



EMPLOYMENT TRIBUNALS

Claimant: Mr R Ward

Respondent: Royal Mail Group Limited

Heard at: London East Tribunal via Cloud Video Platform

On: 14 and 15 August 2024

Before: Employment Judge Brewer
Ms S Harwood
Mr M Wood

Representation

Claimant: In person
Respondent: Ms S Percival, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is:

1. the claimant was not disabled, within the meaning of section 6, Equality Act 2010, at the material time, by reason of stress,
2. the claim for failure to make reasonable adjustments fails and is dismissed,
3. the claim for harassment related to disability fails and is dismissed.

REASONS

Introduction

1. This case came before us for a hearing scheduled for three days between 14 and 16 August 2024. In the event the evidence and submissions were concluded on the first day, the tribunal deliberated and delivered its judgment on day two. Although judgment and reasons were given orally, given the claimant's disability of depression

with the potential impact that has on concentration we felt it was an appropriate adjustment to also provide full written reasons which we set out below.

2. We had an agreed bundle of documents running to 433 pages. We had witness statements from the respondent, and we heard oral evidence from Mr Adam Moat, Local Distribution Manager, Mr Amadou John, CCOM, and Mr Gary Mann, CCOM (at the relevant time, although he now has a new job with the respondent). We had two witness statements from the claimant the first was a one-page chronology with no significant narrative. The second was the claimant's up-to-date disability impact statement which he made on 12 August 2024. As well as the witness evidence the parties made oral submissions and we have taken all of this into account in reaching our judgement.

Issues

3. The issues in this case were agreed and set out at a case management hearing held on the 18 October 2023.

Disability

4. The respondent conceded after that hearing that at the material time the claimant was disabled by reason of depression. The claimant also contended that he was disabled by reason of stress and by reason of insomnia. At this hearing the claimant said he was no longer pursuing the claim that he was disabled by reason of insomnia, but he was maintaining that he was disabled by reason of stress. The tribunal therefore had to decide this point.

Material time

5. The material time in this case is the period between 10 October 2022 and 5 June 2023.

Failure to make reasonable adjustments

6. The claimant claimed that the respondent had failed in its duty to make reasonable adjustments.
7. The PCP was said to be the requirement to work night shifts.
8. The substantial disadvantage was that the claimant could not work night shifts because of his stress, depression and insomnia.

Harassment

9. In relation to the claim for harassment related to disability the claimant relied on four acts or omissions as follows:
 - 9.1. the respondent's failure to allow the claimant to appeal against the finding that he was blameworthy for the road traffic accident, which occurred on 10 October 2022, as at the date he presented his tribunal claim, which was 5 June 2023,

- 9.2. the respondent trying to discipline the claimant (several times between 10 October 2022 and 5 June 2023) prior to him being afforded a right of appeal in respect of the road traffic accident referred to above,
- 9.3. at the start of January 2023, the respondent contacted the claimant in relation to alleged overpayment of wages, three days after the claimant attempted suicide, and they progressed to deduct monies from his wages after receipt of a psychiatric report from Queen’s Hospital without consultation with the claimant, and
- 9.4. failing to return the claimant to driving duties since 10 October 2022.
10. During his cross examination by Ms Percival, the claimant abandoned the claim at 9.3 above and we make no findings about that.

Law

11. We set out here a brief description of the applicable law.

Disability

12. Section 6 of the Equality Act (“EqA”) provides that a person has a disability if
- 12.1. they have a physical or mental impairment, and
- 12.2. the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
13. The EqA defines a ‘disabled person’ as a person who has a ‘disability’ —(S.6(2) EqA). The burden of proof is on the claimant to show that he or she satisfies this definition.
14. Although the definition in S.6(1) is the starting point for establishing the meaning of ‘disability’, it is not the only source that must be considered. The supplementary provisions for determining whether a person has a disability are found in the Equality Act 2010 (Disability) Regulations 2010 SI 2010/2128.
15. In addition, the Government has issued ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (2011) (‘the Guidance’) under S.6(5) EqA. The Guidance does not impose any legal obligations in itself but courts and tribunals must take account of it where they consider it to be relevant — para 12, Sch 1, EqA.
16. Finally, the Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) (‘the EHRC Employment Code’), which has some bearing on the meaning of ‘disability’ under the EqA. Like the Guidance, the Code does not impose legal obligations, but tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

17. The requirement to ‘take account’ of the Guidance or Code applies only where the tribunal considers them relevant, and they must always give way to the statutory provisions if, on a proper construction, these differ. In **Elliott v Dorset County Council** EAT 0197/20 the EAT noted that where ‘*consideration of the statutory provision provides a simple answer, it is erroneous to find additional complexity by considering the Code or Guidance*’.

Material time for establishing disability

18. The time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd** 2002 ICR 729, EAT). This is also the material time when determining whether the impairment has a long-term effect. An employment tribunal is entitled to infer, on the basis of the evidence presented to it, that an impairment found to have existed by a medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination) see **John Grooms Housing Association v Burdett** EAT 0937/03 and **McKechnie Plastic Components v Grant** EAT 0284/08).

Approach to be taken

19. In **Goodwin v Patent Office** [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation should be taken. A tribunal ought to remember that, just because a person can undertake day-to-day activities with difficulty, that does not mean that there was not a substantial impairment. The focus ought to be on what the claimant cannot do or could only do with difficulty and the effect of medication ought to be ignored for the purposes of the assessment.

20. The EAT said that the words used to define disability in S.1(1) DDA (now S.6(1) EqA) require a tribunal to look at the evidence by reference to four different questions (or ‘conditions’, as the EAT termed them):

20.1. did the claimant have a mental and/or physical impairment (the ‘impairment condition’),

20.2. did the impairment affect the claimant’s ability to carry out normal day-to-day activities (the ‘adverse effect condition’),

20.3. was the adverse condition substantial (the ‘substantial condition’), and

20.4. was the adverse condition long term (the ‘long-term condition’)?

21. These four questions should be posed sequentially and not together (**Wigginton v Cowie and ors t/a Baxter International (A Partnership)** EAT 0322/09).]

22. The approach in **Goodwin** was approved in **J v DLA Piper UK LLP** [2010] ICR 1052 (paragraph 40). It was said at paragraph 38 of that judgment:

“There are indeed sometimes cases where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say “impaired” – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from a condition which has produced that adverse effect — in other words, an “impairment”. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred.”

Substantial adverse effect

23. To amount to a disability the impairment must have a ‘substantial adverse effect’ on the person’s ability to carry out normal day-to-day activities — S.6(1)(b) EqA. If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities but that effect is likely to recur, it is to be treated as continuing to have that effect — para 2(2), Sch 1.
24. In **Goodwin** (above) the EAT said that of the four component parts to the definition of a disability in S.1 DDA (now S.6 EqA), judging whether the effects of a condition are substantial is the most difficult.
25. There must be a causal link between the impairment and the substantial adverse effect, but it need not be a direct link.
26. The tribunal must compare the claimant’s ability to carry out normal day-to-day activities with the ability he or she would have if not impaired.
27. In cases where it is not clear whether the effect of an impairment is substantial, the Guidance suggests a number of factors to be considered (see paras B1–B17). These include the time taken by the person to carry out an activity (para B2) and the way in which he or she carries it out (para B3). A comparison is to be made with the time or manner that might be expected if the person did not have the impairment.
28. The cumulative effects of an impairment are also relevant.
29. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, likely means ‘*could well happen*’ (**Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)** 2009 ICR 1056, HL).
30. It is important to focus on what an individual *cannot* do, or *can only do with difficulty*, rather than on the things that he or she can do (see para B9).

Normal day to day activities

31. Normal day-to-day activities are activities that are carried out by most men or women on a fairly regular and frequent basis.
32. The EAT in **Paterson v Commissioner of Police of the Metropolis** 2007 ICR 1522, EAT, concluded that 'normal day-to-day activities' must be interpreted as including activities relevant to professional life.

Long term

33. The effect of an impairment is long term if it:
- 33.1. has lasted for at least 12 months,
 - 33.2. is likely to last for at least 12 months, or
 - 33.3. is likely to last for the rest of the life of the person affected.

Failure to make reasonable adjustments

34. Section 20, EqA, states that the duty to make adjustments comprises three requirements:
- 34.1. a requirement, where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage — S.20(3)
 - 34.2. a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage — S.20(4)
 - 34.3. a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid — S.20(5).
35. In this case we are concerned only with the first situation above.
36. In the case of an employer, a 'relevant matter' for the above-mentioned purposes is any matter concerned with deciding to whom to offer employment and anything concerning employment by the employer — para 5, Sch 8.
37. It is no part of the duty to make reasonable adjustments for the employer actively to consult the employee about what adjustments should or could be made (**Tarbuck v Sainsbury's Supermarkets Ltd** 2006 IRLR 664, EAT).

Time limits

38. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** 2018 ICR 1194, CA, the Court of Appeal held that the duty to comply with the reasonable adjustments requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage.
39. In **Humphries v Chevler Packaging Ltd** EAT 0224/06 the EAT confirmed that a failure to act is an omission and that time begins to run when an employer decides not to make the reasonable adjustment.
40. The Court of Appeal considered the question further in **Kingston upon Hull City Council v Matuszowicz** 2009 ICR 1170, CA. The Court of Appeal noted that, in claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, the employer is to be treated as having decided upon the omission at what is in one sense an artificial date.
41. In **Fernandes v Department for Work and Pensions** 2023 EAT 114, the EAT offered guidance as to how tribunals should determine the notional date from which limitation is to run in reasonable adjustments cases. In the absence of a finding that the employer has made a specific decision not to alleviate a disadvantage, there must be judicial analysis to identify the notional date.
42. This analysis must begin with the identification of the feature which causes the disadvantage (a PCP, physical feature or auxiliary aid). This will be a fact which dates the start of the disadvantage.
43. The next element is a factual finding to determine when it would be reasonable for the employer to have to take steps to alleviate the disadvantage. This will be a finding of fact which dates when the breach occurred.
44. The tribunal should then ask if there are facts which would allow it to conclude that the employer acted inconsistently with the duty to make adjustments. If there are, then that determines the notional date. If there is no inconsistent act by the employer, then there will come a time when it would be reasonable for the employee, on the facts known to him or her, to conclude that the employer is not going to comply with the duty. In those circumstances, identifying the notional date is a jurisdictional question in which there should be an objective analysis of the facts known to the employee, which is then considered on the basis of what a reasonable person would conclude from those facts about the employer's intention to comply with the duty. However, if the notional date means the claim falls outside the primary time limit, the tribunal would then be entitled to consider the claimant's subjective state of mind when considering the discretionary question of whether time should be extended on a just and equitable basis.

Harassment related to disability

General

45. The general definition of harassment set out in S.26(1) states that a person (A) harasses another (B) if:

45.1. A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a); and

45.2. 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 — S.26(1)(b).

46. Where there is disagreement between the parties, it is important that an employment tribunal makes clear findings as to what conduct actually took place, such as what words were used. In **Cam v Matrix Service Development and Training Ltd** EAT 0302/12 an employment tribunal had erred by failing to find whether or not the alleged harasser had used the expression 'white trash', given that he denied doing so.

Unwanted conduct

47. In **Reed and anor v Stedman (above) and Insitu Cleaning Co Ltd v Heads** (above) (both decided before the statutory harassment provisions came into force) the EAT held that the word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited'.

Violating dignity

48. There are few cases examining precisely what is meant by violating a claimant's dignity. In **Richmond Pharmacology v Dhaliwal** 2009 ICR 724, EAT, Mr Justice Underhill, then President of the EAT, said: 'Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended'.

Intimidating, hostile, degrading, humiliating or offensive environment

49. Some of the factors that a tribunal might take into account in deciding whether an adverse environment had been created were noted in **Weeks v Newham College of Further Education** EAT 0630/11. Mr Justice Langstaff, then President of the EAT, held that a tribunal did not err in finding no harassment, having taken into account the fact that the relevant conduct was not directed at the claimant, that the claimant made no immediate complaint and that the words objected to were used only occasionally. (However, he noted that tribunals should be cautious of placing too much weight on the timing of an objection, given that it may not always be easy for an employee to make an immediate complaint.) Langstaff P also pointed out that the relevant word here is 'environment', which means a state of affairs. Such an

environment may be created by a one-off incident, but its effects must be of longer duration to come within what is now S.26(1)(b)(ii) EqA.

Purpose

50. A claim brought on the basis that the unwanted conduct had the purpose of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment obviously involves an examination of the perpetrator's intentions. As the perpetrator is unlikely to admit to having had the necessary purpose, the tribunal hearing the claim is likely to need to draw inferences from the surrounding circumstances.

Effect

51. In deciding whether the conduct has the effect referred to in S.26(1)(b) (i.e. of violating a person's (B) dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B), each of the following must be taken into account:

51.1. the perception of B,

51.2. the other circumstances of the case; and

51.3. whether it is reasonable for the conduct to have that effect.

Related to a relevant protected characteristic

52. In order to constitute unlawful harassment under S.26(1) EqA, the unwanted and offensive conduct must be 'related to a relevant protected characteristic'. However offensive the conduct, it will not constitute harassment unless it is so related, and a tribunal that fails to engage with this point will err — **London Borough of Haringey v O'Brien** EAT 0004/16.

53. Whether or not the conduct is related to the characteristic in question is a matter for the appreciation of the tribunal, making a finding of fact drawing on all the evidence before it — **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor** EAT 0039/19.

54. The words 'related to' in S.26(1)(a) have a broad meaning and holding that conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it — **Hartley v Foreign and Commonwealth Office Services 2016** ICR D17, EAT.

55. In disability cases, the mere fact that unwanted conduct occurs at a time when a claimant satisfies the definition of a disabled person will not necessarily mean that it is related to the disability (see for example **Private Medicine Intermediaries Ltd v Hodkinson** EAT 0134/15).

Burden of proof

56. The burden of proof under the EqA is set out in section 136 which states as follows:

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

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

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

57. In short, the claimant must show a prima facie case and if he does, the burden shifts to the respondent to prove it did not discriminate against the claimant as alleged.

58. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

59. Importantly, in **Madarassy** the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. disability) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed.

Findings of fact

60. We make the following findings of fact.

61. The claimant commenced employment with the respondent on 18 April 1994. He is by any measure a long-serving employee. His original contracted role was as an Operational Postal Grade/Driver working the nightshift driving MGVs. Latterly his role changed to working in Collections on days.

62. For some time, the claimant was a H&S Trade Union Representative, although he gave up that role and returned to his normal contractual duties in February 2021.

63. The claimant has a long history of anxiety and depression and has taken increasing doses of Sertraline for a fairly long time.

64. During August 2021 the claimant, through his trade union, made a request to be moved from nights, driving MGVs to working days in Collections, not driving MGVs. Although at that time there was no actual vacancy within Collections, the claimant was moved on a temporary basis to work in Collections, on the day shift, without a requirement to drive MGVs on what the respondent calls a loan and borrow basis.

65. As a nightshift worker driving MGVs the claimant received, alongside his normal pay, allowances for both the night work and the MGV driving. These extra payments did not apply to the claimant once he moved to working days without the MGV driving and we find that he was told about the difference in pay before or at the time of his move. Even if he was not, in any event we find that as a long-serving employee and trade union representative he would have been well aware that his original role

attracted allowances that did not apply, and would not be paid, if his work altered to a role which did not attract the allowances.

66. The claimant's move to Collections, as an OPG/Driver became permanent in February 2022. It appears that Mr John did not formally process the claimant's move to Collections (by completing an Employee Change Record) until the move became permanent in February 2022. The effect of this was that until the move was formally processed, the claimant continued to receive the allowances he was receiving as a night shift worker driving MGVs even though from the point he moved to Collections, in August 2021, he stopped being entitled to those allowances, and therefore he had been overpaid for the period between August 2021 and February 2022. As a result of that the respondent decided to deduct the overpayments from the claimants pay as they are entitled to do.
67. The claimant's payslip dated 18 February 2022 indicates that a deduction was made of the total overpayment, which meant that the claimant received no pay and he was therefore loaned the amount of £3,174.08
68. On 10 October 2022 the claimant was involved in a road traffic accident (RTA) in one of the respondent's vehicles. This, as with all RTAs, triggered an investigation. That investigation was commenced by Mr John on 11 October 2022.
69. Prior to commencing the investigation, Mr John asked colleagues to send him a copy of the relevant procedure and he was sent a copy of the respondent's RTA procedure which was created in 2012. This is an agreed procedure between the respondent and its recognised trade unions.
70. In fact, at the point the RTA investigation was commenced the respondent had a new agreed RTA procedure. For our purposes the significant difference between the two procedures is that the 2012 procedure does not have an appeal process following a finding of blameworthiness in respect of the RTA. It does contain a review process but that only applies in cases where the blameworthiness does not lead to a conduct case being brought against the culpable driver. The 2022 procedure has a similar process but instead of just referring to a review of the blameworthiness decision, it uses the words "decision review/appeal process" therefore seemingly making it clearer that a culpable, blameworthy driver, can appeal against the blameworthiness decision.
71. Having said that, the claimant's allegation regarding this point is that the respondent failed to allow him to appeal against a finding of blameworthiness. What in fact happened is that at a meeting held by Mr John with the claimant on 22 November 2022, the claimant handed Mr John what he referred to as an appeal which was in the following terms:

"Dear Amadou, I wish to appeal the blameworthy for the 10/10/22 accident I had whilst on duty, the reasons for the appeal are, because we believe that the Royal Mail RTA procedure and the Accident Investigation procedure have not been correctly applied. We specifically wish to challenge the photos taken by the investigation manager and his refusal to accept the photographs I have taken when returning to the scene of the accident taken as evidence" (sic)

72. Presenting an appeal to Mr John was not the correct procedure because it was his decision which was being appealed. The 2012 policy makes it clear that any request for a review is to be submitted in writing to the “*second line manager*”. Mr John was of course the first line manager. The 2022 policy is in almost identical terms stating that the review or challenge, or even appeal should be “*made in writing to 2nd line manager within three working days...*”.
73. There is, in this case, a further complication because, understandably, the claimant began to chase Mr John about the progress of his appeal and in an e-mail of 15 March 2023 Mr John said as follows:
- “...Also regarding your RTA blameworthy, I have [sought clarity] and can confirm there is no appeal process”*
74. Strictly speaking although the word appeal is not used in the 2012 procedure, the one which was being used by Mr John, there is in effect an appeal process by way of review in that procedure, and the information given to the claimant was somewhat misleading. But it seems to the tribunal that the claimant was well aware of his right to appeal (albeit under the 2022 procedure which he rightly said was the correct procedure) because he submitted an appeal.
75. The claimant’s criticism of the respondent is that they failed to allow him to appeal against the blameworthiness finding and that this amounted to an act of harassment related to his disability. However, it was not Mr John who failed to allow the claimant to appeal. He did fail to progress the claimant’s appeal, but he did so because he genuinely believed that there was no appeal process under the 2012 procedure which he believed was the correct procedure under which to investigate the RTA. Therefore, the failure to allow the claimant to appeal, or the failure to progress the appeal he had submitted, was wholly unrelated to the claimant’s disability of depression.
76. The claimant was suspended from driving on 11 November 2022. He takes no issue with that suspension. His complaint is that as at the date of the preliminary hearing he had not been returned to driving duties. That is put as an allegation of disability related harassment and therefore the claimant is essentially arguing that the failure to return him to driving duties since October 2022 is in some way related to his disability of depression.
77. In relation to possible conduct proceedings, on 6 December 2022 the claimant was invited to a conduct fact finding meeting. However, on 13 December 2022 in a letter from the claimant, he argued that his appeal should come before any conduct proceedings.
78. The claimant provided fit notes for the period 18 December 2022 to 31 March 2023.
79. On 6 February 2023 the claimant raised a grievance over the deduction from his pay made to recover the overpayment to him of the allowances he ought not to have been paid once he moved to Collections.

80. On 30 March 2023 the claimant was notified that Adam Moat had been assigned to deal with his grievance
81. On 5 April 2023 the claimant was invited to a grievance meeting with Mr Moat.
82. On 14 April 2023 the claimant was given the grievance outcome. The grievance was not upheld.
83. On 17 April 2023 the claimant appealed the grievance outcome.
84. The claimant commenced early conciliation on 17 April 2023.
85. On 22 May 2023 a grievance appeal meeting was held by Gary Mann.
86. The claimant's RTA blameworthiness appeal was accepted by the respondent and on 24 May 2023 Mr John emailed Mr Palmer, his manager, to confirm that he could not go any further with the claimant's conduct case until the RTA appeal was completed
87. On 25 May 2023 the RTA appeal manager was allocated (Mr Raf Patel).
88. The claimant's early conciliation certificate was issued on 29 May 2023.
89. On 2 June 2023 the outcome of the claimant's grievance appeal, heard by Gary Mann, was sent to the claimant.
90. The claimant presented his claim to the tribunal on 5 June 2023.
91. On 13 July 2023 the claimant's RTA appeal was heard by Mr Patel.
92. On 13 October 2023 the RTA appeal outcome was delivered. The claimant's appeal was not upheld, and a disciplinary procedure was recommended.
93. On 11 November 2023 a conduct case was passed to Kevin Baynham for him to consider whether formal conduct proceedings should commence.
94. Taking all of this into account, we find as a fact that the claimant has not been returned to driving duties because of a combination of the ongoing RTA procedure, the ongoing grievance procedure which arose from the RTA investigation, the claimant's absence through sickness and pending conduct proceedings arising out of the blameworthiness for the RTA, the grievance appeal, the RTA appeal and the potential conduct case. The failure to return the claimant to driving duties is not related in any way to his disability but is based on the procedures in place at the respondent. We would express the view that these procedures do appear to be taking rather longer than is ideal, and may have caused the claimant some upset, but we do not consider that any delay is related to the claimant's disability.

Discussion and conclusions

95. Having set out detailed findings of fact we now deal with the claimant's claims.

Was the claimant disabled by reason of stress at the material time?

96. The claimant gave no evidence as to the basis upon which he says he was disabled by reason of stress. The majority of the claimant's sick notes, other than those relating to his RTA, state that he was suffering from mixed anxiety and depression. We accept that often the terms anxiety (that is episodes of anxiety) and stress are used interchangeably although arguably they are not the same thing. In this case the claimant's disability impact statement and his own medical evidence cannot possibly lead to the conclusion that he was suffering from stress (or mere episodic anxiety) because that would be to underplay the claimant's impairment. Stress, rather like anxiety is a normal reaction to a stressor whereas the claimant was suffering from long anxiety (chronic anxiety sometimes labelled as Generalised Anxiety Disorder), and for the most part, depression, for which he was taking a significant amount of medication. We would also add that a finding that the claimant was suffering from stress, whether or not a disability, adds nothing to this case given the respondent's understandable concession in relation to the disability of depression.
97. Given the complete lack of evidence we find that the claimant was not disabled at the material time by reason of stress.

Failure to make reasonable adjustments

98. During the course of the hearing the claimant, in effect abandoned this claim. The claimant confirmed that he was moved from his role as a night shift driver to working days in Collections. He appears to have been complaining that this move did not happen until February 2022, but he was clearly mistaken about that because all of the documentary evidence is quite clear that he moved roles almost immediately upon his request made by his trade union in August 2021.
99. Giving the claimant the benefit of the doubt, it may be that he was confused by the fact that in August 2021 the move was temporary until a permanent vacancy arose and the move was made permanent in February 2022. However, we are clear about two things.
100. The first is that the purported PCP, which is the respondent's alleged "requirement" to work night shift was not a PCP. The claimant was not "required" to work night shifts, it was his job, the job which he accepted and for which he was paid. It could have become a PCP had the respondent refused to move the claimant to working days although perhaps the PCP would have been better described as the refusal to allow a change in role.
101. In any event all of this is rather moot because the second point, as we have said, is that almost immediately upon his request in August 2021, the claimant was moved from working night shifts and driving MGVs to working days in Collections and therefore insofar as there was a PCP, and insofar as that PCP caused the claimant a substantial disadvantage, the respondent made the reasonable adjustment for which the claimant contended and did so at the appropriate time.
102. The claim for failure to make reasonable adjustments fails.

Harassment related to disability

103. Given the withdrawal of the harassment allegation in relation to the overpayment of wages, there remain three allegations of harassment related to disability.
104. The first allegation is that the respondent failed to allow the claimant to appeal against the RTA blameworthiness finding. As we have set out above this is unsustainable because he was allowed to appeal albeit somewhat late in the day. In relation to timing however we would point out that although the claimant began early conciliation prior to an RTA appeal manager being appointed, that appeal manager was appointed prior to the early conciliation certificate being issued and obviously prior to the claimant presenting his claim. Furthermore, the RTA appeal outcome was delivered to the claimant prior to the preliminary hearing at which he agreed that one of the issues was the alleged failure by the respondent to allow him to appeal against the blameworthiness finding. Whilst we hesitate to be overly critical of litigants in person, it is surprising, given that the claimant had been allowed to appeal, that he maintained after that appeal had been concluded that he had not been allowed to appeal.
105. In our judgment the claimant cannot possibly have shifted the burden of proof to the respondent for the reasons set out above, i.e. the allegation fails because the claimant was allowed an RTA appeal. For that reason alone, this allegation fails.
106. We would add that even if the allegation had been that the RTA appeal had been delayed, this allegation would still have failed. The reasons for the delay have been set out in our findings of fact and are wholly unrelated to the claimant's depression. Whilst we can be critical of the time taken by the respondent to deal with this matter, it has not been straightforward because of the need for an RTA investigation, the claimant sickness absence and the need to deal with the grievances raised by the claimant and the respondent is not wholly blameworthy for such delay. Based on the evidence we heard, we are clear that the reason for the delay is not related to the claimant's depression and if this allegation had been put this way, it would have failed anyway.
107. The second allegation is that the respondent had been trying to discipline the claimant.
108. We bear in mind that the allegation here is that the potential disciplinary action against the claimant is somehow related to his disability. In our judgment it is not. The RTA procedures, whether the 2012 or the 2022 version, both contain the understandable potential for disciplinary action following a finding of blameworthiness when an employee has been involved in an RTA in the respondent's vehicle. The claimant was involved in a significant RTA, and he was held to be blameworthy both at the first stage and following his appeal and it is entirely unsurprising to the tribunal that potential disciplinary action is being considered. There is no evidence to suggest that this is in any way related to the claimant's disability and the claimant has failed to shift the burden of proof in respect of this allegation. Even if the burden of proof had shifted to the respondent, we are entirely satisfied with the respondent's explanation that the potential disciplinary action is wholly related to the RTA and the claimant's blameworthiness and nothing to do with his depression.

109. For those reasons the second allegation also fails.
110. The third and final allegation is the failure to return the claimant to driving duties since he was suspended from those in October 2022.
111. We have set out detailed findings of fact above about the claimant's suspension from driving. As we have said, the claimant does not take issue with the fact that he was suspended from driving. We are therefore only concerned with the fact that he has not been allowed to drive since the original suspension.
112. The question is whether the reason for that is related to the claimant's depression. The claimant led no evidence, nor produced any facts from which we could decide, in the absence of any explanation from the respondent, that the reason he remains suspended from driving is related to his depression. For that reason, the claimant has failed to shift the burden of proof to the respondent and the claim must fail.
113. However, for the sake of completeness, had the claimant shifted the burden of proof we are satisfied with the respondent's explanation as to why the claimant remains suspended from driving. That explanation is that the issue which gave rise to the original suspension is, to date, unresolved. That issue is in summary; to what extent has the claimant committed an act of misconduct given his blameworthy RTA.
114. We have explored the reasons for the time taken to deal with this matter and again whilst we may be critical of the time taken, in and of itself that is not the issue. The reason for the claimant's original suspension from driving, a reason which he accepted, remains, that is unless and until the conduct issue is resolved one way or the other, he is deemed to be a potential driving risk, to himself and to the public, having been found blameworthy for the original RTA and it is that which has led to consideration of disciplinary proceedings.
115. For those reasons the third allegation fails.
116. We find that the claimant has not suffered harassment whether related to disability or otherwise and the claim of harassment related to disability fails.
117. In summary:
- 117.1. the claimant was not disabled by reason of stress at the material time,
 - 117.2. the claim for failure to make reasonable adjustments fails and is dismissed,
 - 117.3. the claim for harassment related to disability fails and is dismissed.

**Employment Judge Brewer
Date: 15 August 2024**