Case No: 1402221/2020

EMPLOYMENT TRIBUNALS

Claimant:	**Mr L Davis**	
Respondent:	**Switch International Trailers (UK) Limited**	
Heard at:	**Southampton**	**On: 6-9 December 2021 and (in Chambers) 20 January 2022**
Before:	**Employment Judge Matthews**	
Members:	**Mrs S Collins** **Mr G Crowe**	
Representation: **Claimant:**	**Ms D Gilbert of Counsel**	
Respondent:	**Mr L Wilson of Counsel**	

UNANIMOUS RESERVED JUDGMENT

1. Mr Davis was subjected to discrimination arising from his disability by reference to sections 15 and 39 of the Equality Act 2010. Mr Davis was put at risk of redundancy, placed in a selection pool of one, selected for redundancy and dismissed because of something arising in consequence of his disability.

2. Mr Davis was victimised by reference to sections 27 and 39 of the Equality Act 2010. Mr Davis was put at risk of redundancy, placed in a selection pool of one, selected for redundancy and dismissed because he had done a protected act.

3. Mr Davis's claims that he was discriminated against because of the protected characteristic of disability by reference to sections 13 (direct discrimination) and 20 and 21 (duty to make adjustments and failure to comply with duty) and 39 of the Equality Act 2010 are dismissed.

4. Mr Davis was unfairly dismissed.

5. The Respondent is ordered to pay to Mr Davis £23,022.93 comprising:

(1) Compensation for injury to feelings in respect of the discrimination of £9,229.15 including interest of £1,229.15.

(2) Compensation for financial loss arising from the discrimination of £8,668.78 including interest of £617.62.

(3) An award of £2,100 being four weeks' pay under the provisions of section 38 of the Employment Act 2002.

(4) A basic award in respect of the unfair dismissal of £2,625.

(5) A compensatory award in respect of the unfair dismissal of £400.

6. The Recoupment Regulations do not apply.

REASONS

INTRODUCTION

1. Mr Lewis Davis's claims and the issues involved were discussed at a preliminary hearing before Employment Judge M Salter on 5 November 2020. At the hearing before us, it was agreed that they were as set out in paragraphs 38-48 of the Case Management Summary (the "CMS" 81-94) sent to the parties on 9 February 2021.

2. Paragraph 39 of the CMS listed "Time/limitation issues". At the hearing, Mr Wilson, on behalf of the Respondent Company, agreed that there were no such issues.

3. Paragraph 40 of the CMS listed disability as an issue. At the hearing this issue was conceded. The Company accepted that Mr Davis had a mental impairment, being post-traumatic stress disorder ("PTSD") and that this had a substantial and long-term adverse effect on Mr Davis's ability to carry out normal day-to-day activities. Further, Mr Davis had been a disabled person at all material times for the purposes of the issues. Broadly, this included the period from the "Crick incident" (see paragraph 28 below) up to the end of March 2020, at which point Mr Davis knew of the outcome of his appeal against his dismissal. The matter of when the Company knew of the disability and, more particularly, of its effects on Mr Davis, remained an issue.

4. We will list Mr Davis's claims in the order they appear in the CMS.

5. Paragraph 42 of the CMS sets out Mr Davis's claim of direct discrimination. Mr Davis says that putting him at risk of redundancy, placing him in a selection pool by himself, selecting him for redundancy and terminating his employment are, severally and together, less favourable treatment for the purposes of section 13 of the Equality Act 2010 (the "EA"). Mr John Goodeve is offered as a comparator.

6. Paragraph 43 of the CMS details Mr Davis's claim of discrimination arising from disability. The "something arising in consequence of" Mr Davis's PTSD relied on is difficulty in coping with a variation of journeys. Paragraph 43 also refers to sickness absence for this purpose, but Ms Gilbert, on Mr Davis's behalf, confirmed that was no longer relied on. The alleged unfavourable treatment is the same as for the direct discrimination claim.

7. Paragraph 44 of the CMS sets out Mr Davis's claim that the Company failed to make reasonable adjustments in relation to his PTSD. The "provision, criterion or practice" of the Company's relied on, is requiring its drivers to drive frequently changing journeys at short notice. Mr Davis's case is that he found this difficult to cope with as a result of his PTSD. Mr Davis suggests that reasonable adjustments would have been to provide him with night driving and driving the same route with less frequent changes.

8. Paragraph 45 of the CMS details Mr Davis's claim of victimisation. The "protected act" relied on is an implied allegation in an exchange of text messages with Ms Tracey Richardson on 15 January 2020. The alleged detriment is that relied on for the purposes of the direct discrimination claim.

9. Paragraph 47 of the CMS sets out Mr Davis's claim that he was unfairly dismissed. This includes a claim that the dismissal was discriminatory.

10. Finally, Paragraph 48 details two further claims. First is a claim for an alleged underpayment of redundancy monies. The Company concedes this. Second is a claim for a sum by reference to section 38 of the Employment Act 2002 (the "EA 2002"). As far as the section 38 claim is concerned, the Company concedes that it was in breach of its duty to Mr Davis under section 1(1) of the Employment Relations Act 1996 (the "ERA"), in that it did not provide him with a written statement of initial employment particulars at any time.

11. The Company, to the extent that it does not concede the claims as explained above, defends them. In short, the Company says that Mr

Davis was fairly dismissed by way of redundancy and that there were no acts of discrimination.

12. Mr Davis gave evidence supported by a written statement. Mr Davis's wife, Mrs Lisa Davis, gave evidence in his support, again by reference to a written statement. On the Company's side we heard from Ms Richardson (Andover Depot Manager with the Company), Mr Nick Baldwin (Andover Office Manager) and Mr Graham Marr (Group Finance Director of the Company's parent company, TWT Logistics Limited). Ms Richardson produced two written statements and Messrs Baldwin and Marr one each.

13. There was a 408 page bundle of documentation supplemented during the hearing by a further 24 pages (some of Ms Richardson's working papers). In addition, there was a "medical bundle" of 117 pages. The page numbers in the 408 page bundle and the medical bundle did not coincide with the PDF versions used by the Tribunal. References in this Judgment to page numbers are to the pages in the PDF bundles unless otherwise specified. The medical bundle is designated "MB".

14. Ms Gilbert produced written argument.

15. The Hearing was completed in the four days allocated to it. It finished late on Day 4 and the Tribunal reserved judgment. In the event, it was necessary for the Tribunal to sit again, in Chambers, to reach its decision.

16. The hearing was a remote hearing using the VHS platform consented to by the parties. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.

17. In deciding this case it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole. Where appropriate the provisions of section 136 EA (Burden of Proof) have been taken into account as is explained below. As is not uncommon, credibility was, in our view, an issue in this case. This was particularly so in relation to the evidence of the main protagonists, Ms Richardson and Mr Davis. Fortunately, this is a case that is more or less capable of decision on the available paperwork.

FACTS

18. Mr Davis was formerly known as Mr Kennie Hill. Mr Davis changed his name by deed poll on 15 November 2019 (MB70). This is why Mr

Davis is sometimes referred to in the bundles as Mr Hill. We will refer to "Mr Davis" throughout.

19. Mr Davis joined the Army at sixteen and had a fifteen year career as an infantryman with the Royal Regiment of Fusiliers, including service in Northern Ireland, Kosovo, Iraq and Afghanistan. Mr Davis left the Army in 2012. Experiences during that career were later identified as the cause of Mr Davis's PTSD.

20. The Company is based at Andover in Hampshire. Its parent company (TWT) is based in Wales. Across the group, the companies employ 120-130 people. The group's business is road haulage.

21. Mr Davis started work for the Company on 15 March 2015. Mr Davis was dismissed with effect from 19 February 2020. Throughout his time with the Company, Mr Davis was employed as an HGV driver.

22. Mr Davis's relevant medical history

23. Mr Davis's eight year medical history from 10 October 2012 to 26 October 2020 can be seen in his Patient Record ("notes") at MB 24-51. These contain many references to Mr Davis's PTSD. To decide the issues before us, we are primarily concerned with the effect Mr Davis's disability had on him and when and what the Company knew about it. Therefore, we confine ourselves to an explanatory summary, noting some relevant points of detail. Apart from the notes, the medical bundle contains other material, which we refer to as necessary.

24. On 2 February 2016 Help for Heroes wrote to Mr Davis's GP (MB3). Mr Davis had been seen at Tedworth House on 2 February and he had *"presented with symptoms of possibly PTSD such as anger, anxiety, hyper vigilance and nightmares."* Mr Davis was to be referred to South West Veterans' Mental Health Service ("SWV"). SWV was a part of Avon and Wiltshire Mental Health Partnership NHS Trust. Over time, Mr Davis was referred to different parts of that NHS Trust, but we will refer to them collectively as "SWV".

25. On 28 June 2016 SWV wrote to Mr Davis recording that EMDR and CBT treatment had been agreed (MB6). This information was copied to Mr Davis's GP and the notes on the same day, 28 June 2016, record that PTSD was an active problem. ("CBT" (Cognitive Behavioural Therapy) is widely understood as a treatment for anxiety and depression, amongst other conditions. "EMDR" is an abbreviation for Eye Movement Desensitisation and Reprocessing and is used to help people recover from conditions such as PTSD.)

26. For 11 August 2016 the notes record that Tedworth House had asked Mr Davis to contact his doctor to arrange a referral for an assessment for PTSD (MB28).

27. That assessment was undertaken on 20 November 2016. Dr Saadia Muzaffar Rathod's reporting letter of 27 November is at MB7-11. It is essential reading for understanding the background and implications of Mr Davis's diagnosis. In essence, the diagnosis was of PTSD and a moderate depressive episode (MB10). Dr Muzaffar commented that Mr Davis *"will continue to benefit from a holistic approach such as the psychological weekly input especially CBT for trauma".* Medication was also discussed.

28. On 12 September 2017 there was a fatal accident at a warehouse near Crick (the "Crick incident" - also see below - paragraph 54). Crick had been Mr Davis's route that evening and he had tried to help the victim. The notes for 14 and 19 September record this (MB32). *"History: I gave Mr"* [Davis] *"a call as he wanted to talk to someone about his PTSD symptoms coming back, he has had lots of help in the past for his PTSD and was slowly getting better. He was at work the other night when someone sadly passed away, Mr"* [Davis] *"was leading on the CPR and trying to keep him alive. Since then he has been getting the nightmares and feelings of guilt come back and wanted to get it sorted before the anxiety came back like it used to be. He has started taking his Trazodone 50mgs again as both him and his wife noticed his moods dropping, feels they just numb him and not much else. Agreed to appointment with Dr C. to discuss medication and hopefully cover him till his appointment on the 26th at Tedworth house."* …. *"EMDR 26th to help put this incident to bed I don't think fiddling with meds will help much, he was fine prior to the incident and I have encouraged him that this response is normal and that he shouldd be fine again after it has settled We discussed the sense of driving HGV at night, solo, when he wasn't sleeping well and I think a week of ammended duties would be sensible"*

29. On that 19 September, Mr Davis's GP issued a fit note for him (103). The fit note referred to *"recurrence of PTSD".* Mr Davis was fit to work as long as his hours and duties were altered. The comment was *"shouldn't be driving long distance, solo at night until after treatment."*

30. Some time afterwards, on 7 August 2018, SWV wrote to Mr Davis's GP (MB12). The letter included: *"I have seen"* [Mr Davis] *"for a course of EMDR for PTSD symptoms relating to traumas he experienced whilst he was serving in the military and a more recent incident relating to his current job. He responded very well to treatment, he has had a reduction in his symptoms."*

31. The notes for 18 and 19 October 2018 include this (MB33). *"Has quite a lot going on at the moment, selling house, wife is being made redundant and is the anniversary of his "PTSD event" No self harm or suicidal thoughts. Is going through help for heroes anger management course. Is in contact with well being officer at Tedworth House, has weekly appointments. Works nights driving lorries, was asking re-MED3"* [fit note] …. *"History: I gave Mr"* [Davis] *"a call. He explained that he called in as he is just really struggling with his sleep, he started taking his Trazodone again which he takes in these situations, he doesn't really feel they're helping. His boss is being really unsupportive and not giving him the time off to self-cert as she doesn't really understand what he is going through and has caused issues in the past."*

32. Notes for 3 January 2019 include (MB33-34): *"Christmas was awkward, No routine A few days after Christmas he had a "major meltdown" on the beach at Bournemouth. Not sure why"* …. *"first night back driving was yesterday and they changed his routine, caused stress but he managed the run."*

33. At this time, Mr Davis's GP referred him to SWV again. However, it seems that, although Mr Davis was seen by SWV on 27 February and 20 March 2019 (see MB13), there is no record of follow up (other than confirmations that Mr Davis was on the waiting list) until the Spring of 2020.

34. Notes on 17 January 2019 include (MB34): *"is back doing the usual route and this has been better Has felt down last few days, wife commented, not aware of triggers so it could just be the way the world is"* …. *"Is back in the gym and is back training and this is helping, going for hte invictus games".*

35. During the evening of the same day, 17 January 2019, the South Western Ambulance Service was called to Mr Davis's home. There are various records of this (MB80-84). This extract summarises what happened (MB83): *"Has had an argument with his wife earlier today. Pt left & had x10 cans of stella. Pt came back home, wife was in bed & sent wife text message that made wife worried. Pt said he took 9x diazepam tabs @ 2300 (took daughter's tablets, pt normally takes 10mg diazepam to sleep). Pt said he took them as he wanted to sleep, but did not plan commit suicide"*…. *"Wife called 999 as she was worried after pt took tablets."* …. *"Pt has full capacity, reluctant to engage with crew. Says he just wants to go to bed. No previous overdoses, does not appear intoxicated. No plans or means to suicide. Pt claims he has been managing his mental health & feels okay."*

36. In his evidence to us, Mr Davis put a more serious complexion on this, essentially that he had intended to take his own life.

37. Notes of an appointment on 25 April 2019 include (MB35-36): *"Is using CBD oil, sleep improved, more present. Able to cope with more, We discussed the risks assoc with HGV, Patient happy he is within legal framework"* …. *"working for the invictus games, bench pressing and aloso clay shooting Appear much better, life is OK, we dsicusserd it may get rocky when he starts EMDR or whatever".*

38. On 23 January 2020 Mr Davis called the surgery to make an appointment. The notes include (MB38): *"Pt struggling with his MH again asking for adjustments at work. These possibly require Medical Reports."*

39. The notes of an appointment on 25 February 2020 include (MB40): *"PTSD And depression getting worse Had CBT And waiting list for cbt Nighmares agitated flash backs-not coping well Made redundant and have to move house loosing control Intermittent self harm thoughts, like waves, causing problems with wife, effecting family No intention to act on them, pilling on top of it wife keep him distracted looking for new job- terrifying"* …. *"Nervous system and mental state general examination – Tearful but good inight".*

40. On 16 March and 24 March 2020 Mr Davis was signed off. The two fit notes ran from 16 March until 20 April 2020 and referred to a *"depressive disorder"* (MB40-41).

41. On 15 April 2020 Mr Davis' GP had a video consultation with him (MB41-42). The notes include: *"No apparent risk of suicide Able to use decision making strategies"* …. *"request Med3 continuation"* …. *"Mental health assessment"* …. *"previous EMDR - under TILS - awaiting more complex treatment - lives with wife & x4 children - aged 20, 15, 11, 9 - x15 years military service - left, made redundant lorry driivng - "feel fragile" reports much improved past several weeks post Gp contact - wife supportive ++ wife work civil service army support - "keeps me on straight and narrow" - enjoys attending gym 3-4 times weekly - ex military gym owner - "my therapy" frustrated unable attend re covid - friend lent gym equipment to use in garden - morning runs with wife 3p/w & gym remaining days - denies suicide ideation "no i'm stable discussed suicidality feb 2020 - reports to frustration - clear wishing life to change not to end - discussed medication mood-considers "make me worse" previous different medications ++ "just zone me out" reports intensive EMDR re PTSD "really helped" - good insight re coping strategies - previous engaged Jane Black TILS - discussed mindfulness "still have all the paperwork" reports to be beneficial - difficult to have space/time re living with 5 other people -*

agreed fu Friday - greatful for Gp & practice support sfatey netted - happy with plan" …. *"Is stable".*

42. On 17 April 2020 Mr Davis was signed off until 16 May 2020 with a *"depressive disorder"* (MB42).

43. On 12 August 2020, Mr Daniel Pipe, a Therapist with SWV, sent an email to Mr Davis's Solicitor providing an update on Mr Davis's position (MB21-22). It included: *"No plans or intent disclosed re Deliberate Self Harm or suicide presently; suicidal thoughts are reported at times but no plans are reported; Mr Davis last felt suicidal following being made redundant from his driving job in February this year, he continues to seek new employment but without success."* …. *"When measured with validated psychometric questionnaires Mr Davis last scored "severely" for PTSD, Phobia, Anxiety, Depression, and Work and Social functioning impairment."* …. *"I am optimistic that Mr Davis should continue to recover from his PTSD whilst he continues to receive appropriate support and treatment from our service."*

44. It appears that Mr Davis did not obtain fit notes for the period 17 May 2020 to 14 August 2020, in light of the Covid restrictions in place. On 14 August 2020 and 21 October 2020 Mr Davis was signed off with *"PTSD and depression"* (MB42-43). The two fit notes covered the period 14 August to 9 December 2020.

45. On 25 January 2021 the Company's Solicitors instructed Dr Purdeep Grewal (Consultant Psychiatrist) jointly on behalf of the Company and Mr Davis (52-57). Dr Grewal was asked to prepare a report primarily for the purpose of establishing whether or not Mr Davis was a disabled person for the purposes of the EA between 1 September 2019 and 26 March 2020. That issue was, as noted, conceded before this Tribunal. Pertinent to our deliberations, however, was one of the subsidiary questions asked (54):

> *"7. If the Claimant does or did have mental impairments:*
>
> *a. do such impairments make it difficult for him to cope with previously unannounced changes to anticipated regular journeys;*
>
> *b would such unannounced changes to journeys exacerbate his PTSD;".*

46. Dr Grewal's report, dated 8 February 2021, is at 58-77. Dr Grewal records the question set out in the preceding paragraph of this Judgment shortly (60): *"Whether unannounced changes to journeys exacerbate his symptoms….".*

47. In paragraph 12.1.4 of his report Dr Grewal expresses this opinion: *"Mr Davis' symptoms of PTSD may be triggered or deteriorated by a range of factors. These include"* …. *"sudden or repeated changes to his normal routines, whether at home or work (e.g. unexpected visit outside the home, frequent change of workplace routine)."*

48. Other relevant facts

49. Ms Richardson ran the depot at Andover. Ms Richardson managed around nine drivers, including Mr Davis. Ms Richardson's job included the day-to-day scheduling of the drivers' routes.

50. Mr Davis started with the Company as a trunk driver on night shifts. A trunk driver is one who operates on a regular route.

51. For the first four and a half years of Mr Davis's employment with the Company, his route was mostly between Andover and Crick (to start with, there had been a route to Rugby). Crick is in Northamptonshire, not far from the Daventry International Rail Freight Terminal and junction 18 on the M1 motorway. The route was one of five operated under contract with a business called XPO Logistics ("XPO").

52. The five XPO routes involved different start times. Some routes needed a start time of 1800. Start times were dictated by the required time of arrival at the destination. In practice, start times evolved over a period. Drivers got to know their runs and the times when the places they drove to would be ready to receive them. Mr Davis and another trunk driver, Mr Goodeve, came to arrangements with the staff at the places they respectively drove to. Mr Goodeve arranged a start time around 2200. Mr Davis secured start times later than 2000, although there were exceptions when he made earlier starts. It was, however, understood that Mr Davis was generally only available for start times from 2100 onwards. This suited Mr Davis's domestic arrangements as it enabled him to look after his children until his wife returned from work and took over. Mrs Davis's return also released the family car, which Mr Davis needed to get to work. During the hearing the evidence was clear that Mr Davis's start time of 2100 was something that arose from his domestic arrangements and not his PTSD. Mr Davis's start time was distinct from Mr Davis's choice to work night shifts because they fitted better with the effects of his PTSD (see WS5).

53. Mr Davis's evidence is that he told Ms Richardson about his diagnosis of PTSD and depression shortly after it had been made in November 2016 (WS4). Further, Mr Davis's evidence is that there were occasions on which he discussed the effects of his PTSD with Ms Richardson (see, for example, WS7). Ms Richardson accepts that

PTSD had been mentioned but no more than that. In particular, Ms Richardson says that Mr Davis did not mention a formal diagnosis nor the effects until 15 January 2020. (We will come to this below). This is to some extent corroborated by Mr Baldwin. We think it possible that the evidential difference on the point may be easily explained. Mr Davis might have been reluctant to go into any detail about the effects PTSD had on him in case they posed a threat to his job. Equally, as long as Mr Davis did his driving job satisfactorily, Ms Richardson took the line of least resistance and did not concern herself with the issue. No doubt the truth is somewhere between the two.

54. On 12 September 2017, the Crick incident occurred. Paragraphs 28-31 above provide the medical background to this. An exchange of text messages between Mr Davis and Mr Baldwin gives some insight into the consequences in the workplace (104). On 14 September 2017 Mr Davis sent a text: *"Hi mate I'm going to take the rest of the week off. I'm not taking what happened very well and it's triggered my PTSD so I'm not sleeping very well."* The response was *"That's okay mate, I had assumed that you would not be back this week. Take the time you need just keep us updated."* Notwithstanding the specific reference to *"recurrence of PTSD"* in the fit note of 19 September 2017, no one at the Company appears to have followed up on this or the mention by Mr Davis of PTSD in his text. Neither Ms Richardson nor Mr Baldwin remembered seeing the fit note and Mr Baldwin's evidence is that it would have gone straight to "Payroll". The Company certainly did not follow up on the comment in the fit note that Mr Davis *"shouldn't be driving long distance, solo at night until after treatment."* Rather, whilst no pressure was applied, it was left to Mr Davis to come back to work when he was ready. It appears that Mr Davis took three paid days off and returned to work on 19 September 2017 (111).

55. In September 2019 the contract with XPO for the five runs was renegotiated. The number of runs was cut to two. This ostensibly reset the baseline for start times to 1800, although, as before, that is not what happened in practice. The time sheets at 225-288 show that Mr Goodeve pretty much continued with his 2200 start times. Nevertheless, Mr Davis's start time of 2100 appeared incompatible with the requirements of the renegotiated XPO contract. There were three other night routes with customers other than XPO, but these also required 1800 starts.

56. Ms Richardson's starting point, therefore, was that she needed five drivers to cover the five night runs, but all with 1800 start times. Ms Richardson spoke to the drivers affected. Mr Davis was clear that he could not start at 1800.

57. At the same time, TWT had obtained a contract which was to commence in October 2019. Containers were to be collected from Southampton docks for onward transportation. Ms Richardson arranged for Mr Davis to use his night shift, starting at 2100, to collect the containers and deliver them either to the Company's Andover Depot for onward transportation by the day shifts or to the Hoover plant at Merthyr Tydfil. Ms Richardson explained to Mr Davis that there might be a need to transfer him to other routes on an ad hoc basis.

58. In the three weeks between the September change in the contractual arrangements with XPO and the new contract for collection from Southampton starting in October, the remaining XPO work was shared out. Mr Davis had runs on other routes and start times earlier than 2100. All this was arranged by friendly text exchange between Ms Richardson and Mr Davis (154-157 and 172). The only point that Mr Davis raised was that he could not regularly do earlier start times. There is nothing in Mr Davis's medical records to indicate that the increased flexibility required of him, both in terms of start times and routes was having an effect on his PTSD, nor was there any mention of this in the exchanges with Ms Richardson.

59. When the October contract came on stream, Ms Richardson reports that the arrangement with Mr Davis worked well (WS17). The contemporary text exchanges between the two continued to be amiable on the whole (126-151). The only noticeable exception was an explicit complaint by Mr Davis that he was being given poor trucks to drive. As well as the runs between Southampton and Andover there were runs to Brackmills (Northampton), Crick, Newark, Crewe, Basingstoke and Merthyr Tydfil. Mr Davis managed many starts before 2100. These were sometimes under protest that he could not do so regularly as he was having to dovetail with Mrs Davis's shifts. Again, there is nothing in the exchanges between Mr Davis and the Company in this period, that touched on Mr Davis's PTSD. In particular, there is nothing to suggest that the flexibility Mr Davis was showing on routing and start times was an issue for him because of any effect it had on his PTSD. Nor do Mr Davis's medical records flag up any such concern.

60. Not all of Mr Davis's scheduling was done by Ms Richardson. On 14 January 2020 Mr Davis was asked by someone else to get in as early as he could to cover a run to Crick. Mr Davis replied that he couldn't get in before 1930 because he would not have the car until 1900.

61. Mr Davis made the run, which seems to have passed without incident. However, the next day, 15 January 2020, there was an

exchange of text messages between Ms Richardson and Mr Davis as follows (179):

> Mr D: *"I'm sorry I won't be in tonight. I have had a massive migraine come on due to my PTSD and anxiety of not knowing what I'm doing at work from night to night I started to have flash backs of that driver that died on me at xpo the other year and it's really affected me…."*
>
> Ms R: [Lewis] *"I'm going to take some advice from HR regarding your PTSD*
>
> *With regards to what?*
>
> *I obviously have to discuss the options for both of us because it's transport and it is rarely going g to be the same work every night and as you have said in your text that is causing your ptsd to flare up*
>
> *I have done the same run for the last 3 to 4 years xpo. It's only recently its changed. Other night trunkers have been doing the same run every night. I'm getting bounced from pillar to post most nights, Yes it is having an affect on my PTSD.*
>
> *You didn't want the trunking because of the times. I can see if I can swop you to trunking if that would be better.*
>
> *I'll wait until you have spoken to HR and see what they say if that's ok? You did tell me that it would be the docks and Merthyr when we had the meeting.*
>
> *It's transport"* [Lewis] *"which constantly changes and on the whole it has been the docks with the odd times of doing something else. You are employed as a night driver and the work is always at night*
>
> *Can you please provide me with the POC details for the HR department as I would like to discuss the options that are available to me. I want to discuss what support can be provided to me as an employee e.g. reasonable adjustments.*
>
> *Can I call you?"*

62. At this point Ms Richardson telephoned Mr Davis. Ms Richardson explained that there was no HR department but that she would talk to

the Company's solicitor. There was a further exchange of text messages (180). Mr Davis wrote:

> *"I'm not happy with signing over my medical history to none medical personnel. I would be ok with an appointment with the company's occupational health doctor so that we discuss my long term medical conditions, then they can speak with my doctor about specific diagnosed issues."*

63. In the context of this case this is an important series of text messages. Understanding what was being said by the two and what was behind that, has considerable significance for the outcome.

64. The two were squaring up to each other. Whilst things had gone smoothly enough since the contract changes of September/October 2019 there were two issues behind the scenes. The first had been there since the contract changes and was well understood by both Ms Richardson and Mr Davis. That was the issue that Mr Davis could not attend for work, other than exceptionally and effectively with his agreement, before 2100. That rested on Mr Davis's domestic arrangements. The second was a new issue, introduced for the first time by Mr Davis in the text exchange. This was the effect *"not knowing what I'm doing at work from night to night"* was having on Mr Davis's PTSD.

65. Ms Richardson replied that she was going to take some advice from HR about Mr Davis's PTSD. It could be said that all Ms Richardson was doing was making a neutral comment with Mr Davis's welfare in mind. In the context of the text exchanges as a whole and of the circumstances the two were in, the Tribunal sees this differently. It was a thinly disguised threat. If Mr Davis was going to bring up the effects of his PTSD, Ms Richardson was going to seek advice. The unspoken threat was that this might affect Mr Davis's job. It seems that Mr Davis understood it that way and responded *"With regards to what".* Ms Richardson responded by expanding on what she had in mind (reinforcing the threat with the mention of *"options"*).

66. Mr Davis maintained his position and restated his case. Probably realising the exchange was not going in the direction she wanted, Ms Richardson then tried a conciliatory approach. Ms Richardson offered to try and put Mr Davis back on trunking. By this stage, however, it was too late. Mr Davis (who probably knew that the Company had no HR department) called Ms Richardson's bluff. Mr Davis's response to the conciliatory approach was that he wanted to wait until Ms Richardson had spoken to HR. He then reinforced that with a request to speak to HR himself. At that point. Ms Richardson was effectively forced to own up to there being no HR department as such.

67. From the evidence before us, this was the first time Mr Davis had put the spotlight on the effects PTSD had on him. It was a change of direction. Clearly something had happened or something had crystallised in Mr Davis's mind. For the first time the language of disability appeared, particularly *"reasonable adjustments"*.

68. Ms Richardson took advice and, on 22 January 2020, wrote to Mr Davis asking for his consent to obtaining a report on his PTSD and its effects from his GP (182-183). Mr Davis signed the consent form on 23 January 2020 (185).

69. Ms Richardson says she then wrote and posted the letter dated 4 February 2020 we see at 196-197 to Mr Davis's GP. The letter asked for a report on Mr Davis's PTSD and its effects and a number of pertinent questions. During the hearing, it was put to Ms Richardson that this letter had never been sent. This was on the basis that Mr Davis's GP had provided a letter on 23 October 2020 (375) addressed to "Whom it may concern" to the effect that Mr Davis's GP's practice had not received a request "from you" for a medical report. It would appear that what was being said was that the practice had never received Ms Richardson's letter. The allegation is, in effect, that Ms Richardson falsified the record. Although there are a number of other possibilities, we find the letter was sent. We do so because the letter was referred to in Mr Marr's appeal outcome letter dated 26 March 2020 (370-372). Mr Marr writes: *"Tracey then wrote to your GP on 4th February 2020".* Either Mr Marr had seen the letter or Ms Richardson had told him she had written it. Ms Richardson would have had no obvious reason to lie to Mr Marr.

70. It is Ms Richardson's evidence that, in January and February 2020, she had to address the consequences of a downturn in available container transportation work (WS27). Whether this was the case or not was the subject of considerable evidence and questioning during the hearing. For our purposes, we need not engage with this in detail. Broadly speaking, we find that there was cause for concern. The work collecting containers from Southampton declined, although by how much and for how long this continued are moot points.

71. Ms Richardson's route to address this was to look for savings in the Company's salary bill for drivers. Ms Richardson thought this best done by giving the night container collection work back to the day drivers. This, however, meant there was no work for a night driver on containers and it was that post, held by Mr Davis, that was identified as at risk of redundancy.

72. It is this that led to what Mr Marr referred to in evidence as the "unfortunate coincidence", that Mr Davis's post became at risk of

redundancy and Mr Davis was ultimately dismissed shortly after he raised the issues in the text exchange with Ms Richardson on 15 January 2020.

73. On 6 February 2020, three weeks after the text exchanges between Ms Richardson and Mr Davis on 15 January, Ms Richardson started the redundancy process off. Ms Richardson sent a text to Mr Davis (194): *"I have no work again tonight and it's unlikely I'll have any tomorrow. On Monday can you come in for a meeting at 17.00 so we can discuss what options we have regarding work please".* It is clear, from the text exchanges between the two that followed, that Mr Davis immediately understood that his job was on the line (195 and 201-202).

74. By arrangement, the meeting took place on 7 February 2020. No minutes were kept of this or any subsequent meeting that Ms Richardson and Mr Davis had on the subject. Following the meeting Mr Davis received the letter we see at 199-200. The letter was in the format that would be expected in a redundancy process. The letter confirmed that Mr Davis's role was at risk of redundancy. It continued:

> *"Given that you are also unable to vary your start time to 6pm, I am unable to allocate you any alternative duties.*
>
> *I have considered whether it is appropriate to pool your role with any others within the business. However, we consider your role to be genuinely stand alone. Given the distinct hours you work and the fact that you only deal with container work, the role is different to that of other drivers. You will have the chance to comment on this during the first consultation meeting."*

75. We pause here to record what ostensibly lay behind the pooling decision. Mr Davis had always maintained that he wanted to drive night shifts starting at 2100. As a result, Ms Richardson's apparent rationale was that there was no point pooling Mr Davis with any other night driver because they were more flexible on start times. There are several problems with this, some of which were explored extensively at the hearing. The biggest is that Mr Goodeve had gone on driving his trunking route with starts later than 2100. Although, at the time of the changes to the XPO contract in September 2019, Mr Goodeve was instructed by Ms Richardson to start at 1800, it seems that, if he ever did, it was only on a couple of occasions (Baldwin WS14 and see driver timesheets 225-288). If Ms Richardson did not know this, a cursory inspection of the driver time sheets would have revealed it. Mr Goodeve was not, by any means, the only problem with the pool. For example, another obvious possibility was to continue to do some

of the container work at night and pool all the container drivers. In any event, Ms Richardson's approach was to wait and see if Mr Davis had any suggestions about the pool. It is hard to avoid the conclusion that the pool was targeted not at the job, but at the man. Ms Richardson waited to see if Mr Davis came up with any objection to the pool and when he did not, left it at that.

76. The first consultation meeting took place on 12 February 2020. After the meeting Ms Richardson wrote to Mr Davis (219). The letter included: *"We discussed the company's view that your role self selects for redundancy rather than being considered as part of a pool. You confirmed that you believed it was a standalone role as you are unable to start at 6pm as the drivers who perform the night trunk work do. I also mentioned that there was a job available as a Class 1 Network day driver should you be interested in being considered for this role. You advised that this was not a feasible option for you."*

77. There was a further consultation meeting on 17 February 2020. Ms Richardson wrote to Mr Davis on the same day inviting him to a final meeting on 19 February 2020 (220).

78. Following the meeting on 19 February 2020, Ms Richardson wrote to Mr Davis on 21 February confirming his dismissal by reason of redundancy (223-224). This occurred some five weeks after the text message exchanges between Ms Richardson and Mr Davis on 15 January. Mr Davis was paid a statutory redundancy payment calculated as £2,100 together with pay in lieu of notice and outstanding holiday pay. Mr Davis was offered a right of appeal to Mr Marr. This letter and the other paperwork used by the Company in this process, covered the necessary formal ground and we assume was the product of advice.

79. It seems to us that Mr Davis had been largely passive during the meetings on 12, 17 and 21 February. Mr Davis's evidence is that he was more than passive (see, for example, WS19 and 21). We doubt that evidence. At the hearing it came across as post event self-serving.

80. Notwithstanding his passive behaviour in the process leading up to his dismissal, Mr Davis had mentioned to Ms Richardson that he intended to take some advice and he did so. Certainly, matters now moved apace. Mr Davis contacted ACAS for Early Conciliation on 22 February 2020 (348). On 24 February 2020 Mr Davis sent Mr Marr a letter of appeal (345-346). The letter should be referred to for its full content. In summary the grounds of appeal were that the pool of one was unfair and should have included all night drivers and that *"I have been discriminated against due to my medical diagnosis of Post*

Traumatic Stress Disorder and Depression" …. "I believe that I have been singled out due to asking for help with the stability of working patterns in times of distress, causing my symptoms to flare up" …. "I believe that m mental health condition has been the main influence for me to be singled out for redundancy."

81. The appeal hearing took place on 19 March 2020. Notes were taken (349-350). With Mr Marr's permission, the meeting was also recorded by Mr Davis. The transcript is at 351-360 and it is to that we turn (the date in the transcript is 2021; clearly it should be 2020). The selection pool was discussed, Mr Davis explaining and evidencing that, although an 1800 start was difficult for him, he was not wedded to 2100 and could do 1900-1930 starts. Mr Davis maintained his flexibility and expressed the view that he should have been pooled with the night drivers. There followed a lengthy discussion about the text and telephone exchanges between Mr Davis and Ms Richardson on 15 January 2020. This came to a head with this from Mr Davis:

> [Referring to the change to container work in the Autumn of 2019] *"I know it was outside the control of the company. But all I wanted from Tracy was, instead of being, you'll be in this truck tonight, you'll be in this one tonight, you'll be going here tonight, you'll be going there tonight, sorry that's cancelled, can you do this tonight, I wanted, like all the other night drivers, regular, exactly the same, same start time, same run, same people. That's all I wanted - exactly the same. And I feel because I brought up this, about it flaring up my PTSD, that's the reason why she came back and said "I need to consult HR about this." And then I had a phone call from Tracy, she said that she'd spoken to HR. HR had then said they wanted a full report on my medical history. So I said "okay, can I have a point of contact for HR". She said well we haven't got an HR department actually, it's a solicitor that I'm talking to, as you will know. Um, and you can't talk to him 'cos I'm talking to him. So I'm left on my own. So who am I supposed to talk to, apart from Tracy? So I agree to sign the medical forms, I have nothing to hide on my condition, I have nothing at all to hide. So I signed the medical request form and returned it back to Tracy as requested. So a week went by absolutely fine and then all of a sudden it was "There's no work tonight, we don't need you tonight." That carried on for the rest of the week until Thursday when I received a message from Tracy saying "I think you need to come in on Monday for a meeting and we need to chat about your job" which then led to this. Led to the meeting about redundancy. So, from the point of me saying that I need some help 'cos my PTSD is flaring up,*

asking for medical documentation, and then all of a sudden I'm the only person that is being pooled for redundancy - it's a very small timeframe."

82. Towards the end of the conversation Mr Marr asked Mr Davis what he wanted from the appeal. Mentioning the Early Conciliation, Mr Davis made it clear that he did not feel he could return to work but wanted compensation. This, we suspect, left Mr Marr in a difficult position.

83. In any event, Mr Marr expressed himself as not persuaded by Mr Davis's explanations of why he thought he should have been pooled with the night drivers and that he had been discriminated against. On 26 March 2020 Mr Marr wrote to Mr Davis rejecting Mr Davis's appeal (370-372). Mr Marr's conclusion was that Mr Davis had not been selected for redundancy as a result of his PTSD but, rather, because of the downturn in work. Mr Marr commented: *"…. My view is that Tracey has tried to support you in your role and attempted to identify how the company could support you within your role moving forward. That was entirely separate to the need for redundancies, and it is just unfortunate that the need for your redundancy was identified prior to the process being completed."*

84. As far as the pool was concerned, Mr Marr placed some reliance on the fact that Mr Davis had not opposed the pool of one during the process Mr Davis had gone through with Ms Richardson. Turning to the issue of start times, Mr Marr's conclusion was that Mr Davis's inability to start at 1800 was a problem. In short, the pool of one was a reasonable approach.

85. Mr Davis's relevant medical history since his dismissal is outlined in paragraphs 39-47 above. In essence, Mr Davis was signed off sick from 16 March until 9 December 2020. There was a break in the fit notes, but that appears to have been attributable to the Covid pandemic. Although there is an indication in Mr Pipe's update of 12 August 2020 (see paragraph 43 above) that Mr Davis was seeking alternative work, it appears he has not done so to the date of this hearing. Mr Davis explains that this is a result of the (WS35) *"upset caused by my dismissal and unlawful treatment by the Respondent".* Mr Davis says he has received a mixture of Employment and Support Allowance ("ESA"), Universal Credit ("UC") and Personal Independence Payment ("PIP"). On 8 May 2021 the Department of Work and Pensions ruled that Mr Davis may continue to receive UC without producing evidence of attempts to look for work (406-408).

APPLICABLE LAW

86. Section 94 of the ERA provides an employee with a right not to be unfairly dismissed by his or her employer.

87. Section 98 of the ERA, so far as it is relevant, provides:

> *"**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.*
>
> *(2) A reason falls within this subsection if it-"* ….
>
> *"(c) is that the employee was redundant,"*
>
> *"(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."*

88. The meaning of redundancy is set out in section 139 of the ERA. So far as it is relevant, that section provides:

> *"**139 Redundancy***
>
> *(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to-"* ….
>
> *"(a) the fact that his employer has ceased or intends to cease-*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*
>
> *(b) the fact that the requirements of that business-*

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

89. In applying the provisions of section 98(4) of the ERA to a dismissal by reason of redundancy, it has long been established that the following are expected:

- As much warning as possible
- Consultation on the method for achieving any necessary redundancies including the selection criteria
- The use of objective selection criteria
- The fair application of the selection criteria
- Consideration of alternatives.

90. Section 126 of the ERA provides:

*"**126 Acts which are both unfair dismissal and discrimination***

(1) This section applies where compensation falls to be awarded in respect of any act both under-

(a) the provisions of this Act relating to unfair dismissal, and

(b) the Equality Act 2010.

(2) An employment tribunal shall not award compensation under either of those Acts in respect of any loss or other matter which is or has been taken into account under the other by the tribunal or another employment tribunal in awarding compensation on the same or another complaint in respect of that act."

91. Section 4 of the EA, so far as it is relevant, provides:

*"**4 The protected characteristics***

The following characteristics are protected characteristics-" ….

"disability"

92. Section 6 of the EA, so far as it is relevant, provides:

*"**6 Disability***

(1) A person (P) has a disability if-

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

93. Section 13 of the EA, so far as it is relevant, provides:

*"**13 Direct discrimination***

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

94. Section 15 of the EA, so far as it is relevant, provides:

*"**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."

95. Sections 20 and 21 of the EA, so far as they are relevant, 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 others who are not so 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, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

96. Paragraph 20(1) of Schedule 8 to the EA, so far as it is relevant, provides as follows:

> ***"20 Lack of knowledge of disability, etc***
>
> *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know-" ….*
>
> *"(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."*

97. Section 27 of the EA, so far as it is relevant, provides as follows:

> *"**27 Victimisation***
>
> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because-*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act-" ….*
>
> *"(c) doing any other thing for the purposes of or in connection with this Act;*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*
>
> *(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation made, in bad faith."*

98. Section 39 of the EA, so far as it is relevant, provides as follows:

> *"**39 Employees and applicants***
>
> *"(2) An employer (A) must not discriminate against an employee of A's (B)-*
>
> *(a) as to B's terms of employment;*
>
> *(b) in the way A affords B access, or by not affording access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
>
> *(c) by dismissing B;*
>
> *(d) by subjecting B to any other detriment." ….*
>
> *"(4) An employer (A) must not victimise an employee of A's (B)-*

"(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer."

99. Section 119 of the EA, so far as it is relevant, provides:

*"**119 Remedies"** ….*

"(2) The county court has power to grant any remedy which could be granted by the High Court-

(a) in proceedings in tort;"

100. Section 124 of the EA, so far as it is relevant, provides:

*"**124 Remedies***

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may-

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate". ….

"(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119."

101. Section 136 of the EA, so far as it is relevant, provides:

*"**136 Burden of proof***

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

102. The Tribunal was referred to *Johnson v Nottinghamshire Combined Police Authority* [1973] WLR 358, *Aziz v Trinity Street Taxis Ltd* [1988] IRLR 204, *Devine v Designer Flowers Wholesale Florist Sundries Ltd* [1993] IRLR 517, *Dignity Funerals v Bruce* [2005] IRLR 189, *Wrexham Golf Co Ltd v Mr G R Ingham* UKEAT/0190/12, *Jennnings v Barts and The London NHS Trust* [2013] AER 184, *Joanne Lamb v The Garrard Academy* UKEAT/0042/18 and *Acetrip Ltd v Dogra* UKEAT/0238/18.

CONCLUSIONS

103. **Why did Ms Richardson dismiss Mr Davis?**

104. Mr Davis summed up the core of his case on this issue at the appeal hearing with Mr Marr on 19 March 2020 (see paragraph 81 above). The key to several of the claims is why did Ms Richardson put Mr Davis at risk of redundancy, place him in a selection pool of one, select him for redundancy and then dismiss him.

105. We have found that there was a downturn in container work (paragraphs 70-71 above). In our view, Ms Richardson was concerned to address that.

106. However, we do not agree with Mr Marr's view, that Ms Richardson putting Mr Davis at risk of redundancy, placing him in a selection pool of one, selecting him for redundancy and dismissing him, so soon after the text exchanges on 15 January 2020, was an unfortunate coincidence. Standing back and looking at the picture as a whole, our view of what happened is this.

107. Mr Davis's relative inflexibility on start times had been in the background for many years. However, whilst Mr Davis was running the XPO night route, mostly to Crick, this had not been a problem. It became a problem when the XPO contract changes came into effect in September 2019. In fact, Ms Richardson had two drivers with start time problems as a result of this. One was Mr Davis and the other Mr Goodeve. As Ms Richardson saw things in September 2019, she was able to instruct Mr Goodeve to start at 1800 (notwithstanding that, in practice, he either never did or only did so on a few occasions at the start). That left Mr Davis, who Ms Richardson knew would not start at 1800 on a regular basis. Ms Richardson, having consulted the

affected drivers, therefore transferred Mr Davis to night work on the containers coming out of Southampton, starting around 2100. In the event, Mr Davis made some considerably earlier starts (and accommodated changes to the routes he worked). However, Mr Davis several times protested against the early start times.

108. We then come to the text exchanges on 15 January 2020. Our findings about these are at paragraphs 61-67 above. In no sense do we see this as a neutral exchange on either side. Probably already fed up with Mr Davis's inflexibility on start times, Ms Richardson now had Mr Davis complaining about the flexibility he was required to show on routing. In context it is clear to us that Ms Richardson's response, that she would have to take some advice from HR regarding Mr Davis's PTSD, was a threat. In essence "If you persist in complaining. I am going to have to speak to HR about my options." "My options" was a threat of unwelcome consequences for Mr Davis. To be fair to Ms Richardson she later backtracked by offering to explore trunking for Mr Davis. However, Mr Davis, no doubt sensing weakness, pressed the case for speaking to "HR". "HR", of course, did not exist as such.

109. In our view, Ms Richardson "lost" this exchange and that no doubt rankled. There was, however, a convenient solution to the inflexibility on start times and routing changes, which solution would also alleviate any pique Ms Richardson felt about the text exchanges on 15 January. There was a downturn in work, savings had to be made and that saving could be Mr Davis's salary. From the text message exchanges on 15 January 2020 until Mr Davis's dismissal on 19 February, barely five weeks elapsed.

110. In summary, our finding is that the reason Ms Richardson dismissed Mr Davis was that she was no longer going to put up with his inflexibility on start times nor was she going to accommodate his new inflexibility on routing. This had come to a head in the exchanges on 15 January, which had resulted in a tactical "win" for Mr Davis, probably causing some irritation on Ms Richardson's part.

111. To achieve the objective, Ms Richardson started a "redundancy" process that was targeted at Mr Davis's dismissal.

112. We make these findings as findings of primary fact on the balance of probabilities. If more is needed, for the discrimination claims we can turn to the applicable burden of proof provisions. The text message exchanges on 15 January 2020, looked at as a whole, together with the short period from that date to the commencement of the "redundancy" procedure and the way in which that procedure was conducted are facts from which we could decide, in the absence of

any other explanation, that the Company contravened provisions of the EA 2010 (these are discussed below). The burden then shifts to the Company to show that it did not contravene the provisions. The Company has not done so.

113. We turn now to the individual claims.

114. **The discrimination claims**

115. **Direct discrimination**

116. It is not in dispute that putting Mr Davis at risk of redundancy, placing him in a selection pool of one, selecting him for redundancy and dismissing him, all potentially fall within section 39 of the EA. Subsections 39(2)(c) and (d) are in point, covering dismissal and any other detriment.

117. The question is, did this amount to the Company treating Mr Davis less favourably than it treats or would treat others? To answer this question a comparator is invariably used. Mr Davis puts forward Mr Goodeve as a comparator. Like Mr Davis, Mr Goodeve wanted to start his routes late in the evening. Mr Goodeve did not have Mr Davis's disability. Mr Goodeve was not subjected to any of the treatment mentioned above. However, whilst it is instructive to compare the treatment of Mr Goodeve with that of Mr Davis, we do not think Mr Goodeve is a safe comparator. There are a number of reasons for this. First, Mr Goodeve was still working trunking routes at the time Mr Davis was subjected to the treatment in question, whilst Mr Davis had been redeployed to the Southampton container work. Second, there is no evidence that, if required, Mr Goodeve could not be flexible on routing.

118. A hypothetical comparator is a better choice. This would be someone in circumstances not materially different from those of Mr Davis but without his disability. In particular, the comparator would share Mr Davis's inflexibility on starting times and routing. On our primary findings of fact, we have no doubt that such a person would have been subjected to exactly the same treatment as Mr Davis. Ms Richardson did not treat Mr Davis as she did because of his protected characteristic of disability but because she was not going to put up with his lack of flexibility anymore. Putting this into the context of the burden of proof set out in section 136 EA, there are no facts from which we could decide, in the absence of any other explanation, that Ms Richardson subjected Mr Davis to unfavourable treatment because of his PTSD.

119. The claim of direct discrimination by reference to section 13 EA is, therefore, dismissed.

120. **Discrimination arising from disability**

121. Again, putting Mr Davis at risk of redundancy, placing him in a selection pool of one, selecting him for redundancy and dismissing him, all potentially fall within section 39 of the EA. Subsections 39(2)(c) and (d) are in point, covering dismissal and any other detriment.

122. Did the Company not know and could it not reasonably have been expected to know that Mr Davis had the disability?

123. The focus here is on whether or not the Company knew of the disability and not whether or not it knew that the disability caused the "something arising in consequence" of the disability. On the evidence, the Company knew that Mr Davis had PTSD no later than 14 September 2017, when Mr Davis mentioned it in a text message (see paragraph 54 above). We also know that Mr Davis mentioned PTSD on 15 January 2020 in his exchange of text messages with Ms Richardson. (In fact, on that occasion, Mr Davis also mentioned the "something arising". Mr Davis's messages included: *I'm getting bounced from pillar to post most nights, Yes it is having an affect on my PTSD."*) In short, the Company knew of Mr Davis's disability.

124. Was there unfavourable treatment?

125. Unfavourable treatment is widely construed and all of the acts complained of (see paragraph 121 above), singly and together, amount to unfavourable treatment.

126. Was there something that arose in consequence of Mr Davis's disability?

127. On 15 January 2020, Mr Davis complained about the effect that route changes were having on his PTSD. Was that effect something arising in consequence of Mr Davis's disability? To put it another way, was it a result of Mr Davis's PTSD or a result of his personal preference for a regular route? Here, there is evidence pointing in both directions. On the facts, from the time Mr Davis started night container work in September 2019 through until 15 January 2020, he appears to have made no complaint about the route changes he accommodated. However, when we turn to the medical evidence, Dr Grewal's opinion was clear enough (see paragraph 47 above): *"Mr Davis' symptoms of PTSD may be triggered or deteriorated by a range of factors. These include"* …. *"sudden or repeated changes to*

his normal routines, whether at home or work (e.g. unexpected visit outside the home, frequent change of workplace routine).”

128. We suspect that both Mr Davis’s personal preference and the effect it had on his PTSD were in play. However, Dr Grewal’s opinion is sufficient to establish the connection. If needed, there are other pointers in Mr Davis’s medical record (see, for example, paragraph 32 above). Our conclusion is that Mr Davis’s symptoms of PTSD were adversely affected by route changes in his working schedule. This was something arising in consequence of Mr Davis’s disability.

129. Was the unfavourable treatment caused by Mr Davis’s inflexibility over route changes?

130. On our findings, there were two main factors that caused Ms Richardson to dismiss Mr Davis. There was probably also a level of pique overlaying these. Of the main factors, one was Mr Davis’s inflexibility on start times. Whilst there is evidence that Mr Davis preferred the night shift because it helped minimise the effects of his PTSD, there is no evidence that starting later than 1800 had the same effect. The evidence points squarely to the opposite conclusion, that Mr Davis’s inflexibility over start times was a matter of domestic convenience. This was not something that arose in consequence of Mr Davis’s disability. If this was the only factor in play, Mr Davis’s claim of discrimination arising from disability would fail because it would be a non-discriminatory factor.

131. However, we have identified a second factor that caused Ms Richardson to act as she did. That is Mr Davis’s inflexibility as far as route changes were concerned. As explained above, that was something arising in consequence of Mr Davis’s disability. Although the “something arising” was only one of two causes of Ms Richardson’s actions, that is sufficient for the purposes of section 15 EA. It operated on Ms Richardson’s mind to a significant extent.

132. Can the Company show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

133. Even though the Company did not apply itself to the issue at the time, it may, after the event, avail itself of the statutory defence in section 15 EA that the treatment was a proportionate means of achieving a legitimate aim. The test is an objective one for the Tribunal and involves weighing the justification against the discriminatory impact.

134. The justification or legitimate aim put forward here is to match workload and resource, thus saving unnecessary cost through

redundancy. There are other ways of expressing the legitimate aim but that is the essence of it. There are arguments about whether or not the objective of cost reduction can ever amount to a legitimate aim, but for our purposes we will assume it can.

135. In no sense, however, can what happened be seen as a proportionate means of achieving that legitimate aim. If that had been an aim, it was conflated with the entirely different objective of dismissing Mr Davis. There may have been a real need to reduce driver numbers, but it was wholly inappropriate to achieve that through a targeted dismissal. Nor was it necessary. A neutral and non-discriminatory redundancy process would have been the appropriate way to achieve any legitimate aim.

136. Therefore, Mr Davis was unfavourably treated as set out in paragraph 121 above, to a significant extent, because of his inflexibility on routing, that being something that arose in consequence of his PTSD. The Company has not shown that the treatment was a proportionate means of achieving a legitimate aim and Mr Davis succeeds in his claim of discrimination arising from disability.

137. **Duty to make adjustments**

138. The duty to make reasonable adjustments does not arise if the employer does not know, and could not reasonably be expected to know that the disabled person in question has a disability and is likely to be placed at the identified disadvantage. The knowledge test is different from the test we have considered above in relation to discrimination arising from disability because it includes a requirement that the employer knows that it is likely that the disabled person will be placed at the identified disadvantage.

139. In this case the CMS identifies the disadvantage as Mr Davis's difficulty in changing journeys at short or no notice. It is what we have identified as the requirement to be flexible on routing.

140. As we found above in considering the claim of discrimination arising from disability, the Company had known of Mr Davis's disability since 14 September 2017. What, however, it did not know, until Mr Davis told Ms Richardson it was the case on 15 January 2020, is that the effects of Mr Davis's PTSD caused the disadvantage. As far as we can see, 15 January 2020 was the first time Mr Davis linked his preference for predictable routing to his PTSD. Nor, in our view, could the Company have reasonably been expected to know this. Whilst it could be argued that the Company had failed to make reasonable enquiries about the possible effects of PTSD when Mr Davis had

brought his PTSD to their attention in 2017, there is no absolute duty on an employer to commission an occupational health report in such circumstances, especially where an employee mostly appears to be managing his job without difficulty. When Mr Davis raised the disadvantage with Ms Richardson on 15 January 2020, she immediately put arrangements in hand to obtain a suitable report.

141. In our view the Company did not know and could not reasonably be expected to know that Mr Davis was likely to be placed at the disadvantage in question until 15 January 2020. At that point the duty to consider what steps it was reasonable to take to avoid the disadvantage was probably engaged. We do not think it right to go further in determining that issue, however. Mr Davis's dismissal within five weeks of the matter first being raised overtook any further development on that front. In any event, if the duty was engaged, the Company had taken the first step to addressing it by promptly requesting a medical report.

142. The claim of a failure to make adjustments is dismissed.

143. **Victimisation**

144. Putting Mr Davis at risk of redundancy, placing him in a selection pool of one, selecting him for redundancy and dismissing him, all potentially fall within section 39 of the EA. Subsections 39(2)(c) and (d) are in point, covering dismissal and any other detriment.

145. Was there a protected act?

146. Mr Davis relies upon the content of his text messages to Ms Richardson on 15 January 2020 as "doing any other thing for the purposes of or in connection with" the EA, within the meaning of section 27(2)(c) of the EA (see paragraph 61 above).

147. In her written submissions Ms Gilbert argues this. "These texts were all part of a single "conversation". Within those texts C set out his disability, its effects, and asked for reasonable adjustments. C was in effect informing R that it was under a duty to make reasonable adjustments and asking R to do so. That was plainly an act for the purposes of or in connection with the EA 2010, and therefore amounts to a protected act."

148. The Tribunal agrees with that submission. There was a protected act.

149. Did the Company subject Mr Davis to the detrimental treatment (see paragraph 144 above) because Mr Davis had done the protected act?

150. The test to be applied in answering this question does not require that the sole reason for the detrimental treatment be the doing of the protected act. It is sufficient that the doing of the protected act was a significant factor in the detrimental treatment.

151. On our findings Ms Richardson subjected Mr Davis to the detrimental treatment because she was no longer going to put up with either his inflexibility on start times or his new inflexibility on routing. In addition, there was probably an element of pique about the exchanges on 15 January 2020, including, of course, the protected act.

152. It could be said that what primarily motivated Ms Richardson to subject Mr Davis to the detrimental treatment was not the doing of the protected act itself. However, one of the two main reasons Ms Richardson acted as she did was Mr Davis's inflexibility on routing. That was so inextricably linked with the protected act in the text message exchanges on 15 January 2020 as to amount to one and the same thing. When this is added to the probable element of pique about the text exchanges, including the protected act, we conclude that the protected act was a significant factor in the detrimental treatment.

153. The Company does not argue that the protected act was false or in bad faith and does not rely on section 109 of the EA.

154. Therefore, Mr Davis was victimised because the protected act was a significant factor in the detrimental treatment to which he was subjected.

155. **The unfair dismissal claim**

156. It is for the Company to show a permissible reason for the dismissal and it puts forward redundancy.

157. Our conclusions on the reasons why Mr Davis was dismissed are summarised in paragraph 110 above.

158. The Company has not shown that the reason for the dismissal was redundancy. Rather, the Tribunal's conclusions on the discrimination claims above lead to the inevitable conclusion that the dismissal was targeted and tainted by discrimination. Part of the reason for the dismissal was something arising in consequence of Mr Davis's disability (inflexibility on route changes) and Mr Davis's dismissal was an act of victimisation.

159. In the absence of a permissible reason for the dismissal, the dismissal was unfair.

160. The Tribunal does not consider it proportionate to conduct a step-by-step examination of the fairness of the dismissal should it be wrong about its conclusions on discrimination and the reason for dismissal. However, the Tribunal has made findings of fact on the dismissal process to support its conclusions as far as discrimination is concerned. It will be apparent from those conclusions that, absent any finding of discrimination, the dismissal would have been unfair because it was not only targeted at Mr Davis, disability or no disability but implemented by unfair means.

161. **Remedy**

162. Discrimination

163. *Declaration*

164. Declarations are made.

165. *Recommendation*

166. There is no appropriate recommendation to be made. However, as the Tribunal pointed out to Mr Marr at the hearing, the Company is required by the ERA to provide written particulars of employment to all its employees and there appears to be a glaring need for its managers to receive some equality and diversity training.

167. *Injury to feelings*

168. An award made in this respect is to compensate for anger, distress and upset caused to the claimant by the unlawful discrimination they have been subjected to. It is not a punitive award. The focus is on the injury caused to the claimant. It is awarded in bands. The upper band for the most serious cases is £27,400 - £46,500, the middle band for cases that do not merit an award in the upper band is £9,100 - £27,400 and the lower band for less serious cases is £900 - £9,100.

169. In this instance there is contemporaneous medical evidence to assist in assessing the extent of the injury to feelings suffered (see paragraphs 39-44 above). Mr Davis was dismissed on 19 February 2020 and saw his doctor on 25 February. Whilst not specifically attributed to Mr Davis's dismissal, it is clear that he was feeling depressed, was not coping well, reported intermittent thoughts of self-harm (although he did not intend to act on them) and found the prospect of looking for a job terrifying and was tearful. Nearly two months later, on 15 April, Mr Davis saw his doctor again. Although Mr Davis remained signed off, the notes record no apparent risk of suicide. Although Mr Davis was feeling fragile, he was much improved and described himself as stable.

170. We see here evidence of a short period of considerable anger, distress and upset, which quickly righted itself.

171. In our view, an award at the top end of the lower band is appropriate and we put this at £8,000. Interest is payable on this award calculated as follows:

> Days between 19 February 2020 (that being taken as the day of the discriminatory act) and 20 January 2022 (the day of calculation): 701
>
> Interest rate: 8%
>
> 701 (days) x 0.08 x 1/365 x £8,000 = £1,229.15

172. *Financial losses*

173. Here we are concerned with putting Mr Davis in the same financial position, as far as it is reasonable, as he would have been in, had he not been discriminated against. We must try to assess what would have happened had the discrimination not taken place. In making this assessment we see two primary factors.

174. First, we need to form a view on the part Mr Davis's medical diagnosis of PTSD and depressive episodes played. We can do this by comparing the position before and after the discriminatory treatment. As we have noted above, there is evidence of a period of two months or so following Mr Davis's dismissal during which he was considerably angry, distressed and upset. Once that had passed, it seems to us that Mr Davis's medical condition was broadly the same as it had been before the discriminatory treatment. Mr Davis has had to contend with the effects of PTSD for many years and they seem to ebb and flow in terms of their severity.

175. However, there was one obvious change. Before the discriminatory treatment Mr Davis was not signed off work, whilst afterwards he was. The plain facts are these. After his dismissal, Mr Davis pretty well remained signed off until 9 December 2020. On 8 May 2021 the Department of Work and Pensions ruled that Mr Davis may continue to receive UC without producing evidence of attempts to look for work (406-408). It would seem that Mr Davis has not been fit for work from his dismissal through to the date of the hearing and that is likely to continue to be the case, so far as we can see, for some time to come.

176. The reasons for Mr Davis's unfitness for work are the effects that the PTSD and depressive episodes had and continue to have on him. When we ask the question, were those effects caused to a material extent by the discriminatory treatment (the dismissal in particular) or

by the pre-existing condition, the answer is dependent on the time period we are considering.

177. As we have recorded, the medical evidence seems to show that, to a material extent, the dismissal caused Mr Davis's unfitness for work for a period of around two months after his dismissal. Thereafter Mr Davis's condition appears to have stabilised and returned to its pre-dismissal state. In short, the discriminatory treatment caused Mr Davis to be signed off from work for around two months but not thereafter. However, in terms of causation, we think it unsafe to limit the initial period to the two months. Rather, it should be limited to the period Mr Davis remained signed off. That is until 9 December 2020. At that point, we think that the arguable case for a causative link between the dismissal and Mr Davis's unfitness for work is exhausted.

178. We can test this by turning to the second factor. This is the wider question of what would have happened to the employment relationship had Mr Davis not been dismissed. Looking at this in broad terms, the employment relationship had been more or less successful for four and a half years, up until September 2019, because it had rested on a regular night shift starting well after 1800. That was a function of the contract the Company had with XPO. When that changed in September 2019, there was only one route left that fitted Mr Davis's particular domestic requirements and, potentially, the adjustments Mr Davis might have been entitled to in respect of his disability. That route was the run for XPO being driven by Mr Goodeve.

179. We understand that Mr Goodeve still drives that route. Assuming Mr Davis had been assigned that route, would his employment have continued indefinitely? We think not for two reasons. First, Mr Davis's job was increasingly being boxed into a corner by contractual changes and his own requirements. At some point those requirements would have become impossible to meet and the employment relationship would have ended. The time period involved is not easy to quantify but we think it would have been around nine months. However, we see the argument is finely balanced. If Mr Davis had been assigned to Mr Goodeve's route and it is still being driven, why would Mr Davis not still be driving it? For the second, more easily quantifiable and more persuasive reason we return to the medical background. It appears that there must have been some change in the effects Mr Davis's disability was having on him. After Mr Davis's certified period of unfitness for work ended on 9 December 2020, it seems he remained unable to seek work. As we have explained, the medical evidence does not support the reason for this as being the dismissal. That being the case it seems to us that, at

some stage, Mr Davis would have been signed off as unfit for work more or less indefinitely because of his long standing diagnosis of PTSD and depressive episodes.

180. Putting these factors together, our conclusion is that Mr Davis can be put in the position he would have been in, as far as it is reasonable, had he not been discriminated against, if he is compensated for financial losses from dismissal on 19 February 2020 until 9 December 2020. That is a period of forty weeks.

181. Compensation for loss of earnings is awarded for forty weeks. Mr Davis's net weekly pay was £466 to which must be added £18.46 in respect of pension (total: £484.46). The calculation is:

> 40 weeks x £484.46 = £19,378.84
>
> In that period Mr Davis received UC, ESA and PIP totalling £9,463.68. Mr Davis also received pay in lieu of notice of £1,864.
>
> Once those sums are deducted the net compensation award for loss of earnings is £8,051.16.

182. Interest is payable on this award calculated as follows:

> Days between 19 February 2020 (that being taken as the day of the discriminatory act) and 20 January 2022 (the day of calculation) divided by 2 to find the mid-point: 350
>
> Interest rate: 8%
>
> 350 (days) x 0.08 x 1/365 x £8,051.16 = £617.62.

183. *Section 38 Employment Act 2002*

184. The Company concedes that Mr Davis is entitled to an award under this provision. The Company argues for the minimum award of two weeks' pay, whilst Mr Davis says that it is just and equitable to award four weeks' pay. This is a case in which an award of the higher amount of four weeks' pay is appropriate. Mr Davis had several years' service and the Company offers no good reason why he was not provided with a written statement of his employment particulars. Mr Davis's gross week's pay was £615.38. This is capped at £525 for these purposes. The calculation is:

> £525 x 4 = £2,100

185. Unfair dismissal

186. Mr Davis does not seek reinstatement or reengagement.

187. *Basic award*

188. The basic award is agreed by the parties at £2,625 (5 x £525). The "redundancy payment" of £2,100 will not be deducted from this, there being no genuine redundancy. £2,625 is awarded.

189. *Financial losses*

190. The calculation for compensation for loss of earnings is the same as the calculation for compensation for financial losses in respect of the discrimination. No further award is made to avoid double counting.

191. *Loss of statutory rights*

192. Compensation for loss of statutory rights is awarded in the sum of £400.

Employment Judge Matthews
Date: 20 January 2022

Judgment & reasons sent to parties: 21 January 2022

FOR THE TRIBUNAL OFFICE