stated reason for its failure (lack of money) not to be reasonable;

46.3. The respondent should have obtained an OH report. We make this finding whilst recognising that it would involve more cost than obtaining a GP report, it may have provided a route that would have enabled the claimant to return to work, or provided evidence that he would not be able to return, thereby opening up the possibility of terminating his employment for the reason of capability. We find that respondent's stated reason for its failure (lack of money) not to be reasonable;

46.4. The respondent should have facilitated a phased return to work for the claimant. Again, this would have enabled the respondent to assess the claimant's capability, whilst offering him a route back to the workplace;

46.5. There should be no requirement for the respondent to provide the claimant with a mobile toilet. We make this finding because of the evidence of the nature of the work and the economics of the haulage industry. We accept that the industry is based on utilising space in the most efficient way possible. We find that despite the relatively small size of a portable toilet, it would still take up valuable room that may make trips less economically viable. We also find that there would be a possibility of the respondent's trucks being on a single lane road with no opportunity to stop and that there would be a risk (although relatively small) of effluent or chemicals leaking into the body of the vehicle and damaging expensive items, such as pianos. We find that the provision of a mobile toilet would not address the problem that required a solution; and

46.6. We find that in the light of the evidence concerning the jobs undertaken by the other employees of the respondent, it would not be feasible to have had the claimant swap jobs with Mr Nicholson, as he does not have the logistics expertise, or Mr Tenniswood Junior, as he has no administration expertise.

47. In determining whether the respondent applied any provisions, criteria or practices (PCPs) which put the claimant at a substantial disadvantage compared to a person who is not disabled, we make the following findings:

47.1. We find that the respondent took disability-related absence into account when dismissing the claimant (whether by a genuine redundancy situation of otherwise) (PCP 1) and that this was a PCP that it would have used with anyone with a disability;

47.2. We find that the respondent had a PCP that employees were required to attend work on a regular basis, from the evidence we heard and the findings we have made elsewhere in this decision (PCP 2);

47.3. We find that the evidence of Mr Tenniswood Junior demonstrated that the respondent would apply the PCP of failing to pay for an occupational health report and/or GP records, while requiring a GP letter confirming the claimant's fitness for work (PCP 3); and

47.4. We do not find that the respondent operated a PCP that required staff to attend work on a regular basis and be able to drive a heavy goods vehicle (PCP 4).

48. We find that the respondent failed to take any steps to avoid the disadvantage to disabled persons of PCPs 1, 2 or 3. We find that it was reasonable for the respondent to have taken the steps to avoid the discriminatory effect of PCPs 1, 2 and 3.

49. We find that the respondent took no steps to install a portable toilet in its vans, but that such steps would not have solved the problem caused by the claimant's disability.

50. In the case of the claimant's claim for unfair dismissal, we have already indicated that the claimant had sufficient continuous service to make a claim of unfair dismissal. We find that the respondent has shown on the balance of probabilities that the reason for dismissal was redundancy, because we find that work of the type undertaken by the claimant had diminished. We made this finding because of the evidence of the respondent that other members of staff were either released, or chose to leave and were not replaced.

51. In assessing the reasonableness of the respondent's actions in the unfair dismissal case, we have used the guidance in **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23. If a step taken by an employer was one that was open to a reasonable employer acting reasonably, that will suffice.

52. We find that the respondent did not define a selection pool or fairly apply objective selection criteria when deciding to dismiss the claimant. The respondent's evidence about how the claimant came to be in a pool of one was not credible in the light of all the other oral evidence given about the roles undertaken by colleagues such as Mr Gordon and Mr Reed. We find that the claimant's role was very similar to those two individuals and no reasonable employer would have placed him in a pool on his own.

53. We do not think it is controversial to find that there was absolutely no information or consultation with the claimant. The evidence offered by the respondent was that the claimant was difficult to contact, but they had no hesitation or difficulty delivering his dismissal letter by hand. The evidence about the claimant losing a mobile phone was no reasonable excuse or failing to either invite him in for a meeting, going to his home by prior appointment or conducting consultation by

telephone. The respondent tried none of these methods, which we find to be omissions that no reasonable employer would make.

54. We find that the claimant was not likely to have undertaken HGV training if his job was at risk, given his failure to complete the training previously. We found the claimant's evidence on this point to be the weakest of his whole claim. His reasons for not completing the training were implausible.

55. We find that there is no statutory right to appeal a redundancy decision, so cannot say that no reasonable employer would have offered one.

56. We find that the claimant was entitled to a statutory redundancy payment, given our findings on his length of service.

57. The respondent did not show on the balance of probabilities that the claimant's dismissal was for some other substantial reason.

58. We find that the claimant was entitled to six weeks' notice pay, because his contract of employment said as much.

59. The respondent did not bring evidence that met the required standard of proof to show that there was any chance that a fair process may have resulted in a fair dismissal. The fact is that we cannot say what may have happened if a fair procedure had been run, because the respondent was nowhere near running a fair procedure. The claimant was in a pool of one, so we saw no objective (or subjective) comparison of his skills, experience and /or any other reasonable metric or any such metrics for his colleagues. The respondent had no medical evidence about the claimant's capability. Our finding that he was selected because of something arising from disability casts doubt on whether the respondent was capable of running a fair procedure under the control of Ms Murphy. No percentage deduction shall be made under the **Polkey** principle.

Applying Findings of Fact to Law and Issues

60. The relevant statutory law applying to the first issue of whether the employment of the claimant transferred from Tenniswood Removals to the respondent is set out in regulations 3 and 4 of the TUPE Regs. In making our findings that there was:

> *"a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity"*

and that the claimant's continuous employment had transferred from Tenniswood Removals to the respondent, we were mindful of the factors to be taken into consideration as set out in the EAT case of **Cheesman v R Brewer Contracts Ltd** [2001] IRLR 144. We found that:

60.1. On the "decisive criteria", the evidence showed that the entity of Tenniswood Removals retained its identity as indicated by the fact that its operation was actually continued. The face of the business remained the same; the transaction was stated to be a merger or takeover; the type of business remained the same (particularly the

specialism in moving pianos); all the staff moved from Tenniswood Removals to the respondent; and the respondent used Tenniswood branded vans and its telephone number after the transfer.

60.2. We considered the evidence 'in the round', without taking any factor in isolation.

60.3. We did not find Mr Tenniswood Senior's evidence on the lack of any transfer of assets to meet the required standard of proof. His evidence was contradicted by the photographs of Tenniswood Removals' vans in the respondent's premises months after the respondent started trading, as he had to admit.

60.4. Tenniswood Removals was a family business largely associated with one person; Mr Tenniswood Senior. He became the managing director of the new company and used his goodwill to try and persuade customers of Tenniswood Removals to continue working with the respondent. We give significant weight to that fact.

60.5. In the alternative, if Mr Tenniswood Senior's evidence was correct and no assets passed, that fact alone would not be enough to outweigh the other facts that we found which indicated that a transfer had taken place.

60.6. The fact that there was no evidence of any contractual link between Tenniswood Removals and the respondent was a factor that we considered, but which we gave little weight compared to the other factors that we have set out above.

60.7. As recorded above, all the employees of Tenniswood Removals moved to the respondent without any break in carrying out the work they had done with the transferor.

61. Any claim by an employer that it lacked actual or constructive knowledge of disability has to considered in the light of the EAT case of **A Ltd v Z** (UKEAT 027/18/BA), in which Judge Eady QC said (at §23):

*"**23***
In determining whether the employer had requisite knowledge for s 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:

(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see City of York Council v Grosset *[2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492 CA at para 39.*

(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that

that impairment had a substantial and (c) long-term effect, see Donelien v Liberata UK Ltd *(2014) UKEAT/0297/14, [2014] All ER (D) 253 (Dec) at para 5, per Langstaff P, and also see* Pnaiser v NHS England *(2016)UKEAT/0137/15/LA, [2016] IRLR 170 EAT at para 69 per Simler J.*

(3) The question of reasonableness is one of fact and evaluation, see [2018] EWCA Civ 129, [2018] IRLR 535 CA at para [27]; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council *(2016) UKEAT/0100/16, [2017] ICR 610, per His Honour Judge Richardson, citing* J v DLA Piper UK LLP *(2010) UKEAT/0263/09, [2010] IRLR 936, [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, '*it becomes much more difficult to know whether it may well last for more than 12 months, if it is not *[*already done so*]', per Langstaff P in* Donelien *EAT at para 31.*

(5) The approach adopted to answering the question thus posed by s 15(2) is to be informed by the Code, which (relevantly) provides as follows:

> *'5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person".*
>
> *5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.'*

*(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (*Ridout v T C Group *(1998) EAT/137/97, [1998] IRLR 628;* Alam v Secretary of State for the Department for Work and Pensions *(2009) UKEAT/0242/09, [2010] IRLR 283, [2010] ICR 665).*

(7) Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."

62. Applying that test to the evidence, we found that the respondent had constructive knowledge of the claimant's disability itself by July 2019. The reasons for that finding are set out above. In the alternative, the respondent had constructive knowledge by the time that Mr Green wrote to the claimant in August 2019.

63. We considered the guidance that the respondent does not need to have constructive knowledge of the diagnosis. We found that the respondent was aware that the claimant had serious issues with his bowel. The burden is on the respondent to show that it was unreasonable for it to be expected to know that the claimant had a physical impairment or that the impediment had a substantial and long-term effect. Given our findings above, the respondent had known since January 2019 that the claimant had issues with his bowel that necessitated an operation and substantial time off. His two attempts to return to work had failed within a day or so and Mr Tenniswood Junior had witnessed the claimant in so much distress that he had sent him home and told him to see a doctor in May 2019. We believe that our considerations considered all the relevant factors.

64. This was not a case where the cause of the claimant's condition could reasonably have been believed to have been a reaction to life events. We find that a reasonable employer would have had genuine concerns about the potential cause of this claimant's absence by July 2019, when he had been absent from work for approximately six months, with two short intermissions. We find that the respondent either ignored or gave no proper consideration to the fact that the claimant said his symptoms were intermittent. A medical report would have clarified the position.

65. We find that when we consider our findings in the light of paragraphs 5.14 and (particularly) 5.15 of the Code, the respondent did not do anywhere close to all it could have done to find out if the claimant had a disability. On our findings, the respondent closed its eyes to what should have raised concerns until June 2019. It then made a half-hearted attempt to obtain GP records and followed that up with a single phone call before giving up. There was no evidence put before us that the issues of dignity or privacy were raised or would have been raised by the claimant.

66. We find that there was far more than "little or no basis" for making further enquiries. It is difficult for the respondent to argue that the enquiries that we have found it should have made would have been unlikely to have yielded results, as we can see from the medical records produced for this hearing (which would have been available to the respondent for £80) clearly show a history of serious physical impairment between January and September 2019 and beyond. The claimant was vehement about his wish to return to work. The respondent blocked his attempts at every turn by insisting on his obtaining a report from his doctor. The respondent's position was not lawful or reasonable. We find that if the respondent had obtained medical records and commissioned a report, there is a distinct and real possibility that those enquiries would have yielded results.

67. We considered section 15 of The Equality Act 2010:

15 Discrimination arising from disability

(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.

68. We have already dealt with the issue of knowledge in section 15(2).

69. We followed the guidance in the Court of Appeal case of **York City Council v Grosset** [2018] IRLR 746, which stated that analysis of the issues in section 15(1)(a) required investigation of whether the respondent treated the claimant unfavourably because of and identified 'something'; and whether that 'something' arose in consequence of the claimant's disability.

70. At paragraph 43 above, we found that the 'something arising' was the claimant's long-term sickness absence. We find that the absence arose in consequence of the claimant's disability. The unfavourable treatment was the claimant's dismissal for the stated reason of redundancy. We then went on to set out our reasons for those findings in paragraphs 43.1 to 43.7.

71. Our approach to the issue of reasonable adjustments was guided by precedent cases, including **Environment Agency v Rowan** [2008] ICR 218; **Ishola v Transport for London** [2020] EWCA Civ 112; **Tarbuck v Sainsbury's Supermarkets Limited** [2006] IRLR 664; and **Conway v Community Options Ltd** [2012] EqLR 871.

72. We repeat our finding that the respondent had constructive knowledge of the claimant's disability by July 2019.

73. It may be useful to repeat the four PCPs relied on as set out in paragraph 10 above, noting that Mr McHugh refers to the PCPs in Roman numerals:

    73.1. Taking disability-related absence into account when dismissing the claimant (whether by a genuine redundancy situation of otherwise) (PCP 1);

    73.2. A requirement to attend work on a regular basis (PCP 2);

    73.3. Failing to pay for an occupational health report and/or GP records, while requiring a GP letter confirming the claimant's fitness for work (PCP 3); and

    73.4. A requirement to attend work on a regular basis and be able to drive a heavy goods vehicle (PCP 4).

74. In his original skeleton, Mr McHugh made the following submissions about the PCP's in relation to reasonable adjustments:

    The Claimant has at no point made clear what the substantial disadvantage is that these PCPs place him at compared to his non-disabled colleagues.

This is particularly important in relation to PCP (ii) given that:

i. *The Respondent did not have an absence management policy that contained trigger points or any increased risk of disability/capability proceedings.*

ii. *The impact of that meant that they took each case on its own merits provided that there was 'good reason' for an absence.*

iii. *In those circumstances per Royal Bank of Scotland v Ashton [2011] ICR 632 it will be extremely difficult to show substantial disadvantage.*

In relation to PCP (iii) the Respondent will rely on the guidance from Ishola to assert that this cannot amount to a PCP. This was a fact-specific occasion where the Respondent had requested further information due to the conflict between the Claimant's assertion that he was fit for work and the fit notes he provided which asserted that he was not fit. There can be no sense of continuum ascribed to this decision nor could it be hypothetically applied to other colleagues in the future.

75. Mr McHugh's addendum to his skeleton argument made the following points on PCP 4:

It will be a matter of fact for the Tribunal to determine whether PCP (iv) was actually imposed by the Respondent (notwithstanding its appearance in the Grounds of Resistance at para 18). The tribunal will recall the evidence of Mr Tenniswood Jr in relation to the roles of James Nicholson and Gary Gordon and their ability to drive an HGV. The guidance in Ishola remains relevant to this point.

In any event the Claimant must demonstrate that the requirement for him to be able to drive a heavy goods vehicle placed him at a substantial disadvantage to his non-disabled colleagues.

The height of the Claimant's case on this point appears to be the assertion in written submissions that he was held to a higher standard than other colleagues. There is no evidence that this was the case as the Claimant was given first refusal at undertaking HGV Training but was unwilling to do so. The evidence of Mr Tenniswood Jr was that Gary Gordon has indicated a willingness to undertake the relevant training when eligible and that was the key difference between the two individuals.

Even if the Tribunal accepts that the Claimant was held to a higher standard than his colleagues and is satisfied that this amounts to a substantial disadvantage, the claim in relation to PCP (iv) must fail as any disadvantage has no relation to the Claimant's disability (per the EAT at para 76 in Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley [2012] EqLR 634).

It has at no point been the Claimant's case that he was prevented from qualifying as an HGV driver as a result of his disability. The Claimant has adduced no evidence to this effect, nor was it suggested on his behalf during cross examination that he was prevented from qualifying as an HGV Driver as a result

of his disability. Put bluntly there is no evidence whatsoever linking the Claimant's ability/inability to complete HGV driver training to his disability.

The Respondent reiterates the point made in the main Skeleton Argument relating to the need of the proposed adjustments to alleviate disadvantage per Conway. None of the adjustments proposed by the Claimant would have the necessary effect in relation to PCP (iv).

The points previously made orally and in writing relating to the reasonableness of the proposed adjustments when considering the business needs of the Respondent apply equally here. The Respondent relies on the oral evidence of Mr Tenniswood Jr in that regard.

76. Ms Craven's submissions, as amended, were as follows:

76.1. With regard to PCP 1, the dismissal letter clearly indicated that the claimant's absences from work was a factor in the decision to make his post redundant. He was placed in a pool of one. This placed him at a substantial disadvantage when compared to colleagues without a disability, as the claimant was more likely to have time off.

76.2. With regard to PCP 2, the claimant's condition meant that he had good days and bad days (our finding is that he had good weeks and bad weeks). The requirement to attend work regularly placed him at a substantial disadvantage compared to employees without a disability as the claimant was more likely to have less regular attendance (per **General Dynamics Information Technology Ltd v Carranza** UKEAT/0107/14).

76.3. The respondent's case was that it had no formal absence policy in place and each case was taken on its own merits. Therefore, there could be no substantial disadvantage. The claimant's response to that is:

76.3.1. A lack of formal policy denoting trigger points for absences is not determinative: businesses do not always have formal absence policies in place, but this does not mean that the relevant decision-makers do not regularly consider absences when making decisions.

76.3.2. David Tenniswood (Jr)'s oral evidence indicated that the Respondent simply had no prior experience of dealing with long-term sickness absences, therefore it would appear that there is no precedent or comparison for dealing with long-term sickness of a non-disabled employee, and a hypothetical will be required.

76.3.3. David Tenniswood (Jr)'s oral evidence was clear that decisions regarding absences and dismissals were ultimately taken by Victoria Murphy.

76.3.4. Therefore, it was for the Respondent to call Victoria Murphy as a witness to explain her decision making and it has not done so.

76.3.5. Victoria Murphy (the decision-maker) was not present at the hearing and therefore the Respondent's approach regarding how it dealt with absences both in the Claimant's case and in other cases remains unconfirmed.

76.3.6. Turning to the evidence of decision-making that we *do* have, the letter of dismissal [97] clearly refers to absence when dismissing the Claimant. There is simply no evidence to suggest that this approach (i.e. taking attendance into account) would not be the case when considering other non-disabled employees for dismissal.

76.4. In respect of PCP 3, the respondent had chosen not to obtain GP records. Its main reason was cost. We were invited to find that the respondent would apply the same rationale to non-disabled employees. It was submitted that the claimant would be put at a substantial disadvantage because he was more likely to require his employer to access his GP records. By its failure, the respondent remained ignorant of any reasonable adjustments it could have implemented.

76.5. In respect of PCP 4, the claimant's condition meant that he had good days and bad days (our finding is that he had good weeks and bad weeks). The requirement to attend work regularly placed him at a substantial disadvantage compared to employees without a disability as the claimant was more likely to have less regular attendance (per **General Dynamics Information Technology Ltd v Carranza** UKEAT/0107/14).

76.6. The claimant was alleged to have refused to undertake HGV training and this had caused frustration for the respondent. There was a factual dispute as to whether the claimant had refused to do the training and what training materials were made available to him.

76.7. However, Gary Gordon and the claimant were both Porters with standard driving licenses. Mr Gordon was unable to apply for an HGV license until after the date of the claimant's dismissal. Mr Gordon was never put at risk of redundancy. Mr Gordon has still not taken the HGV training. This is submitted to put the claimant at a substantial disadvantage.

77. We refer back to our findings of fact above. On the issue of PCP 1, we prefer the claimant's case as submitted by Ms Craven. PCP 1 is not one that falls on the wrong side of the line set out in **Ishola**, as we find that it applied (or would have applied) to any member of staff. The Court of Appeal in **Ishola** held that a "practice"

does not need to have been applied to anyone else, but should carry with it an indication that it will or would be done again in future if a similar case arises.

78. The court accepted that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply. We have found above that this is exactly what the respondent was likely to have done. Without the evidence of Ms Murphy, the respondent was in a difficult position to rebut the claimant's assertion.

79. We also take note that in the case of **Smith v Churchill's Stairlifts PLC** [2005] EWCA Civ 1220, the Court of Appeal held the employer was in breach of the reasonable adjustment duty. It did not matter that the claimant was not at a substantial disadvantage compared with the population generally (the tribunal had found most non-disabled people would have difficulty carrying the cabinet any distance). In the light of the **Archibald** case, the comparison is with a more restricted group which is "readily identified by reference to the disadvantage caused by the relevant arrangements" (i.e. by the PCP).

80. We find that PCP 3 was applied to every employee and would have put the claimant at a substantial disadvantage for the reasons submitted by Ms Craven.

81. We find that despite PCP 4 appearing in the Grounds of resistance, the evidence that it applied did not meet the required standard of proof that it applied to all staff, or even the claimant. We prefer Mr McHugh's argument on the point.

82. On the alleged failures to make reasonable adjustments, we repeat our factual findings above. The respondent should have obtained GP records and/or a medical report from a GP or OH specialist and it should have facilitated a phased return to work, but we find that the other three allegations fail because the evidence that any of them would have made any difference (per **Conway**) did not meet the required standard of proof.

83. On the claim of unfair dismissal, we repeat our findings above. The claimant had sufficient continuity of service to bring a claim. The reason for his dismissal was redundancy. The requirement for work undertaken by the claimant had ceased or diminished. The respondent failed to inform or consult with the claimant at all. We cannot find that it would have been 'futile' to enter into a consultation process with the claimant because of the paucity of information available about what the respondent may have done. We find that the claimant probably wouldn't have completed the HGV training, but this had little practical effect on matters. There was no unfairness in failing to offer the claimant a right of appeal and he is entitled to a redundancy payment. No deduction should be made under the principle in the case of **Polkey**, because of the lack of information about how a fair procedure would have operated. The claimant did not contribute to his own dismissal.

84. The claimant was entitled to six weeks' notice as a simple matter of construction of his contract of employment.

85. We will deal with any alleged failure to follow the ACAS Code of Practice at the remedy hearing.

Employment Judge Shore
22 February 2021