EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Gavin Endacott	**v**	**Rodells Limited**

Heard at: Watford
On: 2,3,4,5 and 6 September 2024

Before: Employment Judge Alliott
Members: Dr B Von Maydell-Koch
Ms S Johnstone

Appearances

For the Claimant: Ms P Daley (legal representative)
For the Respondent: Mr A Mellis (counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claims of unfair dismissal (constructive), disability discrimination and failure to make reasonable adjustments are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent on 30 October 2019 as a Yard Manager. He resigned with immediate effect on 16 June 2022. By a claim form presented on 13 October 2022, following a period of early conciliation from 2 August to 13 September 2022, the claimant brings complaints of unfair dismissal (constructive), section 15 Equality Act 2010 disability discrimination and sections 20-21 Equality Act 2010 failure to make reasonable adjustments. The respondent defends the claims.

The issues

2. The issues as agreed between the parties are as follows:

> "Constructive dismissal
>
> 1. The claimant relies on the following alleged conduct by the respondent:

(a) Not allowing the claimant to participate in the single day Portable Appliance Test training ("PAT") course scheduled on 13 June 2022;

(b) Rejecting the claimant's request to be redeployed to a role that was more appropriate to his disability;

(c) Not accepting proposals by the claimant for a phased return to work (working three days);

(d) Requiring the claimant to provide reports/specialist notes before referring the claimant to Occupational Health; and

(e) Failing to refer the claimant to Occupational Health;

(f) At the meeting between the parties on 16 June 2022 questioning the claimant as part of their investigation into alleged misconduct by the claimant;

(g) Not notifying the claimant in advance of the meeting on 16 June 2022 that he may be asked questions regarding the investigation into alleged misconduct.

2. Did the alleged conduct by the respondent at paragraphs (a)-(g) amount to a repudiatory breach of an express or implied term of the claimant's employment contract?

3. If so, did the claimant resign in response to the alleged breach/breaches at paragraph (a)-(g)?

4. If it is found that the respondent's conduct amounted to a termination of the claimant's contract did the employer's decision to dismiss the employee fall within the range of reasonable responses?

5. If the tribunal finds that the claimant was constructively dismissed what compensation should the claimant be awarded?

6. Should any compensation be reduced:

(a) By up to 25% to reflect the respondent's failure to follow the Acas Code of Practice on disciplinary and grievance procedures.

(b) To reflect the claimant's contributory conduct.

(c) Pursuant to Polkey v AE Dayton Services Ltd [1987] ICR 142 to reflect the fact that the claimant would likely have been dismissed on the grounds of medical capability in any event.

(d) Should be reduced pursuant to Polkey v AE Dayton Services Ltd [1987] ICR 142 to reflect the fact that the claimant would likely have been dismissed due to gross misconduct in any event.

7. Has the claimant suffered any financial loss flowing from the dismissal given his fitness to work both before and after his resignation?

Discrimination arising from disability.

8. The respondent has conceded that the claimant was disabled on the following basis:

> "With a view to narrowing the issues before the tribunal the respondent is prepared to concede that the claimant was disabled under the Equality Act at all material times for the purposes of his claims. We have not been provided with medical evidence or notes prior to October 2021. Based on the evidence we have been provided with by the claimant it appears as though the claimant's disability was likely to have occurred at the latest from the date of his spinal surgery on 5 December 2021 and continued until the date of his resignation. For the avoidance of doubt, the concession is only on the basis of apparent natural degenerative processes of the spine and the respondent does not concede the extent to which the claimant was disabled. Specifically it is not admitted that the claimant's disability was caused by the work the claimant undertook for the respondent or any workplace accident as alleged or at all."

9. The claimant relies on the following alleged unfavourable treatment by the respondent:

   (a) The respondent requesting that the claimant provide medical evidence/fit notes before making an Occupational Health referral.

   (b) The respondent reallocating Portable Appliance Test training ("PAT") scheduled on 13 June 2022.

10. Was the unfavourable treatment at paragraphs (a)-(b) because of something arising in consequence of the claimant's disability?

[During the course of this hearing Ms Daley clarified that the 'something arising' relied upon by the claimant is the period of his disability related absence from 3 December 2021 until 15 June 2022]

11. Can the respondent show that the alleged unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the legitimate aim of ensuring the safety of its workforce including the claimant.

12. Did the respondent know that the claimant was disabled or would the respondent have been reasonably expected to know that the claimant was disabled? The respondent denies knowledge of the claimant's disability at all material times.

<u>Failure to make reasonable adjustments</u>

13. The claimant relies on the following PCPs:

   (a) The requirement for the claimant to return to his normal role/duties of Yard Manager in the event he was fit to return to work.

   (b) Paragraph 7.7 of the respondent's handbook which stated:

> "If you are off work for sickness or injury, the company expects you to:

Remain resting at home, unless specifically advised otherwise by your GP or other qualified medical advisor.

Refrain from any strenuous activity or activity that a reasonable person or healthcare professional would conclude is inconsistent with the reason you are off work.

Comply with the direction of any healthcare professional".

14. Did the above PCPs place the claimant at a substantial disadvantage when compared with non-disabled persons?

15. Did the respondent take such steps as were reasonable to avoid the disadvantage?

16. The claimant relies on the following reasonable adjustments that he contends would have been reasonable:

    (a) Adapting the claimant's role to carry out administrative duties only until appropriate vacancies were available.

    (b) Allowing the claimant to undertake training including the PAT course scheduled for 13 June 2022.

17. Did the respondent know that the claimant was disabled or would the respondent have been reasonably expected to know that the claimant was disabled? The respondent denies knowledge of the claimant's disability at all material times.

18. Would the proposed adjustments have removed the disadvantage? The respondent contends that the claimant's medical evidence suggests that even with the suggested adjustments the claimant was unfit to work.

19. In respect of the claimant's claims for discrimination arising from disability and failure to make reasonable adjustments the claimant claims compensation only.

20. What, if any, compensation should the claimant be awarded?"

The law

3. Section 95 of the Employment Rights Act 1996 provides as follows:

"95 Circumstances in which an employee is dismissed

(1) For the purposes of this part an employee is dismissed by his employer if (and subject to sub section (2)… only if-

…

(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

4. Section 98 of the Employment Rights Act 1996 provides as follows:

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

5. The claimant relies on the implied term of mutual trust and confidence.

6. For constructive dismissal the respondent has to be in fundamental breach of the contract of employment. There may be a series of breaches or conduct, the last of which constitutes the last straw. The claimant has to act reasonably promptly in accepting any repudiatory breach. The claimant has to resign because of the breaches. It need not be the reason for his resignation it is sufficient that it is a reason.

7. In addition, the Acas guide on Disciplinary and Grievances at Work (2020) provides when dealing with investigating cases as follows:

> "When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against. It is not always necessary to hold an investigatory meeting (often called a fact finding meeting). If a meeting is held, give the employee advance notice of it and time to prepare.

8. Section 15 of the Equality Act 2010 provides as follows:

"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."

9. Sections 20 and 21 of the Equality Act 2010 provide as follows:

> "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) The duty comprises the following three requirements.
>
> (3) The first requirement is a 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.
>
> 21 Failure to comply with duty
>
> (1) A failure to comply with the first…requirement is a failure to comply with a duty to make reasonable adjustments."

10. The Code of Practice on Employment (2011) provides in the section "What if the employer does not know the worker is disabled".

> "6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. 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."

The evidence

11. We had a hearing bundle of 440 pages plus an unredacted copy of page 435.

12. We had witness statements and heard evidence from:

(i) The claimant
(ii) Ms Louise Endacott, the claimant's wife.
(iii) Mr Matthew Rodell, Managing Director of the respondent
(iv) Mr James Questel (nee Boyle), a colleague of the claimant in the yard until December 2021.
(v) Mr Christian Pinnigar, Commercial Manager at the respondent.
(vi) Mr Mark Turton, the claimant's line manager at the respondent.

13. In addition we had a witness statement from Ms Tina Rodell, Administrator at the respondent. Tina Rodell was to have given evidence but a recent bereavement meant that she was not called.

The facts

14. The respondent is a family run scaffolding business. In April 2021 Matthew Rodell took over from his father, having worked in the business for about 25 years. Matthew Rodell and the claimant are first cousins, their mothers are sisters. The claimant had worked for the respondent on and off for 20 years. Matthew Rodell and the claimant are similar in age and, until the events of spring 2022, were very close and good friends. Tina Rodell is the aunt of Matthew Rodell. She worked in the office with the claimant's wife, Louise Endacott Sadly, it is clear that there is now a major rift in the family.

15. The claimant was employed as Yard Manager. He worked with James Questel (nee Boyle) in the yard. His line manager was Mark Turton.

16. The respondent's Employee Handbook sets out in chapter 7 "Absence and Sick Pay" the following:

> "7.1 Sick pay
>
> Statutory Sick Pay (SSP)
>
> During periods of absence due to sickness you will be paid Statutory Sick pay (SSP) in accordance with current legislation provided that you comply with the procedures set out below.
>
> …
>
> 7.7 Expected behaviour during sickness absence
>
> If you are off work for sickness or injury, the company expects you to:
>
> Remain resting at home, unless specifically advised otherwise by your GP or other qualified medical advisor.
>
> Refrain from any strenuous activity or activity that a reasonable person or healthcare professional would conclude is inconsistent with the reason you are off work.
>
> Comply with the directions of any healthcare professional.
>
> You should not:
>
> - Undertake any work or employment whether paid or unpaid.
>
> - Participate in any activity which a reasonable person or healthcare professional would find inconsistent with the reason you gave for being off work.
>
> …
>
> 7.8 Returning to work
>
> Letter verifying fitness to work
>
> Because we have a duty to all our staff to ensure that they are safe and well, if we have any doubt whatever about your medical fitness, we may require your medical practitioner to verify you as being fit for work.

> To ensure that you can return to work as soon as you are fit, you agree that if requested by a manager/foreman, you will obtain and provide a letter signed by your medical practitioner verifying that you are fit to work. In these circumstances you must take all reasonable steps to obtain such a letter as quickly as possible."

17. It is the claimant's case that on 13 October 2021 he had a work related accident. The claimant states that when walking towards the saw bench with a 16 foot long tube on his right shoulder he heard a voice which made him jump and turn his head to the right. He says he hit his bottom lip against the tube causing a cut in his mouth and his neck snapped back. He says that it felt like he had been electrocuted in the neck.

18. The claimant's account is that James Questel helped him and told him to report the accident and sign a form. He states that he spoke to Mark Turton on that day. He states that he reported the accident to Tina Rodell the next day but that she did not fill in an accident report form or request he sign any form when he was there in the office.

19. James Questel gave evidence that he witnessed the alleged accident but explained that he assumed an accident report form had been filled in. On the other hand, Mark Turton gave evidence that the claimant did not report the alleged accident to him on or around 13/14 October 2021.

20. Tina Rodell was interviewed by Matthew Rodell and Christian Pinnigar on 24 May 2022. The notes record her stating that:

> "TR now questions if the proposed accident happened, as nobody came to report it at the time".

21. We do not have to make a finding as to whether or not the alleged accident happened.

22. James Questel's evidence was that the alleged accident took place between 10 and 11am. The accident report form completed in March/April 2022 records the time of the accident as 11.30am. The claimant actually worked the rest of the day on 13 October and also on 14 and 15 October 2021.

23. The respondent's pleaded case is that it has been unable to verify whether the alleged accident actually occurred.

24. The claimant gave evidence that he discussed the alleged accident with Matthew Rodell more than once in telephone calls, probably before Christmas 2021.

25. Matthew Rodell and Christian Pinnigar gave evidence that the first they knew about the alleged accident was on 4 April 2022 when the claimant rang Matthew Rodell to tell him about a DWP form being sent in for the respondent to complete. The DWP form was in relation to a claim the claimant had made for Industrial Injury Disablement Benefit.

26. We prefer the evidence of Matthew Rodell and Christian Pinnigar and Mark Turton and the, albeit untested, evidence of Tina Rodell that the alleged

accident was not reported to her and that they knew nothing about it before March/April 2022 and we so find.

27. Our reasons for this conclusion are as follows:

    27.1 There is no mention of the alleged accident in the claimant's GP records from 20 October 2021 until it is first referenced on 10 May 2022.

    27.2 There is no mention of the alleged accident in any of the hospital records placed before us (albeit that they are far from complete).

    27.3 The respondent's workplace was a fairly close knit community. As part of his investigation in July 2022 Christian Pinnigar took witness statements from a number of work colleagues. As well as Tina Rodell and Mark Truton, Mr Andrew Nobel states the first he was aware of an accident was in May 2022 and Mr Scott Lyons in late March 2022. Had there been an accident we find it is probable it would have been talked about in the yard and the office. We find it was not.

    27.4 The claimant's email dated 20 October 2021 when he left work merely states:

    > "Due to not feeling well I will not be in for the rest of the week…I have been for blood test today and hopefully I will be back on Monday".

    No mention is made linking the illness or sickness absence with any accident.

    27.5 Very friendly WhatsApp messages between the claimant and the claimant's wife and Christian Pinnigar from 20 October to January 2022 make no reference to the alleged accident in circumstances where the claimant's sickness is discussed extensively. The exchange from 20 October 2021, following the claimant's visit to his GP, simply references a trapped nerve.

    27.6 Tina Rodell only reported the alleged incident to the respondent's insurers on 13 May 2022. The respondent's insurers require accidents to be reported promptly to facilitate investigation. The late reporting suggests Tina Rodell was unaware of the alleged accident at the time.

    27.7 The importance of the happening of a workplace accident only became relevant when the claimant made a claim for benefits in March 2022.

28. The claimant returned to work on 25 October 2021. He worked until 3 December 2021 when he attended Watford General Hospital A&E. He was transferred to UCLH.

29. It is clear to us that the claimant was experiencing pain, dizziness and unsteadiness in October/November and early December 2021. Christian

Pinnigar effectively counselled him and encouraged him to seek medical attention as the claimant was concerned about cancer. Again, we find it is unlikely that the accident would not be mentioned had it been relevant to the claimant's symptoms. We find it was not mentioned.

30. The claimant had an operation on his neck (anterior cervical discectomy and fusion C5-C6) on 6 December 2021. He was discharged on 15 December 2021. He was readmitted to hospital on 11 January 2022 and discharged from UCLH on 29 January 2022. No hospital records have been placed before us. We would expect that, before an operation, the treating consultant would have obtained a detailed history of how and when symptoms arose and recorded any significant feature such as the alleged 13 October 2021 accident.

31. Despite only having a contractual right to SSP, the respondent continued to pay the claimant his full pay in December, January and February 2022.

32. Prior to the claimant's discharge from hospital in December 2021, the respondent supported the claimant by arranging for outstanding DIY at his home to be completed. The respondent was also prepared to pay for a private ambulance although one was not used.

33. On 11 March 2022, due to cash flow issues at the respondent, the claimant was informed by Christian Pinnigar that he would not continue to receive full pay and would only get SSP. Christian Pinnigar suggested the claimant look into what state benefits he may be entitled to. The claimant was told the situation would be kept under review if the financial position improved.

34. It is clear to us that the claimant and his wife investigated claiming benefits and, we find, that it was at this stage that the possibility of claiming Industrial Injuries Disablement Benefit became relevant. We find that the claimant and his wife became aware that in order to make such a claim an accident report was likely to be required by the DWP.

35. The respondent's accident report book has a number of accident record forms stapled together at the top. An accident at work that occurred on 22 February 2022 was the last entry in the book.

36. It is not in dispute that in March 2022 Tina Rodell tore out the form filled in in February 2022, entered details of the alleged accident on 13 October 2021 on the next page and then re-entered the February 2022 accident details on the subsequent page. This was in order that 13 October 2021 alleged accident appeared in the correct chronological place. The claimant signed the accident report form in March/early April 2022. Why Tina Rodell did this in in dispute.

37. The claimant suggests that he rang Tina Rodell, asked for a copy of the accident report as he needed it for his Industrial Injuries Benefit claim and Tina Rodell realised she had not put the accident in the book and that is why she acted as she did. He denied it was because of pressure from him or his wife or at their behest.

38. On 4 April 2022 the claimant rang Matthew Rodell who was working late in the office as he was going on holiday the following day. Matthew Rodell's evidence was that the claimant was awkward and a bit agitated and was calling him to give him the "heads up" that the respondent would receive a form from DWP and he wanted it signed as it was to claim benefits in relation to an accident at work. Matthew Rodell replied that he had no idea what the claimant was talking about. The claimant referred Matthew Rodell to the accident book, stating that all the information was in it. We find that this exchange took place and that this was the first that Matthew Rodell was aware of the alleged accident.

39. Immediately after the call, Matthew Rodell looked at the accident book and saw it was incomplete in that it was missing the date next to the claimant's signature. He took a photocopy of the accident record and dated it 4 April 2022. Matthew Rodell then contacted Christian Pinnigar and asked him if he knew about the accident and he said he did not. Christian Pinnigar was tasked to look into the matter.

40. Although the claimant had a Med 3 Fit note dated 24 March 2022 covering the period 15/3-16/4 he did not provide this to the respondent. However, the condition is recorded as "Multi level cervical spine disease". The first Med 3 fit note submitted by the claimant to the respondent was dated 19 April 2022 and covered the period 15/4-16/5/22. Again, the condition described was "Multi level cervical spine disease" and the claimant was signed off work.

41. In due course the respondent received the DWP letter/form dated 25 April 2022 requesting information for an Industrial Injuries Disablement Benefit claim. The letter/form was open by Louise Endacott but handed to Tina Rodell.

42. The DWP letter/form had pre-printed on it certain information. The date of the accident was recorded as 1 October 2021 and the detail of the injury was "Injury to face" which, given that the information must have come from the claimant or his wife, is odd. The copy of the form we have has manuscript additions. It is common ground that this is Tina Rodell's writing. The date is corrected to 13 October but the time of the accident is 10am and the hours actually worked are put as 7-10am. The accident record times the alleged accident at 11.30 and the claimant accepts he worked the full day. At the very least, there were issues we find were worthy of legitimate further investigation by the respondent.

43. Tina Rodell states that she was being pressured to add information to the form and, in particular, it is noticeable that the description of the injury has been significantly "beefed up" to:

> "Cut to inside of mouth (right side bottom lip) and injury to neck through jerking head sideways".

And

> "… hit the right side of his face just under his bottom lip. This caused his head to jerk sideways causing severe pain in his neck, down his back and whole body."

44. We have an email dated 6 May 2022 from Louise Endacott to Matthew Rodell and Christian Pinnigar chasing the form as it was supposed to be submitted to the DWP by 9 May 2022. Matthew Rodell gave evidence that he would not sign the form until Christian Pinnigar's investigation was completed.

45. At some stage, probably in late April 2022/early May 2022, Christian Pinnigar inspected the accident report book and it was clear that a page had been removed. We have seen the original and it is very clear. Christian Pinnigar was concerned as the alleged accident had not been reported to the respondent's insurers as it would be standard practice to do so. Tina Rodell was instructed to call the insurers which she did on 13 May. We have no evidence as to what, if any, exchange there was between Christian Pinnigar and Tina Rodell when Christian Pinnigar found the page missing.

46. It is clear that in late April/early May 2022 conversations were taking place between the claimant and Matthew Rodell and Christian Pinnigar about the claimant's condition and his return to work. The claimant made occasional visits to the office. The claimant indicated that he felt he would not be able to return to his duties as Yard Manager due to his capabilities and the possibility of changing his role was discussed. It was suggested to the claimant that he might benefit from further training to enable him to undertake less physically demanding tasks.

47. On or about 5/6 May 2022 a one day, in person, PAT testing course was booked for 13 June 2022 and a five day Site Management Safety Training course (SMTS) was booked for 27 June-1 July 2022. At the time the claimant's Med 3 fit note signed him off work until 15 May 2022.

48. On 10 May 2022 the claimant had a return to work meeting with Matthew Rodell and Christian Pinnigar. Just before the meeting the claimant submitted a fresh Med 3 fit note to Christian Pinnigar's assistant, Karen Cowen. This was dated 10 May and covered the period of the two previous Med 3 fit notes, namely 15/3-16/5. The claimant had obtained a change in the condition to record "Work accident 13 October 2021 causing neck pain and leg pain and spinal operation for neck injury". The claimant requested the old form back but this was refused. We find that the reason the claimant obtained a revised Med 3 fit note was to support his Industrial Disability Benefit claim.

49. At the meeting on 10 May the claimant was talking about a return to work and a phased three day per week return. Christian Pinnigar gave evidence that they discussed one way forward would be to get an OH assessment but if that was to happen the outside OH assessor would need some medical information from the claimant as to his condition, treatment and prognosis. We accept Christian Pinnigar's evidence that this was discussed. The claimant was requested to obtain medical evidence of fitness to work and what duties he would be able to do. We find that this was a perfectly reasonable management request, not least because it was in accordance with the Employee Handbook and given the Code of Practice obligation on an employer to do all they could reasonably be expected to do to find out if

the claimant had a disability and was likely to be put at a substantial disadvantage by any work PCP.

50. We find that the claimant's proposal for a phased return to work, such as it was at that early stage, was not 'not accepted'.

51. It is accepted by the respondent that at this time the claimant was disabled within the meaning of the Equality Act by reason of natural degenerative processes of the spine. The respondent disputes knowledge of the claimant's disability.

52. We find that the respondent knew the claimant had a significant physical impairment of his spine and that he was saying that he could not return to his job as Yard Manager. We find that the respondent knew or ought to have known that the claimant's ability to undertake normal day to day activities was substantially impaired and that the impairment was likely to or could well last over 12 months. As such, we find that the respondent did know the claimant was disabled as of early May 2022.

53. After 19 May 2022 the claimant submitted a further Med 3 fit note to the respondent signing him unfit for work for the period 15/5-15/6.

54. On 20 May 2022, Christian Pinnigar, in continuing his investigation, went to Tina Rodell's office. Louise Endacott was present and he has given evidence that there was something of an atmosphere when he asked questions about the accident reporting forms. The respondent also recorded accidents electronically. Tina Rodell opened the electronic accident report on her computer. The form has entered on it in two sections "updated 11/5/22". However, when Christian Pinnigar hovered the cursor over the digital form he could see that it had been created on 11 May 2022. External IT support subsequently confirmed that it had been created on 11 May 2022 and modified on 13 May 2022. The paper accident report form had also been added to after 13 May 2022 with the addition of Tina Rodell's signature, two dates 14/10/21 and a box ticked granting permission to disclose employee personal information.

55. On Sunday 22 May Christian Pinnigar received a call from Tina Rodell. Tina Rodell was very upset and told him that she had been put under pressure by Louise Endacott and the claimant to falsify the accident records and that the alleged accident had actually been reported to her in March 2022.

56. We have the notes of an interview with Tina Rodell on 24 and 27 May 2022 conducted by Matthew Rodell and Christian Pinnigar. This confirms that Louise Endacott and the claimant asked her to add the alleged accident to the book and provided her with the details This is borne out by Tina Rodell's witness statement.

57. Obviously Tina Rodell's evidence has not been tested by cross examination. However, we find that Tina Rodell falsified the accident report forms. We find that she did so either in collusion with or as a result of pressure from Louise Endacott and, probably to a lesser extent, from the claimant. We

reject the claimant's evidence that he and his wife had nothing to do with it. Our reasons for these conclusions are as follows:-

57.1 The claimant needed an accident report form to support his DWP Industrial disability Benefit claim.

57.2 We have clear evidence of him actively manipulating the fit note to change the condition to reference the alleged accident.

57.3 It is less likely that Tina Rodell would go to such lengths if she had simply forgotten to record the alleged accident in October 2021.

57.4 The alleged accident was not reported to the respondent's insurers until 13 May 2022. Not reporting it sooner potentially ran the risk of the insurers repudiating liability.

57.5 We have already found that the alleged accident was not reported to her in October 2021. As such, Tina Rodell cannot have forgotten it.

58. On 9 June 2022 Christian Pinnigar sent the claimant an email as follows:

> "Dear Gavin
>
> We hope you are well.
>
> We have noted your current statement of fitness for work finishes on 15 June 2022. However, the PAT course that had been arranged for you was booked for 13 June 2022. Taking the course date into consideration we have reallocated this training course to another member of staff. Therefore, you are not required to attend this course.
>
> We note your plans are to return to work on a part time basis. This means the SMSTS course planned for five consecutive days at the end of June will not be possible based on your intentions. Therefore, we have also reallocated this course to another member of staff and your attendance will not be required."

59. Also on 9 June 2022 the respondent sent a letter in the post to the claimant as follows:

> "We note your current statement of fitness to work finishes on 15 June 2022. Based on this period the company would like you to return to work on 16 June 2022 at 2pm. You will be reimbursed full pay for the period between your statement of fitness for work finishing and the date and time of the meeting.
>
> When arriving at the office you are required to meet with Mr Christian Pinnigar, Mr Adam Rodell and Mr Owen Marsden."

60. The claimant replied on 9 June in an email as follows:

> "As discussed in our meeting with yourself and Matthew on 10 May, as you are both aware and both agreed that it was my intention to return to the work and carry out a PAT testing course and an SMSTS course which you subsequently organised. During this meeting it was also discussed and agreed that the training would provide me with a phased return to work, regarding days/hours. Please note that it was never my intention to return

to work on a part time basis as you have stated. The courses were booked to "ease" me back in. You asked me if I would be able to carry out the training, to which I replied "Yes" as it was classroom based and did not include manual work.

With regard to the SMSTS course and as discussed with you on many occasions. I now find this very disappointing that you have reallocated this training as I believe it was yourself that put me forward for this course and was you that recommended me for it.

…

Could you provide me my job description and duties for my return to work in July to ascertain suitability."

61. The respondent replied on 13 June 2022 in an email as follows:

"During our meeting we discussed your return to work, we also discussed and booked two potential courses. Both courses were intended for your attendance. However, the PAT testing course was booked in the period during your new and latest statement of fitness to work, which finishes on 15 June 2022. We do not expect you to attend a course during this period, as it would be against your doctor's advice.

In our meeting we also discussed the option of an SMTS training course. However, you later went on to confirm that five days would initially be out of the question, as you want to see how things go and not push yourself. You then discussed and proposed a three-day working week with days of between working days. Hence the course needing to be reallocated to another member of staff, as this was booked on a five consecutive day basis. This does not mean that alternative training will not be offered in the future, should it be required.

…

During our meeting we discussed and requested that you provide a medical capacity report from a qualified medical practitioner. We have not received this to date and kindly request you conform when this will be available?

Please note your job remains Yard Manager and all duties remain the same. Once we have an understanding of your qualified medical practitioners assessment and guidance, we can then assess suitability."

62. The claimant responded on 14 June as follows:

"Firstly, please can you confirm the purpose of the meeting scheduled for Thursday 16th June at 14.00? Please note that I will be bringing along a family friend for support.

In response to paragraphs 4 and 5 of your email. I request that the company arranges an Occupational Health review, as previously discussed and requested via meetings of telephone conversation.

…

> After the Occupational Health review has taken place, I would welcome further conversations on my return to work and any reasonable adjustments needed as per the review."

63. The respondent replied in an email dated 15 June 2022. This sets out as follows:

> "The meeting booked for tomorrow is not a disciplinary meeting. Therefore, we must refuse your request to bring a family friend for support.
>
> The meeting is to discuss several matters including your current sickness absence.
>
> The company will be willing to instruct an Occupational Health professional. However, at this early stage, may we again request you gain a "letter verifying fitness for work" or similar. We hope this is acceptable, as your medical team best knows your current condition.
>
> The two courses have been reallocated and I have previously explained the reasons for doing so.
>
> We confirm that your position within the business remains that of yard manager. No agreement exists to reallocate you to another department. Although, we do know you have made a verbal request to be considered for reallocation."

64. We find that whilst reference is made to discussing several matters, the fact that the meeting would, in part, be an investigation meeting was not spelt out. The respondent's reason was to prevent collusion between the claimant and his wife who was scheduled to be interviewed immediately after the claimant on 16 June 2022.

65. On 10 June 2022, the claimant obtained a new Med 3 fit note signing him off work for three months from 10 June 2023. This note was not given to the respondent. From the GP notes, it is clear that at 12.46 on 16 June 2022 the claimant also obtained a revised Med 3 fit note covering the period 10/6-15/9. This signed him fit for work subject to altered hours (20 hours a week) and amended duties.

66. At 2pm, 16 June, the claimant attended the meeting with Christian Pinnigar and Matthew Rodell. The claimant was questioned about the irregularities with the accident reporting documentation and we readily understand why he found this uncomfortable and feeling he was being attacked. However, we find that the questioning was entirely legitimate given the clear irregularities. This is especially so as we have found that the claimant and his wife were involved. Reference was made to misconduct and the potential involvement of police and fraud department, which again we find was legitimate.

67. The claimant was told that the respondent could offer training to assist his relocation. It was observed that the claimant had not provided a new Med 3 form (although he had two contradictory ones in his possession at the time which he never gave them) and that SSP would cease without one. It was stressed that the respondent needed more information about the claimant's medical fitness to work and capabilities to support his return to work. The

respondent offered to refer the claimant to OH for assessment once the claimant had provided some medical information.

68. At 21.18 on 16 June 2022 the claimant tendered his resignation by email. His resignation letter states as follows:

> "Resignation
>
> I am writing to confirm my resignation from the post of Yard Manager. I am resigning with immediate effect from today's date. Please arrange for my final payslip and P45, together with any other relevant materials to be sent to my home address.
>
> You should be aware that I am resigning in response to a repudiatory breach of contract by my employer and I, therefore, consider myself constructively dismissed.
>
> You rejected my requests and grievance to be assigned to a new position following my injury at work on 13 October 2021. In our meeting today, you falsely accused me of falsifying documents and threatened me with police and the Fraud Department (I welcome this investigation, as these allegations are untrue and unfounded). You attempted to bully and scare me by stating you have several company witnesses who will support your false claims against me.
>
> As you have not upheld my grievance, I now consider that my position at Rodell's Ltd is untenable and my working conditions intolerable, leaving me no option but to resign in response to your breach."

69. In actual fact the claimant had not made a grievance.

Conclusions

Constructive dismissal

70. We find that the respondent did reallocate the PAT course scheduled for 13 June 2022. This was because the claimant was signed off sick. We do not find that this was a breach of the implied term of mutual trust and confidence.

71. We find that the respondent did not reject the claimant's request for redeployment. We find that redeployment was being actively considered with training offered once the claimant was fit to return to work. We find that his existing role was held open pending an assessment of what he was capable of. We do not find that this was a breach of the implied term of mutual trust and confidence.

72. We find that the respondent did accept the claimant's proposals for a phased return to work (working three days). We find that the claimant resigned before the respondent had a medical Med 3 fit note stating he was fit for work subject to a phased return. We do not find that this was a breach of the implied term of mutual trust and confidence.

73. We find that the respondent was requiring medical evidence of the claimant's condition before referring him to Occupational Health. We find

that this was a legitimate management request in line with the Employee Handbook and the guidance. We find that the respondent was not requesting a report or specialist notes but more general information from the claimant's General Practitioner. We find that this was not a breach of the implied term of mutual trust and confidence.

74. We do not find that the respondent failed to refer the claimant to Occupational Health. We find the respondent was actively intending to refer the claimant to Occupational Health once some medical information was received and the claimant resigned before they could do so. We do not find that this was a breach of the implied term of mutual trust and confidence.

75. We find that at the meeting on 16 June the respondent did question the claimant about alleged misconduct. We find that this was a perfectly legitimate management conduct. We do not find that this was a breach of the implied term of mutual trust and confidence.

76. We find that the claimant was not specifically informed in advance of the 16 June meeting that he may be asked questions regarding the investigation into alleged misconduct. He was aware that several issues were to be discussed and we find that the claimant probably was well aware of the investigation and we have found that he and his wife were involved in the falsification of the accident report forms. The claimant's request to be accompanied suggests this.

77. Whilst this was contrary to the Acas Guide, we find it was a minor departure with some justification due to the claimant and his wife being investigated and the risk of collusion. We do not find that this was so serious that it was a breach of the implied term of mutual trust and confidence.

78. We find that the claimant resigned in the face of possible disciplinary action and probably "jumped before he was pushed".

79. Accordingly, we find that the claimant was not constructively unfairly dismissed.

<u>Section 15 disability discrimination</u>

80. We find that the 'something arising' in consequence of the claimant's disability was the claimant's sickness absence from 3 December 2021 until 15 June 2022.

81. We find that the respondent did request that the claimant provide medical evidence (but not fit notes) before referring the claimant to OH.

82. We find that the request was in accordance with the Employee Handbook and guidance. We find that it was not unfavourable treatment. Even if unfavourable, we find that it was a legitimate aim to better inform the respondent of the claimant's capabilities and to ensure his safe return to work and was a proportionate response.

83. We find the respondent did reallocate the PAT course scheduled for 13 June 2022. We find that this was because the claimant was signed unfit for work.

84. We do not find that this was unfavourable treatment. We find that this was because the claimant was signed off unfit for work and consequently could not attend a training course.

85. Accordingly, we find the claimant was not subjected to disability discrimination.

Reasonable adjustments.

86. We find the respondent did hold the claimant's job as a Yard Manager open whilst he was off sick pending the assessment of his capabilities and in the event that he was fit to return to work in some capacity. However, we do not find that the respondent had a PCP that the claimant could only return to work as a Yard Manager. As such, we find the pleaded PCP has not been established.

87. We find that Clause 7.7 was a PCP. We find that that clause did not place disabled people at a substantial disadvantage compared with non-disabled people. Non-disabled people could be absent for work due to sickness for long periods of time.

88. Consequently, we find that no duty to provide reasonable adjustments arose as pleaded.

89. Accordingly, we find there was no failure to make reasonable adjustments.

90. For the above reasons the claimant's claims are dismissed.

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Employment Judge Alliott
Date: 30 September 2024

Sent to the parties on: 10 October 2024

For the Tribunal Office

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/