



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104530/2022

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Held in Glasgow on 24 – 27 January 2023

Employment Judge S MacLean
Tribunal Members I Ashraf and J McCaig

10 Mr R Caven

Claimant
Represented by:
Mr C Maclean -
Solicitor

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Caledonian MacBrayne Crewing (Guernsey) Limited

Respondent
Represented by:
Ms G Watson -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims are dismissed.

REASONS

25 Introduction

The claim and the response

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1. The claimant sent his claim form to the Tribunal's office on 16 August 2022. The claimant complains that he was discriminated against on the grounds of disability under section 21, section 26 and section 15 of the Equality Act 2010 (the EqA).

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2. The claimant says that he is a disabled person. He avers that the respondent applied provision, criterion or practice (PCPs) which put him at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and the respondent did not take such steps that were reasonable to avoid the disadvantage. The claimant also says that the

respondent's conduct relating to disability created a hostile and intimidating workplace. The claimant says that he was forced to resign because the respondent did not manage this situation properly. This was unfavourable treatment which was because of something arising in consequence of his disability. The claimant alleges that he suffered personal injury arising from the discrimination.

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3. The claimant also complains that he was constructively unfairly dismissed in terms of section 95 (1)(c) of the Employment Rights Act 1996. He avers that the respondent's failure to deal with the flexible working request, taking over nine months to produce an unsatisfactory conclusion which offered no support to him, was a repudiatory breach of the implied term of trust and confidence. Alternatively, the claimant says that the failure to grant his flexible working request was the final straw following a series of cumulative breaches including the continued failure of the respondent to appropriately deal with his request and concerns in respect of his working hours, rejecting his initial flexible working request and ignoring his appeal, failing to refer him to occupational health, failing to support him with his mental health, breach of confidentiality and taking an inordinate amount of time to address his whole flexible working request.

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4. The respondent denies that the treatment of the claimant including its handling of the flexible working request amounted to a breach of any express or implied terms of the claimant's contract of employment. If there was any breach then it was not sufficiently serious as to constitute a repudiatory breach giving rise to entitlement to treat the contract as terminated with immediate effect. The respondent denies discriminating against the claimant as alleged. It denies that it failed to make reasonable adjustments; that the claimant was subject to harassment or that the claimant was discriminated against because of something arising in consequence of his disability. The respondent raises issues in relation to time bar.

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The final hearing

5. The final hearing was conducted in person. It was previously agreed that the final hearing would determine liability only and that remedy would be reserved.
- 5 6. The Tribunal was advised that the respondent conceded that the claimant was a disabled person by reason of depression. The respondent noted that the claimant's disability impact statement made reference to being disabled by reason of anxiety, fatigue and stress. The respondent did not accept that those conditions amounted to disabilities within the meaning of the EqA. The
10 respondent did not consider that the medical records produced adequately demonstrated that the claimant had been diagnosed with these impairments. The respondent contended that stress and fatigue in particular were symptoms rather than impairments in themselves.
7. Witnesses gave their evidence orally. The claimant gave his evidence on his
15 own account. His wife, Sarah Jane Caven, gave evidence on his behalf. For the respondent, the Tribunal heard evidence from Andrew Gray, planning and resource manager (formerly crew resources officer), Brigit Hume, HR business partner, and Dario Spadavecchia, marine manager.
8. The Tribunal was also referred to a joint set of file of documents.
- 20 9. The Tribunal has set out facts as found that are essential to the Tribunal's reasons or to an understanding of important parts of the evidence. The Tribunal carefully considered the submissions during its deliberations and has dealt with the points made in submissions whilst setting out the facts, the law and the application of the law to those facts. It should not be taken that a
25 point was overlooked, or facts ignored, because the facts or submissions is not part of the reasons in the way it was presented to the Tribunal by a party.

The issues

10. The parties prepared a joint list of issues. The Tribunal agreed with the list of issues but has set out below the questions in the order that the Tribunal
30 consider them when deliberating:

Failure to make reasonable adjustments

11. Did the respondent apply a PCP to the claimant? The alleged PCPs relied upon by the claimant are:
- 5 i. a requirement for the claimant to work in several locations, on a number of shift patterns at short notice; and
 - ii. having a practice of failing to approve flexible working requests.
12. If so, did the claimant suffer a substantial disadvantage because of the PCP? The claimant says that the requirement for him to work in several locations, on a number of shift patterns at short notice caused him stress and negatively affected his mental health causing him to have periods of sick absence. He
10 says that the practice of rejecting flexible working requests meant that he was struggling with his current work pattern which worsened his mental health
13. If so, did the respondent know or could reasonably have been expected to know that the claimant was disabled or that the claimant would be placed at a substantial disadvantage?
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14. If so, would any of the following adjustments have reduced or removed the substantial disadvantage to the claimant:
- i. carrying out a risk assessment;
 - ii. referring the claimant to occupational health; and
 - 20 iii. implementing changes to the claimant's working pattern to alleviate the disadvantage by either granting his flexible working request or otherwise agreeing changes to his working patterns in consultation with the claimant.
15. Would any such adjustments have been reasonable in the circumstances?
- 25 16. If so, did the respondent make such adjustments as were reasonable to avoid the disadvantage?

Harassment

17. Was the claimant subjected to unwanted conduct? The alleged unwanted conduct relied upon by the claimant is Mr Spadavecchia's conduct towards the claimant in his email sent on 28 January 2022 and a subsequent telephone conversation.
18. If so, is that conduct related to disability?
19. If so, has that conduct had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
20. If so, is it reasonable for the conduct to have that effect?

Discrimination arising from disability

21. Was there something arising in consequence of the claimant's disability? The claimant relies on his difficulty in working shift patterns and changing locations as something arising in consequence of his disability.
22. Was the claimant subject to unfavourable treatment? The claimant relies on his alleged constructive dismissal as unfavourable treatment.
23. If the alleged treatment is found to have occurred as a matter of fact and was unfavourable, was the reason for any such unfavourable treatment because of something arise in consequence of the claimant having difficulty in working shift patterns and changing locations?
24. If so, did the respondent know or could reasonably have been expected to know that the claimant was disabled?
25. If so, can the respondent show that the treatment was nonetheless justified as a proportionate means of achieving a legitimate aim and if so, what?

Relevant law*Reasonable adjustments*

26. Section 20 of the EqA provides:

- “(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.
- 5 (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
10 the disadvantage.”
27. Under the EHRC Code, there are a number of factors which might be taken into account in deciding what are reasonable steps for an employer to have to take. The Code states that ultimately the test of reasonableness in any step an employer may have to take is an objective one and will depend on the
15 circumstances of the case. Guidance is set out on what should be taken into account when determining whether an adjustment was reasonable, specifically:
- i. The extent to which the adjustment would have ameliorated the disadvantage;
 - 20 ii. The extent to which the adjustment was practicable;
 - iii. The financial and other costs of making the adjustment and the extent to which the step would have disrupted the employer's activities;
 - iv. The financial and other resources available to the employer;
 - v. The availability of external, financial or other assistance;
 - 25 vi. The nature of the employer's activities and the size of the undertaking.

Harassment

28. Section 26(1) EqA provides:

“A person (A) harasses another (B) if - (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”

5 *Constructive unfair dismissal*

29. Did the respondent commit a fundamental breach of the implied term of trust and confidence sufficient to entitle the claimant to resign in response to it? The claimant relies on the following alleged breaches:

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- i. failure to adequately deal with the claimant's flexible working request;
 - ii. taking over nine months to produce a conclusion;
 - iii. producing an unsatisfactory conclusion which offered no support to the claimant.

15 30. Was the alleged breach sufficiently serious to justify the claimant resigning from their employment?

31. If so, did the claimant accept the breach and resign in response to it?

32. If so, did the claimant delay too long before resigning in response to the alleged breach?

20 33. Alternatively, was the outcome of the claimant's flexible working request the “last straw” in an alleged series of cumulative breaches namely:

- i. continued failure to appropriately deal with the claimant's requests and concerns in relation to his working hours;
- ii. rejecting his initial working request and ignoring his appeal;
- iii. failing to refer him to occupational health;

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- iv. failing to support him with his mental health;
- v. breaching his confidentiality; and

- vi. taking an inordinate amount of time to address his flexible working request.

34. With regard to the alleged acts set out at paragraph 30 above:

- i. did each of the acts occur as alleged by the claimant;
- 5 ii. to the extent that they did, do these acts represent a series of breaches of contract of the course of conduct by the respondent which led to the implied duty of trust and confidence;
- 10 iii. was the claimant entitled to treat the outcome of his flexible working request as a last straw which entitled the claimant to resign on 21 March 2022; and
- iv. if so, did the claimant accept the alleged breach and resign in response to it.

35. If the claimant was constructively dismissed, was a dismissal fair and reasonable in all the circumstances?

15 *Discrimination arising from disability*

36. Section 15(1) of the EqA provides:

20 “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.”

Time bar

37. Section 123 (1) of the EqA provides:

25 “Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. “

38. For the purposes of this section (a) conduct extending over a period is to be treated as done at the end of the period.

Constructive dismissal

39. Section 95(1)(c) of the ERA 1996 provides:

5 For the purposes of this Part an employee is dismissed by his employer if 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."

10 40. *Western Excavating (ECC) Ltd -v- Sharp* [1978] ICR 221 established that the test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of contract of employment.

15 41. *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606 confirmed it is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between an employer and employee, and that the test of whether there has been a breach of the implied term of trust and confidence is an objective one.

20 42. *Lewis v Motorworld Garages Ltd* [1986] ICR 157 confirmed that the breach of the implied term of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so (the 'last straw' doctrine).

Background

People involved in the claims

25 43. The respondent is a limited company operating a number of ferry services throughout Scotland. The respondent has two fleets: major vessels and small ferries. Small ferries are double ended with no crew accommodation. The respondent has about 15 small ferries whose journeys last between three and

40 minutes. Small ferries usually have a crew of three people including a skipper and a motorman.

44. There were approximately 20 motormen in the small ferry pool. The purpose of the pool was to cover sickness, annual leave and vessel movements and maintenance. Motormen's duties include regular checks of engine spaces and planned maintenance. They are heavily involved when the vessel is having its maintenance overhaul.
45. The respondent employed the claimant from 18 April 2012 as a motorman. He was part of the small ferry relief pool. It was a requirement of the claimant's role that he could be deployed to work on any vessels within the small ferry fleet on which he was inducted. The claimant was inducted to work on approximately 12 of the 15 vessels in the small ferry pool. It was also a requirement of the claimant's role that he worked a "seven day on, seven day off" shift pattern: work for seven consecutive days, followed by seven days' rest. The seven days would run from a Wednesday to through to the following Tuesday.
46. Andrew Gray, crew resources officer was responsible for the small ferry fleet and approximately 200 crew members most of whom worked at a permanent location. The employees in the small ferry pool worked a roster of seven days on and seven days off, Wednesday to Tuesday. Mr Gray would plan ahead ensuring that leave periods for the year were covered along with any scheduled sick absence. He would then allocate employees in the small ferry pool to the roster generally on a Thursday and Friday where they would be working the following week. This was sometimes subject to change at the last minute if there were unexpected breakdowns or unexpected absence.
47. While on vessels, the motorman reports to the skipper for day to day line management. Matters relating to sickness and welfare are dealt with by the marine manager of the vessel on which the motorman is working.
48. Dario Spadavecchia is a marine manager reporting to Mark Thomson, head of marine. Marine managers have responsibility for a number of vessels.

They are not involved in the technical aspects of the vessels as this is the responsibility of the technical supervisors.

49. Marine managers have the support of HR business partners of whom there are four including Brigit Hume. HR business partners support different areas of the business. Ms Hume had responsibility for the relief crew and several ports including head office in the Clyde area.

Absent management policy

50. The respondent has an absence management policy and procedure which sets out the requirement for an employee to explain why they are unable to report for work and how long they anticipate the absence will last. If an employee has been absent for eight days or more, before returning to work, they must obtain a final sick line from their general practitioner (GP) and give the crew resources department at least one day's notice of their return. The employee will attend a return to work interview with the relevant line manager.

51. Employees who have been absent for 30 days or more must also attend the company doctor or their relevant MCA approved doctor before returning to work.

52. Employees may be referred to the company doctor at any stage of the procedure or they may be asked to give their consent for the respondent contacting their GP in order to obtain a report. A referral to the company doctor and/or obtaining a report from the employee's GP or specialist may be arranged for various reasons including assessing if the doctor can give any advice about making reasonable adjustments to the employee's workplace and/or duties to enable the employee to return to work. Employees are advised that if they refuse to give the respondent consent to contact their GP or specialist and/or refuse to attend a company doctor, the company may have no alternative but to make a decision about the employee's employment based on the information available.

53. Absences are monitored and formal meetings are arranged. In cases of long term absence (continuously absent for four weeks or more with a recurring

medical condition or is regularly absent from work with a recurring medical condition), then permission may be sought to contact the employee's GP or specialist to obtain a report to explain the claimant's current medical condition, how long the condition is likely to last and how the condition affects the employee's ability to carry out the current job.

Flexible working policy and procedure

54. The respondent also has a flexible working policy which is open to all employees whether permanent, temporary, fixed term, part time or seasonal. The procedure involves making one formal application per year running from the date when the application is made. There will be a meeting which the employee is entitled to be accompanied. Following that meeting, the manager will write either to agree a new working pattern and confirm a date when the contract variation date takes effect or provide clear business grounds as to why the application cannot be accepted for setting out the right to appeal.
55. It is envisaged that there may be occasions where the respondent may need further time to consider an application or put in place other arrangements before notifying of a final decision. Accordingly, time periods can be extended by agreement. The business reasons for which the respondent may reject the request are the burden of additional costs; detrimental effect on its ability to meet customer demand; inability to reorganise work amongst existing employees; inability to recruit additional employees; detrimental impact on quality; detrimental impact on performance; insufficiency of work during the periods of proposed work; planned changes.
56. There is a right of appeal which is heard by a senior manager who has not been involved in the original decision.

Sick absence between June 2018 and September 2018

57. Around 14 June 2018, the claimant consulted his GP. The claimant told his GP that he had a history of intermittent episodes of low mood. He normally managed to deal with this but it was causing him to feel anxious and angry

for no reason. He was reacting badly to situations that he normally coped with. The claimant was provided medication (anti-depressants) and was signed off work between 27 June 2018 and 11 July 2018.

58. In terms of section 6 of the EqA the claimant is a disabled person at all
5 relevant times by reason of depression.

59. The claimant remained absent from work. While his mood did not initially
improve, he became less anxious and stressed. He felt that being away from
work had made the biggest difference. The claimant requested an extension
to his MED3 around 5 September 2018. This was extended to 28 September
10 2018. The claimant was absent from work due to reasons connected with his
disability.

60. The respondent had knowledge of the claimant's condition during the relevant
period (from 6 September 2018 to the claimant's resignation) for the purposes
of the claim.

15 *Request to work from home port on a permanent basis*

61. On 6 September 2018, the claimant sent an email to Brenda Connor, regional
HR manager. The claimant advised that he was currently off sick due to poor
mental health which he believed was a direct result of his working conditions.
He wanted help to return to work. The claimant said that he believed that the
20 cause of his poor mental health was his work pattern being away from home
9 days in 14. He did not know where he would working from one week to the
next and on which vessel he would be working. The claimant said he was
suffering from bouts of rage, depression and stress which was impacting on
his family and home life significantly. He said that his ideal solution would be
25 to work from his home port permanently on the same vessel. There was no
permanent position for his job role as motorman. It was necessary to be a
qualified engineer to work on the MV Loch Shira at Largs. The claimant
advised that Mr Gray had been in contact and that he said he would try to
accommodate the claimant at his home port whenever possible. However
30 due to there being no permanent vessel requiring motormen this may be
difficult. The claimant said he understood this and Mr Gray had suggested

contacting Ms Connor or Evan MacKay, marine manager, in case something else could be done.

5 62. The claimant attended a meeting with Ms Connor and Mr MacKay. They suggested that the claimant put forward a request to Mr Gray to be moved permanently to his home port should a position become available. The claimant made this request by email sent on 26 September 2018.

10 63. The claimant's home port was Largs where the MV Loch Shira sailed. The claimant was not qualified to work on MV Loch Shira. During the summer months an addition vessel, MV Loch Riddon sailed from Largs. The claimant was qualified to work on this vessel.

64. As required by statute the claimant attended Clyde Marine Medical Services for a seafarer medical certificate on 26 September 2018. The claimant was certified fit – no limitations or restrictions on fitness. The claimant was to be reviewed in six months (26 March 2019).

15 65. Mr Gray sent an email to the claimant on 27 September 2018 stating that, "I will try and keep you in the Clyde area as much as possible. Also I could pencil you in for the Loch Riddon next summer if that would suit."

20 66. The claimant confirmed that would be great. He appreciated that it was not always possible to be in or around the Clyde but wherever possible would suit. The claimant also said that he had suggested to Ms Connor and Mr MacKay that he be allowed to conduct the necessary training to go to his home port on a permanent basis so hopefully that would be progressed.

67. The claimant self-referred to the primary care mental health team on 24 September 2018.

25 *Return to work – October 2018*

68. The claimant returned to work on 10 October 2018. The claimant attended a return to work interview on 7 November 2018. The note, signed by the claimant, recorded that the claimant had "stress/anxiety/low mood". This was caused by work related stress. The claimant was not on medication. No

phased return or reasonable adjustments were required. There was discussion about a referral to occupational health. The note recorded: "in contact with own doctor."

5 69. The claimant attended an assessment with the primary care mental health team on 30 November 2019. He attended a therapy clinic from 14 December 2018.

70. The claimant was in the process of moving house in January 2019. He was discharged from the therapy clinic on 22 February 2019. He did not consult his GP until April 2020 when he attended a different practice.

10 *March 2019*

71. The claimant attended Clyde Marine Medical Services for a seafarer medical certificate on 12 March 2019. The claimant was certified fit – no limitations or restrictions on fitness. The claimant was to be reviewed in three months (12 June 2019).

15 72. Mr Gray emailed the claimant on 15 March 2019 advising that he was trying to keep the claimant as local as much as possible. The claimant was not the only motorman looking to work on the MV Loch Riddon that summer.

73. The claimant sent an email to Mr Gray on 26 March 2019 to advise that he did not feel mentally well enough to be at work. The claimant said that the news about Largs was unfortunate and that he did not think the respondent was taking his mental health issues seriously or doing enough to help. The claimant said,

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25 "Being alone in a hotel room for a week when suffering depression and other issues can be a big problem. There has been no long term help or a solution being put in place. Since returning to work six months ago, I have worked on eight vessels in nine locations. It has got to the point where I am mentally fatigued and suffering as I was last year. Looking ahead to the summer, I don't think I will cope with being moved all over the network as required."

74. The claimant also advised that he had completed the necessary paperwork to be considered to work part time (one week in four) as opposed to one week on and one week off. The claimant said that this could be a possible solution and asked for Mr Gray's support.

5 75. Mr Gray responded that another alternative was to swap the claimant onto the opposite shift where he could put the claimant at Largs for the summer on the MV Loch Riddon and asked one of the seasonal employees to swap. Mr Gray accepted that it did not change the situation when the summer timetable ended as there was no vessel in Largs that the claimant could work
10 in the winter months. Mr Gray advised that changing the shift pattern to one week in four was not straightforward and would need to be discussed further.

76. The claimant advised that he would be happy to move on to the other shift if possible. The claimant said this would provide short term relief from the relief pool. The only issue was his wedding abroad booked from 21 April 2019 to
15 28 April 2019 and a home event on 3 May 2019 to 6 May 2019 which were being covered by annual leave.

77. On 29 March 2019, the claimant wrote to Mr Gray confirming the summer would be fine and the winter should be manageable provided he remained within daily commuting distance. As there was not a vessel at Largs that he
20 could work on year-round, the compromise would be that he would at least know that he could commute daily to whatever vessel he was required on.

78. The claimant had a self-certified absence from 27 March 2019 to 2 April 2019. This absence was due to a reason connected with the claimant's disability. He returned to work on 10 April 2019.

25 *Absence review*

79. On 16 May 2019, the claimant was invited by letter to an absence review meeting held by Scott MacLean, marine manager. The letter stated that the purpose was to discuss the claimant's sick absence and decide on the best way forward with improving the claimant's sick absence level. If at the
30 meeting it was indicated that the claimant had an underlying medical

condition the permission would be sought from him to contact his doctor and/or the respondent may decide to refer the claimant to occupational health for advice. The claimant was advised that he had the right to be accompanied and a copy of his sick absence record was enclosed.

5 80. At the absence review meeting the claimant was advised that the reason for meeting was that he had more than ten days of absence in the rolling year. There was reference to occupational health. It was noted that:

“Work related stress causing absence. Feel as if company has let him down due to not getting home port after being promised it for stability purposes”.

10 The outcome of the meeting was that “no decision today. Scott to get absence from HR first” and that the claimant was to be contacted “before contacting GP.”

15 81. On 22 May 2019, the respondent wrote to the claimant asking for permission to contact his GP to obtain a medical report on his medical condition “for this particular absence only”. A consent form was enclosed.

20 82. The claimant wrote to Mr MacLean on 24 May 2019 expressing disappointment about being disciplined over an absence which he felt could have been avoided had crewing followed through the previous statement that he would be at Largs for the summer. The claimant referred to attending a councillor at which it had been identified that the major root cause of his health was his job that he was undertaking. Being in the pool was detrimental as working a shift pattern of seven days away from home with travel either side of the working week was becoming a major struggle mentally and physically. Other factors such as living out of a suitcase in a hotel every second week and moving between boats at the last minute and never knowing where he was going from one week to another were wearing him down mentally.

25 83. Mr MacLean acknowledged receipt of the email and said that he would contact Mr Gray and Ms Connor. Mr MacLean clarified that the absence review process had no connection with disciplinary proceedings. There was an exchange of emails in which the claimant advised that he had not returned

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the medical consent form as there was no place to reject permission. He was willing to attend the company doctor. Mr MacLean said that the respondent no longer has a company doctor and occupational health tended to advise on having an employee return to work.

- 5 84. The claimant explained what had happened following his absence in 2018. The claimant's position that his last absence was self-certified so the GP would have no record. The claimant said that being told that he was not going to the MV Loch Riddon and he felt he required to take a period of absence to evaluate whether he could continue in this employment at all. The claimant
10 said he felt this absence could be avoided had the respondent acted in a way it had previously said it would. The claimant stated:

“I would like to add that I fully understand Brenda, Evan and Andy have a lot to deal with at times and they have many important issues that are going on daily so I have been passed by accidentally. I am fully in control of my own
15 health and take responsibility for my own actions and that is exactly what I have done. After this was highlighted to crewing and HR, I feel that they have helped me enormously which I am fully grateful.

This is why I feel this should have a line drawn through it and move on. I will await your decision and outcome.”

- 20 85. Mr MacLean replied that the respondent could do with access to a GP report due to the amount of information that had been provided. The report could back up the claimant's account of things and allow Mr MacLean and Ms Connor a greater understanding of his health conditions. The claimant advised that as previously stated, he would not be granting access to the GP
25 report and awaited the outcome.

Flexible working request – September 2019

86. The claimant worked on the MV Loch Riddon from May 2019 to the end of October 2019.
87. On 9 September 2019, Mr MacLean sent an email to Ms Connor and Mr Gray
30 as the claimant has asked what was happening to him when the MV Loch

Riddon left Largs. The claimant has asked Mr MacLean about a job share (working one week in four) as he felt would benefit his health and give him a better life. Mr MacLean indicated that he could not promise anything but would ask the question and see if it was feasible.

5 88. Ms Connor responded that if the claimant's working request of working one week in four could be accommodated then that was fine. However, the claimant would not attract three for one call out on the days that he would normally have worked before reducing his hours. It would also involve the claimant's leave being pro-rata'd. This would need to be explained to the
10 claimant and included in a letter sent to him regarding the flexible working arrangement. Ms Connor provided the relevant forms for the claimant to complete.

89. The claimant made a flexible working request around 16 September 2019. The claimant requested to change his working pattern to "one week on, three
15 weeks off".

90. Mr MacLean wrote to the claimant on 25 September 2019 advising that having spoken to HR and crewing, the only way that the request could be accommodated was if the claimant found an employee of the same rank who was willing to do same shift pattern. Mr MacLean suggested that the claimant
20 may wish to ask around. The claimant indicated that he believed there were crew who would be interested. However, for this to be viable, the claimant felt that the job should be advertised as it would present the idea in a professional manner by the respondent rather than just word of mouth. It would also open up the offer to more employees who the claimant did not
25 know on a personal level.

91. On 2 October 2019, the claimant received a letter from Calum McNicoll, authorised signatory advising that after consideration, he was unable to accommodate the request for the following reasons:

30 i. The burden of additional costs to the respondent as the respondent would need to increase the headcount within the small ferry fleet. At the moment, this would not be within the agreed manning levels. The

manning levels for the small ferry fleet had to be agreed based on operational requirements and also on the minimum safe manning levels for each vessel/route.

5 ii. There had not been any volunteers or similar requests from the small ferry fleet to create a job share position with the claimant within the current headcount limits. Operationally, if the respondent did not have another small ferry employee wishing to do this work shift pattern in line with the claimant's rotation, then the respondent would be a short of pool employees during the claimant's three week rest period resulting in a call back costs to the respondent. The existing small ferry employees are not able to cover the extra shifts without call back and risk of fatigue.

10 iii. The claimant was assigned to the relief pool and the agreement was that he could be sent across the network when required for operational reasons. Reducing the work pattern would also restrict the flexibility required to work in the relief pool.

15 92. The claimant was advised of the right to appeal against the decision. The claimant appealed by letter dated 3 October 2019. The claimant did not consider that there would be any additional costs as his salary and other benefits would be cut in half. The claimant felt that this position ought to be advertised and this had not been done. He did not foresee any issues if the job share was advertised as the relief pool. The claimant sent the appeal by post on 4 October 2019. The respondent did not respond to the claimant's appeal, the reason for which was unknown. The claimant did not follow this
20 up.
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October 2019 to February 2021

93. On 24 October 2019 Mr Gray advised the claimant that he was looking at the next year's roster. He needed to put the claimant back to the opposite shift to even up the number of motormen each side of the pool. Mr Gray said that
30 he would put the claimant on the MV Loch Riddon over the summer.

94. The claimant responded that it would be problematic to move him back to his opposite shift because his wife had organised her shifts to coincide with his and he had a few dates planned dates that would fall on his time off. If this had to be done, it should be the week after Christmas as it would suit the claimant best as he had arranged things on his week off on the run up to Christmas.
95. On 29 October 2019, Mr Gray advised that the claimant would definitely be moving back permanently to the other shift and that he would definitely be at Largs in the summer. The claimant was informed that the reason why the move was needed was to have equal amounts of relief crew on each shift.
96. In the meantime, the claimant spoke to his colleague who had also wanted to work on the MV Loch Riddon. Due to a change in circumstances, there would be no issue with both employees working on that vessel the following summer.
97. The claimant attended Bryden Medical Limited for a seafarer medical certificate on 4 December 2019. The claimant was certified fit – no limitations or restrictions on fitness. The claimant was to be reviewed on 4 December 2020.
98. Between late April 2020 until August 2020 the claimant consulted with a GP from a different general practice. He was prescribed medication for his mental health (low mood) until September 2020.
99. Due to COVID-19 restrictions from March 2020 there were reduced passenger numbers and social distancing. The MV Loch Riddon was not at Largs until later in the season. The claimant was primarily based within commuting distance from his home port.
100. The claimant was absent from work between 16 to 23 December 2020 due to a shoulder injury. The claimant attended a return to work interview on 28 January 2021. This was the claimant's only absence in the last 12 month period.

March 2021 to May 2021

101. On 8 March 2021, the claimant telephoned Mr Gray who asked the claimant to put his comments in writing.

5 102. The claimant then sent an email to Mr Gray regarding his concerns about, his mental welfare “and other crew within the small ferry pool” between vessels and locations sometimes at short notice. The need to be flexible was understood but over the years there had been little change on how this was managed or a reflection on the impact on the crew’s welfare. The claimant then referred to how he has struggled with his own mental health and had
10 asked to move to his home port to provide stability from the pool environment. Although he only had a few months of this it had greatly improved his personal circumstances as he had more of a work like balance. The claimant said that these moves had become mentally tiring and was having an impact on his home life and mental wellbeing. The claimant felt that this was something that
15 should be available as a choice to all pool crew. He also suggested that the rota should be available to all crew members three to six months in advance. The claimant accepted that for some the pool environment was not an issue and they enjoy the flexibility but for others it was tiresome.

20 103. Mr Gray sent the email to the marine managers and copied to HR. Mr Gray said during the telephone conversation he had explained the last minute changes of location are the nature of the job in the pool and that he had no control over vessel breakdowns and movements that require vessels to be moved at short notice. Mr Gray also explained the bearing that sickness had on this. Mr Gray said that claimant indicated that he felt the respondent was
25 not taking his concerns seriously. Mr Gray had made the claimant a regular motorman on the MV Loch Riddon at Largs during the summer months so that he was nearer home. This was only possible in the summer as the claimant did not have certification to work on the MV Loch Shira. While the claimant said that it was a concern many of the small ferry pool crew had, Mr
30 Gray said that this was the first complaint he had regarding moving other crew at short notice as he considered that this was what being in the pool entailed.

104. Mr Thomson acknowledged that the nomadic lifestyle of being a crew member was not for everyone but was a feature of the job and may be an attraction for some. As the claimant was returning to the MV Loch Riddon in the summer he asked Dario Spadavecchia to deal with the matter. Mr Thomson also asked Mr Gray if it was reasonably practicable for the rota to be available to all crew members in advance. Mr Gray explained that pool crew being given a three to six month roster was just not possible. While the plans were a few months in advance, he did not issue the roster to avoid confusion as things changed often for this to be possible. It was agreed that Ms Hume would deal with the matter from an HR perspective.
105. On 1 April 2021, the claimant was invited to a meeting with Mr Spadavecchia and Ms Hume which was rescheduled for 27 May 2021. While there was information on the claimant's file from 2019 in connection with the flexible working request, there was no copy of the original request. Given the length of time, it was agreed that the claimant would submit a new flexible working application so that the process could be followed from there. The claimant was sent the documentation for completion.

Flexible working request – June 2021

106. The claimant was sent a stress risk assessment form which he was invited to complete and return to Mr Spadavecchia which the claimant did.
107. On 10 June 2021, the claimant completed a flexible working application. The claimant indicated that he proposed a part time job share with another employee. All company benefits would be split 50/50 so there would be no additional costs to the respondent to have two employees covering one role. The claimant indicated that this would allow him a greater period of rest between working an 84 hour seven day working week and did not consider it would cause any issues to crewing for the seven day working pattern so there would be no additional costs to the company. The claimant felt that this would give him greater rest periods between shifts and he would be in better health to conduct his employment. The claimant considered that the respondent would benefit from having two fully trained members of staff at no additional

cost. The claimant did not foresee any issues and indicated that he would be pleased to hear an alternative if there was a better and more suitable option.

108. The claimant provided additional information explaining that his rest period was often reduced by two days as he required to travel on the day before his shift starts and afterwards. He had to stay in familiar surroundings of hotels which does not help with his health condition. The claimant indicated that there were several employees who were employed on a seasonal basis over the year who he believed would love the opportunity to become an employee of the respondent on a reduced contract. The claimant referred to his earlier flexible working application and asked that if his application was rejected, he wanted a more in depth justification as to the reasons behind this.

109. On receipt of the flexible working application, the claimant was invited to attend a meeting with Mr Spadavecchia and Ms Hume which was rescheduled due to annual leave until 28 June 2021.

110. At the flexible working meeting on 28 June 2021 the claimant talked through his request (the June Meeting). He was looking for more time off and to have a better work life balance. The claimant believed that it could be done through a job share. He was asked if he had considered any other employment within the business. The claimant said he had not but this may be something he would need to consider. He would prefer to stay in his own role. The claimant said that he was not thinking at this stage about what it would mean if the respondent was unable to accommodate his request. He was hoping that it would be seriously considered. The claimant could not say 100 percent how he would feel if he was still travelling but thought more time off would help. The claimant was asked if he was aware of the counselling service which he confirmed that he was. He also confirmed that he was speaking to his wife who was a mental health nurse. The claimant was asked about his restricted medical. He explained that it was initially reduced to three months because of his mental health but it was back to 12 months. The claimant was informed that any reduction in hours would mean a pro rata salary which the claimant understood.

111. In the intervening period, there were discussions with Ms Hume, crewing and the asset management department regarding the proposal and how it might work. There was some uncertainty about this and options had to be explored. The claimant was aware there was some slippage due to annual leave.
5 He did not raise a concern.
112. On 22 September 2021, the respondent wrote to the claimant inviting him to a meeting initially scheduled for 29 September 2021 which was rescheduled for 5 October 2021 (the September Letter). The September Letter advised that in reviewing the request, the only feasible way the request could be
10 accommodated, without incurring additional cost to the business, would be on a job share basis. To establish whether there is a suitable candidate to job share with the claimant, this would first of all need to be approved and then advertised. The claimant was advised that should there be a suitable candidate to job share, then the following will apply:
- 15 i. The start date will be dependent on if the job share can be put in place and the successful candidate had been fully inducted.
- ii. If the job share was to leave the business and/or be absent from the business on a long term basis for any reason, the flexible working arrangement would be dependent on successfully filling the job share
20 vacancy
- iii. Should the respondent agree a flexible working arrangement, it may not be operationally possible for the claimant to work at Largs over the summer period.
- iv. The respondent expected some flexibility from the claimant
25 depending on where the job share lives.
- v. The claimant would not be ordinarily call back however any premium payments under the Small Ferry Agreement would only apply in the first seven days of rest not the following 14 or during any annual leave periods.

vi. The claimant's salary and annual leave entitlement would be pro-rated.

113. The September Letter advised that should there be no suitable applicants for the job share, the respondent may not be in a position to accommodate the flexible working request. However, this could be discussed in more detail once there is approval and there is a suitable candidate.
114. Mr Spadavecchia chaired the flexible working meeting by telephone on 5 October 2021 (the October Meeting). The claimant chose not to be accompanied. Ms Hume participated. The purpose was to discuss how the claimant's request would be progressed. They talked through the September Letter. The claimant understood that approval was needed to advertise for a suitable job share candidate and a recruitment process had to be followed. The claimant agreed that the way matters were to be progressed made sense.
115. Mr Spadavecchia was not directly involved in the approval and recruitment process. Ms Hume co-ordinated this. She required to liaise with crewing to raise a requisition for the approval of the operations director. Once the requisition was approved the advertisement was drafted and approved by the technical supervisor who would be conducting the interviews.
116. On 15 November 2021, the claimant sent an email to Ms Hume advising of a colleague who may be interested in a job share. The claimant indicated that if his colleague was successful any full-time position that would become available, would likely to be filled by fully trained seasonal staff. The claimant indicated that a possible concern was the impact of pension on his colleague.
117. On 24 November 2021, the claimant emailed Ms Hume, copied to Mr Spadavecchia indicating that he was concerned about the time taken for his flexible working request to be determined. He was extremely stressed about the ongoing request.
118. Ms Hume replied advising that the advertisement was live on 25 November 2021 both internally and externally. The claimant was sent a link to the

advertisement. Applications were to close on 9 December 2021. Ms Hume explained that owing to availability and the holiday season it may not be until the new year before decision was made.

119. The claimant acknowledged receipt and said it was a positive step. He also
5 “understood that this is a process that will take time”.

120. The respondent carried out a recruitment exercise for the vacant role. The respondent offered the role to two successful candidates. Neither offer resulted in a candidate being secured into the role. The claimant’s colleague did not apply for the position of job share.

10 *Communication in January and February 2022*

121. The claimant contacted his GP on 12 January 2022 as he thought he had COVID-19. He had not been in contact with the surgery since August 2020. He was advised to self-certify. The claimant was absent from work with COVID-19 between 12 January and 18 January 2022.

15 122. On 28 January 2022, the claimant was working on the vessel MV Catriona. The claimant was upset when a colleague was called onto the vessel. This resulted in the skipper sending an email, headed “Robert Caven” to the technical superintendent at 08:11, regarding the reason for this. The email was copied to Mr Spadavecchia. The email was sent from the MV Catriona
20 email address which is accessible to employees with the appropriate password.

123. The technical superintendent responded to the skipper on the MV Catriona email address at 08:59 explaining the reasoning for the decision and reassuring that the claimant’s ability was not in question but they were trying
25 to support crews who had not been onboard for a significant period of time. The technical superintendent asked the skipper to tell the claimant that he would telephone him.

124. At 11:08 the claimant became involved in the email exchange. He sent an email from the MV Catriona email address to the technical superintendent setting out his position (the 11:08 Email). The 11:08 Email was copied to
30

others including Mr Spadavecchia. The 11:08 Email included the following paragraphs:

5 “I would be interested to learn what additional information you feel I could learn from having Fraser on board for an extra couple of days? There has been nothing relayed to the vessels regarding extra training for hybrid vessels and Andy Gray is obviously out of the loop as well as he has not been given this information when crewing them.

10 I feel you have handled this very poorly as you didn’t speak to myself yesterday afternoon when you learned I was on board or the skipper Gavin over any concerns you had about me on board. You went directly to Andy and organised an additional crew member to join us immediately without even speaking to Gavin.

15 I have spoken to Gavin and other crew to gage their opinion on how you have handled this as I was aware that I may be a bit oversensitive in a situation but they are in full agreement that this could have been handled much better. I now feel purely rattled onboard and this has come from nowhere. I think a quick phone call to myself and Gavin would have been common decency and would have stopped this issue arising.”

20 125. Mr Spadavecchia sent an email addressed to the MV Catriona email address and the technical superintendent at 11:34 copied to the others who had already been copied saying (the 11:34 Email):

25 “Can we please stop this email chain? I spoke with Oliver and I believe there has been no malice in sending another crew member and it was done with the best of intentions, it seems you cannot see the company’s point of view and we cannot see yours.

Perhaps in future instead of sending these emails with so many people in copy, if you have any doubts/questions, can you just pick up the phone?

I believe you are well aware of how the company supports crew members and how we listen, and you are the living proof of that.

Next time just pick up the phone, it is so simple!”

126. The skipper telephoned Mr Spadavecchia to indicate that the claimant was upset. Mr Spadavecchia apologised and said that he had wanted the email exchange to stop.

5 127. On 2 February 2022, the claimant sent an email to Mr Spadavecchia stating that the 11:38 Email was “unprofessional and out of line in my view. I don’t think if an employee approaches a company for support, it should be thrown back at them publicly during a discussion on a completely unrelated issue.” The claimant then went on to refer to his flexible working application. The
10 claimant’s email continued:

“While discussing my application with Gavin the other day, he said you had told him that someone had been employed for this position and that it would be put in place. This is extremely positive and the people who work behind the scenes putting this into place should be commended, but again I believe
15 I should have been contacted and updated before it was discussed with other employees. If this is indeed the case, could I please have some further information on what stage the whole process is at?”

I hope you review the points I have raised and respond accordingly as I believe that for the company to reflect on the company’s needs and be willing
20 to adapt by putting things in place such as flexible working as a massive step forward. This should be reflected as extremely positive and indeed shows proof that the company is willing to support its employees.

I believe that it is at times a lack of communication between management and vessel staff that needs to improve and would be something we would all
25 benefit from.”

128. Mr Spadavecchia responded to the claimant’s email as follows:

“Gavin phoned me and told me how you felt, it wasn’t my intention and I am sorry you feel that way. I just wanted to stop the endless email chain.

I agree we could have picked up the phone and explained why we sent Fraser instead of him turning up unannounced and left you wondering why this was happening.

Definitely a few lessons have been learned from this and again apologies you felt that way. It wasn't my intention."

5
129. The claimant replied later that day as follows:

"Thanks for your email. I appreciate you accept things could have been handled better in this case. I do not want to drag on further so I accept your apology and we move on. I would appreciate an update on the progression of my flexible working request whether via phone call or email. This would be grateful appreciated."

10
130. Mr Spadavecchia replied:

"Thank you Robert.

My understanding is that technical has carried the interviews, an offer has been made and we are in the process to vet his application/certification. I will check with HR and let you know."

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Sick absence

131. On 12 February 2022, the claimant self-certified with cold/flu symptoms. The claimant contacted his GP on 18 February 2022 and was provided with a fit note for stress and fatigue from 18 February 2022 until 7 March 2022. A further fit note was issued on 7 March until 21 March 2022 for the same reasons. The claimant's absence was for a reason connected to his disability

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Outcome of flexible working request

132. Mr Spadavecchia and Ms Hume were advised in late February/early March 2022 that despite a healthy number of applications and two offers being made the job share role could not be filled. They discussed whether there were any other candidates on the list who would be suitable for the job share role. There were not. They also considered whether to readvertise. Mr

25

Spadavecchia concluded at this stage it was unlikely that the recruitment pool would change and the flexible working process had been ongoing since June 2022. They also discussed the options if the reduction of hours were granted without a job share. This had previously been explored before the job share option was explored. This would involve relying of the exiting employees were there was no compulsory overtime and would impinge on their working hours. The respondent, a publicly subsidised business was running at a loss post COVID-19 and there were cost implications of recruiting a full-time motorman and retaining the claimant in the role.

10 133. On 15 March 2022, David Clarke, director sent a letter by email to the claimant apologising for the length of time the process had taken. It was acknowledged that it was not an acceptable length of time to bring matters to a conclusion however the job share recruitment process took longer than initially anticipated.

15 134. The claimant was advised that the job share vacancy was advertised late in 2021. Several applications were received. There was then an interview and selection process and the role was subsequently offered to two different candidates. On both occasions, the respondent was unable to secure those candidates into the role. There were no other suitable candidates.
20 Accordingly, they were unable to accommodate the job share arrangement.

135. The letter continued the only other option to resource this would be through using relief staff. The respondent was not agreeable for the following reasons:

25 i. Using the current relief pool without any increase in headcount would result in the use of call back to cover time off. This was estimated to be a potential cost of £34,000 per annum which would be an unacceptable cost to the business.

30 ii. As well as being an additional cost, and taking into consideration staff work life balance, over time it should ideally only be offered to cover unforeseen circumstances rather than as part of covering another employee's shift pattern and therefore becoming routine. There was

also a risk that volunteers may not agree to work call back. Therefore putting a full time additional member of relief staff would incur additional cost estimated to be a potential cost of £32,600. This was an unacceptable cost to the business.

- 5 136. The claimant was advised that he had a right to appeal against the decision. Given that he was absent from work due to stress and fatigue, the claimant was invited to contact Ms Hume so that any extension to the appeal period could be given consideration.

Resignation

- 10 137. On 21 March 2022 the claimant contacted his GP surgery for another fit note which he said he would collect on 23 March 2022. He was issued a fit note up to 18 April 2022.
- 15 138. On 21 March 2022 the claimant wrote to the respondent resigning with effect from 28 March 2022. The claimant said the additional stress of travel days had been used in relief for six months within a twelve month period was a contributing factor. The claimant referred to the respondent having failed to handle both his flexible working request timely and professionally. The respondent's failure to offer support or a suitable work pattern to support his ill health. He also felt that he had been continually let down by the HR
- 20 department and line managers. The claimant indicated that he did not consider his concerns were taken seriously and the company had continually dismissed his efforts to reduce his workload and cited a "recent outburst by marine manager Dario Spadavecchia who decided to engage in bullying and intimidating tactics". The claimant referred to Mr Spadavecchia using the
- 25 company email system to publicly notify work colleagues and various management personnel of the claimant's ongoing health struggles, a personal attack that left him feeling humiliated. The claimant said that the outcome of the latest flexible working request had left him physically and mentally exhausted. The company had requested for a second time of
- 30 offering any additional measures of support in his role.

139. On 22 March 2022, the claimant received an email from Debbie Hayes, resources analyst, advising that she had tried to get in touch with him regarding obtaining permission to occupational health and that she would be in contact to discuss a welfare support meeting.
- 5 140. On 29 March 2022, the respondent wrote to the claimant acknowledging receipt of his resignation and encouraging the claimant to consider the flexible working appeal. The claimant did not exercise that right and his resignation was accepted on 4 April 2022 with effect from 28 March 2022.

Observation on witnesses and conflict of evidence

- 10 141. The Tribunal considered that the claimant gave his evidence honestly based on his recollection of events. He answered questions as best he could on cross examination. The Tribunal's impression of the claimant was that he was an experienced motorman who had a high regard of his own abilities.
- 15 142. While the Tribunal appreciated that the claimant's focus was on his mental health and that of the crew it was surprising that he did not acknowledge Mr Gray's contribution or demonstrate any insight on what was a challenging time for all the respondent's employees particularly during COVID-19 restrictions.
- 20 143. The Tribunal considered that from contemporaneous documents, the claimant's position at the time was often inconsistent with his position at the final hearing. The Tribunal comments more fully on this below. The Tribunal concluded that when giving evidence at the final hearing the claimant viewed everything retrospectively through the prism of his mental health. The Tribunal also felt that the claimant had a tendency to embellish his evidence.
- 25 For example, the respondent produced a document detailing the claimant's weekly work locations between September 2018 and March 2022. More often than not from January 2019 the claimant was assigned to Largs or Sandbank being the ports closest to his home. The claimant said that while the document showed where he was located each week this was frequently
- 30 changed at short notice. The claimant provided no contemporaneous documentation such as a diary or expenses claims to show where he was

working on any given week nor did he provide any explanation on what basis he considered that if on a particular week he was located away from home Mr Gray would have been able to located him closer to home rather than someone else.

5 144. Turning to Mrs Caven, when giving evidence she appeared nervous and was visibly relieved once her evidence concluded. The Tribunal appreciated that she had been under considerable stress dealing with the claimant's depression and workplace issues while she was also working shifts throughout this period. She candidly accepted that her evidence was based
10 on what she had been told by the claimant. The Tribunal took this into consideration when assessing her evidence. As explained below the Tribunal considered that her comments about consenting to a GP report were unconvincing.

145. The Tribunal considered that the respondent's witnesses gave their evidence
15 honestly and based on their recollection of events. Their evidence was consistent with contemporaneous documents. The Tribunal felt that the witnesses held no animosity towards the claimant. If anything, the Tribunal felt that individually, to the extent that they had control over decisions they attempted to resolve matters for the claimant. Those attempts were ultimately
20 unsuccessful because the job shares could not be confirmed into the role. All of the respondent's witnesses patiently answered questions put to them as best they could. Some of the evidence related to events over several years before the claimant's resignation. None of the respondent's witnesses had been directly involved during the first flexible working request. The
25 respondent's witnesses were limited to responding to those issues based on their understanding from the documents that had been produced or in the case of Mr Gray discussion at the time.

146. The Tribunal considered that in relation to the material facts as found, there was little significant dispute between the parties. The Tribunal felt it was
30 important to make the following observations.

147. The Tribunal was referred to two policies: the absence management policy and the flexible working request policy. The Tribunal noted that throughout the various processes, the operational managers were supported by different colleagues from the HR department. Despite being offered the right to be accompanied, the claimant declined throughout.
148. From the documents, it was apparent that before the claimant's absence in 2018, he had previous non-disability related absences and return to work interviews. In May 2015 the claimant was asked to provide his medical consent in order to contact his GP for a report on the condition for which he had been absent.
149. The respondent conceded that the claimant was a disabled person under the EqA at all relevant times. From the medical evidence the claimant stopped taking medication for his disability around October 2018. In February 2019 further sessions from the primary care mental health team were not required and he was discharged back to the care of his GP.
150. While the claimant had a Seafarer medical examination in March 2019 which was to be reviewed in three months, from the medical records the claimant did not consult with a GP in this period. The Tribunal also noted that this coincided with a recent house move around January 2019 and his wedding in April 2019.
151. There was an exchange of emails on 26 March 2019 in relation to where the claimant would be working during the summer. The Tribunal noted that in this exchange, the claimant said that he did not feel mentally well enough to be at work and wanted to be marked down for sickness. This was a self-certified absence. The claimant agreed to swap onto another shift so he could remain at Largs subject to his annual leave remaining which allowed him to be abroad for his wedding. On 28 March 2019, the claimant was advised that he would remain at Largs in the summer and the following summer and during winter, he would be kept closer to home but not at Largs but possibly Sandbank Dockings and Colintrave.

152. The claimant appeared content with this arrangement but the absence triggered an absence management review meeting. The extent to which an occupation health report was discussed at the absence management review meeting was unclear. From the documentation the Tribunal was satisfied that the issue of medical evidence was raised and Mr MacLean was to seek support from HR. It was however noted that the claimant was to be contacted before any approach was made to his GP.
153. The Tribunal considered that it was clear from the correspondence sent to the claimant that what was being sought was his consent to approach his GP for a medical report on the particular absence in April 2019. This was consistent in the Tribunal's view with the respondent's approach in May 2015. The Tribunal's impression was that the claimant wrongly thought that he was being disciplined over his absence. All that was being considered was the potential of a level 1 attendance warning. It was against this background that a medical report from his GP was being requested. Notwithstanding this, the Tribunal considered that the claimant's position was surprising given that there was a clear explanation that access to a GP report was sought because of the information that the claimant had provided and was to allow a better understanding of the claimant's health conditions. The claimant had returned to work and remained at work throughout this period.
154. The Tribunal considered that Mrs Cavan's evidence about why she considered that an occupational health report was more suitable given her experience as an NHS employee was unconvincing. The Tribunal was of the view that on any reasonable reading of the correspondence, it was apparent that all that was being sought was the medical report.
155. There was a lack of evidence before the Tribunal as to what was the outcome of the absence management review meeting. There was no evidence of a warning being issued. The claimant's remained in attendance as there was no sick absence.

156. The issue of the claimant's work location arose at the end of September 2019 because he was no longer able to work at Largs. There was no evidence of the claimant consulting a GP and he remained at work.
157. The Tribunal did not hear evidence from Mr MacLean and Ms Connor who dealt with the first flexible working request. Mr Gray was not directly involved in the first flexible working request. He was asked for his view from a crewing perspective. He considered that if the first flexible working request was granted the respondent would be short of a motorman so someone was needed for the other shift. From the correspondence management was supportive of the first flexible working request subject to looking for a job share. That appeared to be something that the claimant understood. The first flexible working request was processed and Mr MacLean noted the claimant's comments regarding internal interest in job share and that the job should be advertised. The Tribunal did not understand there to be a dispute that no one volunteered to job share although the Tribunal appreciated the claimant's point that the post had not been advertised.
158. The claimant appealed against that decision which he posted on 4 October 2019. There was evidence of posting but no evidence that the appeal letter had been received nor was there explanation as to why it was not processed. The claimant accepted that he did not follow up the matter. At the final hearing the claimant said that the respondent ignore his appeal and this culminated in his decision to resign. The Tribunal felt it highly unlikely that the respondent deliberately did not action the appeal. Despite receiving no acknowledgement, or any correspondence from the respondent about the appeal the claimant took no action whatsoever to follow up the appeal nor did he discuss it with Mr Gray with whom he was in regular contact and who was aware of the first flexible working request. The Tribunal considered that while the claimant appealed the decision he was at the time satisfied with how Mr Gray was dealing with matters and this was the reason he did not pursue the matter further.
159. The Tribunal considered that Mr Gray did continue to liaise with the claimant with a view to clarifying that he would be at Largs the following year and

explained to him why there was a need for the claimant to change back to his original shift to ensure that there were equal number of relief crew on each shift. The Tribunal considered that Mr Gray's evidence was convincing and accepted it. He was candid about the reactionary nature of the relief pool
5 meant that the claimant could not always be based close to his home. There was always a possibility of being redeployed at short notice as that was an inherent feature of the claimant's role. In cross examination Mr Gray accepted that the document recording the claimant's work locations did not reflect some of the movements that may have taken place during each week,
10 his position was that it was as accurate as it could be from the roster and that there were not movements every week. Mr Gray did not accept that when changes were made, he could have found other places for the claimant to work closer to home and no specific examples were put to him.

160. While the Tribunal did not doubt that the claimant was not the only crew
15 member looking to work from his home port from time to time the Tribunal felt that Mr Gray did all that he could to ensure that the claimant was working at a commuting distance from his home port and if not as close as possible. The Tribunal felt that the claimant was well aware of this which was why he did not raise the matter with Mr Gray at the time.

20 161. The medical records produced suggests that the claimant did not consult a GP until April 2020 when he had changed medical practice. The claimant consulted a GP between April 2020 and August 2020 when he was prescribed medication. The Tribunal noted that during this period the claimant was based at his home port. The Tribunal considered that this also
25 coincided with the first COVID-19 restrictions which were a worrying period for everyone. The claimant remained on medication until 24 September 2020. The claimant did not return to seeing a GP until January 2022 and his medication restarted in April 2022.

162. The Tribunal noted that there appeared to be no issues raised by the claimant
30 until March 2021. In that intervening period, the vast majority of time, the claimant was based at or within travelling distance of his home port. The

claimant's sick absence during that period was unrelated to any disability (COVID isolation and shoulder injury).

163. There was a dispute in relation to the discussion at the June Meeting. The claimant's position at the final hearing was that he did not exclude
5 consideration of any other employment within the business. The evidence of Mr Spadavecchia and Ms Hume was their understanding, as was recorded in the note of the meeting, that this was not something the claimant was considering at that stage. His focus was trying to explore his flexible working request in his existing role. The Tribunal considered that there was no
10 evidence to suggest that at this stage, the claimant was considering or wanted to explore any alternative employment within the respondent. The Tribunal accepted that might have been something that he might considered in the future but in the Tribunal's view, the claimant was focused on his flexible working request which he acknowledged required to be done through job share. The Tribunal considered that had the claimant given any indication
15 that he would be willing to consider some alternative role, there was absolutely no reason why the respondent would not have explored this particularly as it may have been an easier/quicker alternative option than recruiting someone to job share. The Tribunal's impression was that the claimant was quite clear that alternative employment within the business was
20 not something that he wished to consider at that time.

Deliberations

164. The claims consisted of various types of discrimination relying on the protected characteristic of disability. The representatives addressed the
25 Tribunal on each claim but they did so in different order.

Failure to make reasonable adjustments

165. The Tribunal started by considering the reasonable adjustments claim. First the Tribunal asked whether the respondent applied a PCP to the claimant. PCPs are not defined in the EqA.

166. The claimant relied on two PCPs. The first was the requirement to work in several locations, on a number of shift patterns at short notice. The Tribunal considered that this was a requirement of the claimant's role as a motorman. The respondent therefore applied this PCP to the claimant.
- 5 167. The second PCP that the claimant relied upon was a practice of failing to approve flexible working requests. The Tribunal did not consider that there was a practice of failing to approve flexible working requests even in relation to the claimant. Had the respondent been able to secure a candidate into the job share role the claimant's first and second flexible working requests would have been approved. If there was a PCP it was in the Tribunal's view the requirement for a job share arrangement. However, that was not the argument before the Tribunal.
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168. The duty to make reasonable adjustments only arises when the disabled person is put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.
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169. The Tribunal then considered the identity of persons who are not disabled to in order to compare the effect of the PCP that the respondent applied to the claimant. In the Tribunal's view the comparator is a motorman with no disability who works in the small ferry pool.
- 20
170. The Tribunal then considered the nature and the extent of the substantial disadvantage caused by the PCP. The Tribunal noted that "substantial" disadvantage means "more than minor or trivial". The Tribunal also noted that although substantial disadvantage represents a relatively low threshold the Tribunal should not assume that simply because an employee is disabled the employer is obliged to make reasonable adjustments.
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171. The claimant said that the requirement for him to work in several locations, on a number of shift patterns at short notice caused him stress and negatively affected his mental health causing him to have periods of sick absence.
172. The claimant was absent from work due reasons connected to his disability (poor mental health) between 20 June 2018 and 26 September 2018. The
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claimant said that this due to his work pattern being away from home. The Tribunal considered that the PCP placed the claimant at a substantial disadvantage in comparison with a motorman with no disability who works in the small ferry pool. The Tribunal also considered that the respondent was
5 aware of this from September 2018 when the matter was brought to the attention of Mr Gray, Ms Connor and Mr MacKay.

173. The Tribunal then asked what step was reasonable for the respondent to have taken to avoid the particular disadvantage. In so doing, the Tribunal had in mind the EHRC's Code of Practice at paragraph 6.23 when it states that what
10 is a reasonable step will depend on all the circumstances of each individual case and paragraph 6.28 which sets out examples of matters that may be taken into account when deciding what is a reasonable step for an employer to have to take and these include: whether taking any particular steps would be effective in preventing the substantial disadvantage and the type and size
15 of the employer. The Tribunal noted, at paragraph 6.29 that it is stated that ultimately the test of reasonableness of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

174. The Tribunal found that after September 2018 the respondent did make adjustments. The respondent adjusted the rota insofar as was practicable in
20 order to keep the claimant on routes close to home. The claimant was allocated to the MV Loch Riddon when it was docked at Largs in the summer months. More often than not the claimant was assigned to Largs or Sandbank which were the ports closest to his home. Alternatively, whenever possible he was assigned to ports within commuting distance from his home.

25 175. The Tribunal noted that the claimant had one week self-certified absence for a disability related reason between 27 March 2019 and 2 April 2019. This followed an email exchange in which another employee on the claimant's shift was being allocated to the MV Loch Riddon. The claimant agreed to change shift and he was located to the MV Loch Riddon for the summer. The claimant
30 next absence for a disability related reason was in February 2022.

176. The Tribunal then considered, viewed objectively what other steps that the respondent could have reasonably taken.
177. The claimant's position was that the substantial disadvantage would be reduced or removed had the respondent carried out a stress risk assessment and made a referral to occupation health.
178. The Tribunal found that the respondent did carry out a risk assessment. While it was not specifically discussed with the claimant in June 2021, there was no evidence that to have done so would have done anything to ameliorate the claimant's difficulties. The claimant understandably wanted to explore the flexible working option before considering any other alternative role. In the Tribunal's view the respondent was willing to consider other roles as the respondent raised this with the claimant. The Tribunal had no reason to think this was not a genuine question. Indeed, the flexible working request might have been more easily accommodated in another role. It was not explored at that stage because the claimant was focussed on the flexible working request and remaining in his existing role.
179. The Tribunal did not consider that referring the claimant to occupational health was a reasonable adjustment. There was no evidence that it would have reduced or removed the substantial disadvantage. The respondent accepted from September 2018 that the PCP was placing the claimant at a substantial disadvantage because of his medical condition. The claimant had returned to work. The respondent made adjustments in consultation with the claimant. The respondent accepted what the claimant said about his medical condition. Other than a short self-certified absence in March 2019 the claimant did not have any disability related absences until February 2022.
180. The Tribunal then considered whether implementing changes to the claimant's working pattern to alleviate the disadvantage by either granting his flexible working request or otherwise agreeing changes to his working patterns in consultation with the claimant was a reasonable adjustment.
181. The Tribunal did not accept the claimant's submission that the respondent failed to address the claimant's requests for reasonable adjustments for three

and half years. As mentioned above the respondent consulted with the claimant and did make adjustments. The claimant accepted that the reactionary nature of being in the relief pool meant that he could not always be accommodated at his home port. The inherent feature of the claimant's role was that there was a possibility of being deployed at short notice. The claimant accepted that this was regardless of the number of hours that he worked.

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182. The Tribunal understood that the change to the claimant's working pattern was to reduce his hours by 50 percent. The Tribunal did not accept the claimant's submission that the respondent did not properly consider the claimant's second flexible working request because of Mr Spadavecchia's evidence about consideration of alternative roles.

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183. In the Tribunal's view the respondent readily considered both the claimant's first and second flexible working requests. There was no precedent for such a request by motormen which had significant operational consequences. The respondent was willing to explore the requests to reduce the claimant's working hours by 50 percent but identified that it was subject to job share. The Tribunal had no doubt that had a jobsharer been found in September 2019 or March 2022 the flexible working request would have been granted.

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184. The claimant submitted that the cost of granting the flexible working request/change in pattern of working without a jobsharer was proportionate particularly as the claimant would be taking a corresponding reduction in salary. Viewed objectively the Tribunal did not consider that this was only an issue of cost. If an additional full time motorman was recruited this would have potential implications for the roster as there would be an imbalance in the shifts. Using relief staff to cover 50 percent of the claimant's hours would also have consequences for the rostering as call back (overtime) was voluntary. Such arrangements were only used on a temporary basis which the claimant's situation was not. The Tribunal noted that the claimant said that he was not alone in having health issues about the rostering. It therefore seemed odd to the Tribunal that the adjustment that was being proposed

would result in colleagues regularly working more than their contracted hours to cover the claimant's non-working time.

185. Another option would have been for the respondent to have considered an alternative role for the claimant. The Tribunal did not understand that this option was unavailable but rather that the flexible working request was not being considered in the context of an alternative role as the claimant preference was to stay in his existing role on reduce hours. Given the claimant's preference and the recruitment process that was involved the Tribunal considered that it was understandable that the respondent explored the job share option before considering alternative options. To have done otherwise might have resulted in recruiting a jobsharer only to have to find another jobsharer to replace the claimant who had opted for an alternative role.

186. The Tribunal also considered that depending on the nature of the alternative role the current flexible working request may have been unnecessary or would have require modification. The Tribunal agreed with the respondent's submission that at no time did the respondent refuse to move the claimant to an alternative position. This would in the Tribunal's view have been explored had the claimant not resigned.

187. The Tribunal concluded that when the claimant resigned the respondent had made reasonable adjustments and when viewed objectively the further adjustments proposed by the claimant were not reasonable in the circumstances.

Harassment

188. The Tribunal then turned to consider the harassment claim. The respondent raised the issue of time bar on the basis that the alleged discriminatory act related to comments made on 28 January 2022. The claimant did not commence ACAS early conciliation in relation to his claims until 8 June 2022. Accordingly, the claimant's harassment claim was significantly out of time.

189. The Tribunal did not accept that the fact that the respondent failed to raise the preliminary point in the agreed list of issues meant that the claimant was therefore unaware that he would need to lead evidence on this point. The Tribunal's jurisdiction is not a matter that can be conceded.
- 5 190. The claimant's position was that the comments formed part of a continuing course of conduct in respect of the alleged failure to make reasonable adjustments resulting in the claimant's resignation. The Tribunal did not accept the claimant's submission that the alleged harassment related to his flexible working request and was part of a continuing course of conduct. The
10 Tribunal therefore concluded that this claim was out of time. However, having heard evidence in respect of this alleged conduct, the Tribunal considered that it was just and equitable to go onto consider the matter.
191. The Tribunal considered whether the claimant was subjected to unwanted conduct. The Tribunal found that on 28 January 2022 Mr Spadavecchia sent
15 the 11:34 Email. Although not specifically addressed to the claimant it was in response to the 11:08 Email and referred to the claimant being living proof of the respondent listening and supporting crew members. Given the subject matter of the email exchange the Tribunal considered that this was unwanted conduct.
- 20 192. The Tribunal asked whether that conduct related to disability. While the respondent submitted that the comment did not relate to the claimant's disability, that was not Mr Spadavecchia's candid position when giving evidence. The Tribunal therefore accepted that the unwanted conduct related to disability.
- 25 193. The Tribunal then asked if Mr Spadavecchia made the comment with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment for the claimant. The Tribunal had no hesitation in accepting Mr Spadavecchia's evidence that was not the purpose of his reply.
- 30 194. The Tribunal then consider if it had that effect. The 11:34 Email was sent in the context of responding to the 11:08 Email from the claimant in which he

5 asserted that a senior colleague had mishandled a situation and was lacking in common decency. The Tribunal considered that the claimant was angry about Mr Spadavecchia's public rebuke rather than any concern about colleagues being aware of steps taken by the respondent in relation to his disability. The Tribunal's impression was that the skipper was already aware of the claimant's desire to reduce his working hours and it must have been common knowledge within the organisation that a job share motorman was being sought given that the post was being advertised internally and externally.

10 195. The Tribunal also felt that it was significant that the claimant readily accepted Mr Spadavecchia's apology. The Tribunal was unconvinced that the claimant was concerned that not to accept it would impact on the second flexible working request particularly given the tone of his email sent to Mr Spadavecchia on 2 February 2022.

15 196. The Tribunal did not consider that there was any inconsistency between Mr Spadavecchia considering the 11:08 Email to be inappropriate whilst still apologising to the claimant. In the Tribunals' view this demonstrated Mr Spadavecchia's insight in contrast to the claimant who appeared to lack any perception about the inappropriate tone of the 11:08 Email.

20 197. The Tribunal concluded that view objectively it was not reasonable for the conduct to have that effect. The Tribunal therefore dismissed the harassment claim.

Constructive unfair dismissal

25 198. At this stage, the Tribunal turned to consider the constructive unfair dismissal complaint. The Tribunal first asked whether the respondent committed a fundamental breach of the implied term of trust and confidence sufficient to entitle the claimant to resign in response to it.

30 199. The Tribunal must consider whether a decision of there being a breach of the implied term of trust and confidence is sufficient to entitle the claimant to resign in response to it.

200. A decision whether there has a breach of contract by the respondent sufficient constitute the claimant's constructive dismissal is one of mixed law and fact. The Tribunal noted that an employer "will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee". This is an objective test which the subjective perception of the employee can be relevant but is not determinative. The test is demanding. Simply acting in an unreasonable manner is not sufficient. The qualifying word "damage" is "seriously". It covers a diversity of situations in which a balance has to be struck between the employer's interests in managing his business as he sees fit and the employee's interest in not being unfairly or improperly exploited. The test is stringent. The conduct must be such that an employee cannot be expected to put up with it. The employer demonstrates by its behaviour that it is abandoning altogether to perform the contract. These words indicate the strength of the term. It is not a test that the employer has to behave reasonably towards employees. It should be borne in mind however that conduct however reprehensible, may not necessarily result in a fundamental breach of contract.
201. The claimant relied on what he said was the failure of the respondent to adequately deal with his (second) flexible working request; the time taken over which to produce a conclusion; and then producing an unsatisfactory conclusion which offered no support to the claimant.
202. The Tribunal did not accept the claimant's submission that for three and a half years, the respondent failed to address his complaints about his work pattern.
203. From its findings the Tribunal considered that flexible working request was not straightforward and required to be considered with the crewing, asset managing department and operations director.
204. The second flexible working request was made on 10 June 2021 and discussed at the June Meeting. Internal discussions with the crewing and asset management departments took place between June 2021 and

September 2021 which coincided with the consecutive periods of annual leave. This was explained to the claimant and he had no issue with that. The respondent communicated its decision to the claimant on 22 September 2021 in the September Letter and confirmed that the claimant's request would be accommodated if a suitable candidate could be found to job share with the claimant. This was also discussed with the claimant at the October Meeting. The claimant was comfortable with the conditions that were attached. The claimant understood that a recruitment process had to be followed and that this would involve a job advertisement being placed and interviews being undertaken.

205. The Tribunal appreciated the claimant's frustration about the delay in the job share post being advertised. The Tribunal did not consider that either Ms Hume or Mr Spadavecchia were being dilatory or obstructive. The Tribunal felt that Ms Hume was dealing with a request for which there was no precedent. It was necessary to have discussions with colleagues in the wider business some of whom needed persuasion. Once consensus had been reached, it seemed to the Tribunal reasonable and proper that before embarking on a recruitment exercise for a job share partner, the respondent ensured that the claimant was comfortable with the caveats that were attached to the approval of his request. The Tribunal also considered that it was reasonable and proper for the respondent to undertake its normal recruitment exercise for the job share appointment, seeking the necessary approvals for the advertisement and ensuring that the appropriate manager was involved in the recruitment exercise from the asset management department. There was no evidence to suggest that there was any unreasonable delay once the interviews took place. It seemed to the Tribunal beyond the respondent's control that the two candidates who were offered positions fell through. There were no other suitable candidates.

206. The Tribunal appreciated that the claimant felt that the process should have been concluded sooner. The respondent accepted that the timescale of nine months to deal with the application was longer than anticipated and certainly beyond that envisaged in the flexible working policy. The claimant had a

conditional response to his request by 22 September 2021 and the recruitment exercise undertaken involved at least five other personnel at different stages and ran over the Christmas period. In the Tribunal's view while this was a longer period than expected and no doubt caused the claimant to be frustrated and stressed, the Tribunal did not consider that in the circumstances the delay was such that the claimant could not be expected to put up with it. The claimant was aware of the ongoing recruitment process and had a suitable candidate been found the Tribunal considered that the claimant would have accepted the situation.

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10 207. The Tribunal found that Mr Spadavecchia considered readvertising the position but concluded that it was unlikely that further candidates would apply. The Tribunal noted that no internal candidates had applied despite the claimant's presumption that this might happen. The Tribunal could understand that while consideration could be given to readvertising at some point in the future, given the resources involved and the length of time that it had taken to reach this point, it was not unreasonable for the respondent to report back to the claimant particularly as he was under the impression that the post was to be filled. The Tribunal considered that the respondent required to provide the claimant with an update on his flexible working request particularly as the matter had been ongoing for some time. For the reasons previously explained, the Tribunal did not consider there was a failure to make reasonable adjustments by not automatically granting that request notwithstanding the inability to obtain a job share partner. The claimant was fully aware of that position in September 2021.

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25 208. The Tribunal accepted that the outcome was extremely disappointing to the claimant however given the caveats that were in place, the Tribunal did not consider that refusing the flexible working request because the respondent was unable to fulfil the job share post amounted to a breach of the implied term of trust and confidence.

30 209. The Tribunal then considered the alternative claim which was based on the last straw for a series of cumulative breaches.

210. The Tribunal did not consider that there was a continued failure by the respondent to appropriately deal with the claimant's request and concerns in relation to working hours. The Tribunal considered that when matters were raised, the claimant's line managers were supportive and took steps to ensure that the claimant's requests were brought to the attention of the appropriate managers who then progressed the requests albeit not to the claimant's satisfaction.
211. The Tribunal considered that while the first flexible request was refused, this was not without due consideration and was subject to recruitment of the job share candidate. While the Tribunal considered that the claimant's grounds of appeal particularly in relation to advertising the vacancy internally and externally were worthy of consideration, the Tribunal was not able on the evidence before it to conclude that the respondent had ignored the claimant's appeal. The claimant did not pursue this or mention to those managers with whom he was liaising that the matter of his appeal had not been addressed.
212. While the respondent did not refer the claimant to occupational health, the Tribunal considered that the respondent had reasonable and proper cause for not doing so. The claimant had returned to work and that there was a clear understanding between the claimant and his managers as to what might alleviate the stress at work. The Tribunal also did not find that the respondent failed to support the claimant with his mental health. To the contrary, the Tribunal considered that the respondent readily agreed to adjusting the claimant's work pattern and the respondent was clear about the nature of the claimant's difficulties and what might help him. Earlier attempts by the respondent to obtain a medical report about the claimant had been obstructed by the claimant himself. The claimant was directed to mental health first aiders and the employees assistant programme. Mr Gray was sympathetic to the claimant and used his best efforts to ensure that the claimant was working close to home whenever possible.
213. The claimant said that the last straw was the rejection of his second flexible working request. The Tribunal did not consider that by making this decision, the respondent was in breach of contract or in any way objectively acting in

a way that showed that it was abandoning or refusing to accommodate a change in the claimant's working pattern. The claimant invited the respondent to appeal the decision. The claimant was also aware that the respondent had flagged the possibility of the claimant considering an alternative role. This request had not been rejected but had not been pursued as the claimant did not wish to do so at that stage. The Tribunal did not consider that the respondent's position was in any way blameworthy or unreasonable. The Tribunal however felt that from the claimant's point of view, the letter advising the claimant of the refusal of his flexible working request without expressly indicating a willingness to explore other options such as an alternative job role could amount to a last straw.

214. During its deliberations, the Tribunal considered that the respondent demonstrated its commitment to the claimant's continued contract of employment. While there was delay in the process, the Tribunal was satisfied that there was reasonable and proper cause for the conduct relied upon by the claimant. There were administrative oversights in relation to the first appeal but in the absence of this matter being brought to the respondent's attention, any breach was not so serious that the claimant was entitled to treat the contract as being at an end.

215. The Tribunal looked at the respondent's conduct as a whole in order to determine whether it was such that its effect, judged reasonably and sensibly, were such that the claimant could not be expected to put up with it.

216. In the Tribunal's view, the claimant was a well-regarded employee who was valued by the respondent. Issues arose regarding the effect of working in the relief pool had on the claimant's health. In becoming aware of this, the respondent took steps to alleviate the situation. The respondent acknowledged that the appeal of the first flexible working request was not processed. Notwithstanding this, the claimant's request to work from a home port was accommodated so far as possible after which the claimant was not absent from work for any significant period. As soon as the claimant raised issues in March 2021, the respondent dealt with the matter while he continued to work from his home port over the summer. The respondent confirmed that

it would be agreeable to the flexible working request if a job share candidate could be found. The respondent carried out a recruitment process which initially resulted in two potential candidates. For reasons beyond the respondent's control, it was not possible to make these appointments. There was no evidence to suggest that the respondent did not want to assist the claimant in working closer to home and remaining in their employment. To the contrary, the Tribunal's impression was that the respondent was seeking to do all that it could and was encouraging the claimant to continue to cooperate with them.

10 217. The Tribunal was satisfied that the respondent's conduct as a whole was not a breach of the implied term of trust and confidence entitling the claimant to resign.

15 218. Being satisfied that there was no fundamental breach of contract, the Tribunal did not require to consider whether the claimant had affirmed the contract following the breach.

Discrimination arising from disability

219. The Tribunal then turned to the claim of discrimination arising from disability.

20 220. The Tribunal found that the claimant was disabled at all relevant times by reason of depression. The effect of his disability was that he had difficulty in working variable shift pattern, in varying locations often at short notice.

25 221. The claimant alleged that he was treated unfavourably because he was constructively dismissed. For the reasons previously explained, the Tribunal did not find that that the respondent was in fundamental breach of contract nor did it find that the respondent failed to make reasonable adjustments. There was no unfavourable treatment.

222. The claimant asserted that the respondent had little intention of making or was unwilling to make the changes requested by him. The Tribunal did not accept this submission. The Tribunal considered that Mr Gray made every effort to accommodate the claimant's request to work at or close to his home port.

The Tribunal also did not accept for the reasons set out above that the respondent ignored the claimant's appeal of his first flexible working request.

223. While the Tribunal accepted that the second flexible working request took longer than expected the Tribunal concluded that there was reasonable and proper cause for the delay which the claimant understood and accepted at the time. The Tribunal did not accept the claimant's submission that or took an inordinate or unreasonable amount of time to consider his second working request.

224. The Tribunal also did not accept the claimant's submission that the respondent's efforts to find a job share were perfunctory and minimal at best. The Tribunal considered that to the contrary, the respondent was prepared to agree to a job share in circumstances where this had not been tested. The respondent undertook an recruitment exercise. The respondent was willing to consider internal candidates (none of whom came forward) and offered the position to two external candidates.

225. In the Tribunal's view the respondent remained open to exploring further options. The claimant had a right of appeal in relation to the second flexible working request. He had also indicated that he may need to consider alternative roles. The claimant chose not to pursue either of these options preferring to resign.

226. Having concluded that there was no unfavourable treatment the Tribunal did not go onto consider if the treatment was nonetheless justified as a proportionate means of achieving a legitimate aim.

227. In all the circumstances, the Tribunal dismissed the claims.

Employment Judge: S Maclean
Date of Judgment: 27 March 2023
Entered in register: 27 March 2023
and copied to parties