EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100018/2020

Held in Dundee on 22, 24-26 & 29 March 2021

Employment Judge Sangster
Tribunal Member McCullagh
Tribunal Member Martin

Mr G R Black	**Claimant** **Represented by:** **Mr J McMillan** **Solicitor**
Mackie Motors (Brechin) Limited	**First Respondent** **Represented by:** **Mr O'Carroll** **Advocate** **Instructed by:** **Law At Work Ltd**
Mr K Mackie	**Second Respondent** **Represented by:** **Mr O'Carroll** **Advocate** **Instructed by:** **Law At Work Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

- The claimant was unfairly dismissed. The First Respondent is ordered to pay to the claimant the sum of Sixty Three Thousand, One Hundred and Fifty Pounds **(£63,150)** by way of compensation as a result.

- The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award. The prescribed element is Forty Four Thousand, Three

Hundred and Fifty Pounds and Twenty Nine Pence **(£44,350.29)** and relates to the period from 22 October 2019 to 18 April 2021. The monetary award exceeds the prescribed element by Eighteen Thousand, Seven Hundred and Ninety Nine Pounds and Seventy One Pence (**£18,799.71)**.

- The remaining claims of disability discrimination, unauthorised deductions from wages and breach of contract do not succeed and are dismissed.

REASONS

Introduction

1. The claimant presented a complaint of constructive unfair dismissal, disability discrimination (direct discrimination, discrimination arising from disability, indirect discrimination and harassment), unauthorised deductions from wages and breach of contract.

2. The respondents denied that the claimant was unfairly dismissed and that he had been subjected to disability discrimination. They denied that the claimant's stress and depression amounted to a disability and that they had knowledge of this. They accepted however that the claimant was a disabled person for the purposes of the Equality Act 2010 (EqA) by virtue of him having Chronic Lymphatic Leukaemia (**CLL**) and that the claimant's wife also had a disability for the purposes of the EqA.

3. The claimant gave evidence on his own behalf.

4. The respondents led evidence from:

    a. The Second Respondent, Kevin Black, the Managing Director of the First Respondent; and

    b. George Ross, Sales Manager for the First Respondent.

5. The parties agreed a joint bundle of documents extending to 537 pages, in advance of the hearing. A further document was added during the course of the hearing.

Issues to be Determined

6. It was agreed at the outset of the hearing that the issues to be determined were as noted below.

Direct discrimination because of disability - s13 EqA

7. Was the claimant a disabled person in accordance with the EqA at all relevant times because of stress and depression?

8. Did the respondents subject the claimant to the following treatment?

    a. Failing to pay enhanced sick pay, in addition to statutory sick pay;

    b. Failing to pay a bonus for 2018;

    c. Failing to respond to correspondence from the claimant;

    d. Sending recorded delivery letters to the claimant;

    e. Cancelling the claimant's fuel card;

    f. Failing to ensure the claimant was notified of the cancellation of his fuel card;

    g. Requiring the claimant to return his company laptop and mobile phone during his sickness absence;

    h. Causing the claimant's access to emails to be removed (or his emails deleted);

    i. Instructing the claimant not to contact colleagues; and

    j. Instructing staff not to speak to the claimant following his resignation.

9. If so, was that treatment '*less favourable treatment*', i.e. did the respondents treat the claimant less favourably than they treated, or would have treated others ("comparators") in not materially different circumstances?

10. If so, was this because of the claimant's disability, or that of his wife?

Discrimination arising from disability – s15 EqA

11. Was the claimant treated unfavourably in any of the following respects:

    a. Failing to pay enhanced sick pay, in addition to statutory sick pay;

    b. Failing to pay a bonus for 2018;

    c. Failing to respond to correspondence from the claimant;

    d. Sending recorded delivery letters to the claimant;

    e. Cancelling the claimant's fuel card;

    f. Failing to ensure the claimant was notified of the cancellation of his fuel card;

    g. Requiring the claimant to return his company laptop and mobile phone during his sickness absence;

    h. Causing the claimant's emails to be deleted;

    i. Instructing the claimant not to contact colleagues; and

    j. Instructing staff not to speak to the claimant following his resignation.

12. If so, was this due to something arising in consequence the claimant's disabilities? Namely his absence from work, which arose as a result of his disabilities?

13. If so, was the treatment pursuant to a legitimate aim?

Harassment related to disability – s26 EqA

14. Did the respondents engage in the following conduct?

    a. Failing to respond to correspondence from the claimant;

    b. Sending recorded delivery letters to the claimant;

    c. The Second Respondent's response to a letter going missing on or around July 2019;

d. Cancelling the claimant's fuel card;

e. Failing to ensure the claimant was notified of the cancellation of his fuel card;

f. Requiring the claimant to return his company laptop and mobile phone during his sickness absence;

g. Causing the claimant's emails to be deleted;

h. Instructing the claimant not to contact colleagues; and

i. Instructing staff not to speak to the claimant following his resignation.

15. If so was that conduct unwanted?

16. If so, did it relate to the protected characteristic of disability?

17. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Time Limits

18. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the EqA? If not, should time be extended on a "just and equitable" basis?

Constructive Unfair Dismissal

19. Did the factual allegations made by the claimant amount to a breach of any express or implied terms of the claimant's contract of employment?

20. If so, were such alleged breaches (taken alone or cumulatively) sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement for the claimant to treat the contract as terminated?

21. Did the claimant, by his conduct, waive any such breaches with the result that he did not remain entitled to terminate the contract?

22. Was the claimant's resignation in response to any alleged repudiatory breach?

23. If the claimant was dismissed: what was the principal reason for dismissal; was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ('ERA'); and, if so, was the dismissal fair or unfair in accordance with s98(4) ERA?

Unauthorised deductions from wages/Breach of contract

24. Was the claimant entitled to enhanced sick pay or a bonus for 2018?

Indirect Discrimination – s19 EqA

25. This claim was withdrawn by the claimant during the course of the Hearing.

Findings in Fact

26. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

27. The First Respondent operates a car dealership with showrooms in Brechin and Arbroath. There are approximately 50 employees and the business turnover is approximately £25m. The Second Respondent is the Managing Director of the First Respondent.

28. The claimant commenced employment with the First Respondent on 19 October 2015 as a Sales Manager, based in the Arbroath showroom. His salary on the commencement of his employment was £60,000 per annum for the first 6 months of employment, thereafter reducing to £45,000 per annum with an annual bonus potential of £25,000. His notice period was 8 weeks and he was entitled to statutory sick pay only, if absent from work due to illness. He received a contract of employment setting out these terms. In addition, he was entitled to a company car and a fuel card, with which he could purchase fuel for personal and business milage.

29. With effect from 1 April 2016 the claimant was promoted to the position of Franchise Director. In that position the claimant was responsible, with the Second Respondent, for running the First Respondent's car dealerships. It was agreed that his salary would increase to £60,000. In addition, there was the potential of a bonus, at the sole discretion of the Second Respondent. His other terms and conditions remained unchanged. Whilst it may have been intended that the revised terms be documented, this was not done. No new contract of employment was issued.

30. Following the claimant's promotion, the Second Respondent increasingly focused on other business interests and would generally spend at least 6 months each year abroad.

31. The claimant and the Second Respondent had a good working relationship and occasionally socialised outside of their working hours also. The claimant attended the Second Respondent's wedding in September 2017 and the Second Respondent and his wife attended the claimant's wedding in October 2018.

32. The default position for all employees was that they would receive SSP only when absent due to illness. The Second Respondent would however consider each absence and determine whether to exercise discretion and pay full pay for the period of absence. This was done, for example, where long serving employees were ill for a short period, provided the business was doing well at the time. On 3 March 2017, following concerns raised by a long serving employee who was very seldom absent due to illness (approximately 5 days in 22 years' service), the Second Respondent sent an email to the company's accountant, stating that *'Lorraine and Graham are to be paid if they are off'*. Graham had over 30 years' service and had had a similar absence record. This was copied to the claimant.

33. The claimant was absent on 3 occasions in 2016/17: to deal with family matters for a few days; as a result of kidney stones for 4/5 days; and as a result of chest pains for 10 days. He received full pay during each period of absence.

34. Shortly prior to commencing employment with the respondent, the claimant separated from his first wife. Their daughter, who was born in 2010, remained living with her mother. The claimant was then involved in acrimonious divorce and custody/residency proceedings. This caused the claimant considerable stress and, in 2016, he was prescribed anti-depressant medication. The claimant's divorce was finalised in December 2017 and custody/residency proceedings concluded in November 2019. The Second Respondent was aware that the claimant was involved an acrimonious divorce and custody residency proceedings and referred him to a psychotherapist and life coach in Aberdeen in 2017, to assist him in dealing with stress caused by these issues. The Second Respondent was not aware of the fact that the claimant had been prescribed anti-depressants.

35. On 26 January 2018, the claimant received a discretionary bonus payment of £7,500 gross. This was the first bonus payment he received.

36. In February 2018, with the agreement of the Second Respondent, the claimant conducted a consultation exercise with all the First Respondent's staff who reported to him. This resulted in the removal of their ability to use company fuel cards to pay for fuel and their entitlement to have personal fuel paid for by the First Respondent. Instead, they would require to pay for fuel themselves and be reimbursed for business milage only. This was a cost cutting exercise. Following this point, only the claimant and the Second Respondent's family members who were involved in the business had fuel cards in their own name.

37. In April or May 2018, the claimant received a discretionary bonus payment of £2,000 gross. This coincided with a trip the claimant was taking to New York and was provided as gesture by the Second Respondent who was appreciative of his efforts in running the business, enabling him to focus on other business interests abroad.

38. In June 2018, the claimant as diagnosed with CLL, which is a type of cancer of the blood. He was informed his condition was at an early stage and no treatment was required at that time, or in the foreseeable future. It is however

a progressive condition and it is expected that, at some point, the claimant will require to undertake chemotherapy treatment. The claimant informed the Second Respondent of his diagnosis and prognosis and that his condition would simply be monitored at that stage.

39. The claimant was absent from work for 2 weeks following his diagnosis. He took time off because he did not feel able to properly cope with what was going on, or to concentrate on work with worry and tiredness. He was having trouble sleeping and was often tearful. At that time he was again prescribed anti-depressants, as well as sleeping tablets. He told the Second Respondent how he was feeling, but not that he had a history of depression or that he had been prescribed anti-depressants. He received full pay during his absence. He remained on anti-depressants for the remainder of 2018.

40. In September 2018 the Second Respondent requested that the claimant arrange for the fuel cards in the names of the Second Respondent's family members, who were involved in the business, be cancelled. The claimant arranged for this to be done. During 2018, there had been an investigation of the First Respondent's practices by HMRC which highlighted that personal mileage, if paid by the First Respondent, would be deemed to be a taxable benefit, even if this only covered travel from home to work.

41. On 28 September 2018, the claimant received a payment of £5,526.18 gross, in addition to his normal remuneration. This was detailed on his payslip as 'Bonus – Annual'. There was then a 'Deduction from Net' in the sum of £3,150, meaning that the claimant's net take home pay for that month did not change significantly. No explanation was provided to the Tribunal regarding what the 'Deduction from Net' related to.

42. On 24 December 2018 the Second Respondent emailed the claimant offering him and his family a weekend at Gleneagles hotel, at his expense.

43. During 2018 the Arbroath showroom, where the claimant was based, did not perform as well as the Brechin showroom, which made around over three times the profit made in Arbroath. While the business as a whole was

profitable, it was at the lower end of the expectations. At the start of 2019, the First Respondent was operating with an overdraft of around £600,000.

44. In February 2019, the claimant again attended his GP with symptoms of depression. He was suffering from low mood, anhedonia and sleep disturbances, as well as fatigue and difficulties with concentration. He was again prescribed anti-depressant medication. The Second Respondent was out of the country at the time and for most of that month, as he had been for most of December 2018 January 2019 also. The claimant did not inform the Second Respondent of the fact that he had been prescribed anti-depressants and the claimant did not take any time off work at that stage.

45. In March 2019, the claimant's wife found a lump in her breast and was referred to hospital for tests. Her diagnosis of breast cancer was confirmed on Monday 15 April 2019. The claimant attended that appointment with his wife and then returned to work on 17 April 2019.

46. The claimant attended an appointment with his GP on the morning of 18 April 2019. He broke down when discussing matters with his GP. He was certified as unfit to work, initially for a 3 week period. He remained absent until the termination of his employment. The initial medical certificate stated depression. Subsequent medical certificates indicated that he was unable to work due to 'stress at home'.

47. The claimant emailed the Second Respondent at 08:43 on 18 April 2019 to inform him that he had been signed off for a couple of weeks and that this was to try to come to terms with his wife's diagnosis, so soon after his own diagnosis of CLL. He asked that he not be contacted during his absence, to give him the breathing space he required.

48. The claimant contacted the First Respondent's wages clerk on/around 22 April 2019 to ask what he would be paid during his absence. She contacted the Second Respondent who confirmed that the claimant should be paid full pay for the remainder of April 2019, but if he remained absent thereafter, he would revert to SSP only. The wages clerk relayed this to the claimant.

49. The claimant sent three emails to the Second Respondent that day, as follows

    a. At 13:23 stating that he had been signed off for 3 weeks and that he had an email from the company accountant stating that would be paid full pay when off sick and that his amended contract also stated this;

    b. At 13:36 raising concerns that he had not received a bonus in respect of 2018; and

    c. At 14:38 stating that he was disappointed that he would only be paid SSP, contrary to the position confirmed by the company's accountant in 2016. Given that other staff had been paid when off, he could not understand why he was being treated differently. He went on to state *'I have also not been paid any bonus for last year and feel that your treatment towards me has changed in recent months. I am not sure of the basis for that, but it is something that needs to be discussed when I return.'*

50. The Second Respondent responded stating that he would be happy to meet him to discuss matters, once he was in a position to return to work.

51. On 8 May 2019, the claimant wrote to the Second Respondent confirming that he had been certified as unfit to work for a further 4 weeks. The Second Respondent responded later that day asking him to forward the email which he previously mentioned from the accountant regarding him receiving full pay while absent. He stated that he had looked for this and had also checked with the First Respondent's HR provider, Empire, but this could not be located.

52. On 16 May 2019, the Second Respondent dictated a letter to the claimant. He assumed it was sent, but it was in fact placed in his mail tray for signature.

53. The claimant responded to the Second Respondent's email of 8 May 2019 on 20 May 2019. He stated that he would look out the email from the accountant. He stated that from memory this was sent around 2016 and that it involved payment for certain people, such the claimant, Lorraine, Graham and another named individual, and that they would receive full payment if off sick. The claimant was however subsequently unable to locate any such email. In his

email he also stated that he hadn't switched on his laptop during his absence, in order to avoid stress altogether, and that he hadn't been able to locate his work mobile since before his holiday (which predated his absence). The claimant had his own mobile telephone and an iPad for personal matters.

54. On 31 May 2019, the claimant sent two emails to the Second Respondent, as follows

a. At 10:12 stating that he had not received a response to his previous email of 20 May 2019 and that he had been paid that day, but not full pay. He stated *'You have previously confirmed to both myself and [the accountant] that I am entitled to full pay during sickness absences for up to 12 months. This is consistent with what has happened to others and when I have been off work sick in the past. Although I don't have a breakdown, it is clear I have not been paid that. Unfortunately, in the absence of any explanation, it means that this and my previous email should be treated as a formal grievance…'*

b. At 10:16 stating that *'In addition to my previous email and despite assurances at the time in both December and January I also have not been paid my bonus for 2018. The expectation is that this should be paid in line with previous year as there has been no communication to the contrary.'*

55. On 3 June 2019 the claimant informed the Second Respondent that he had been certified as unfit to work for a further four weeks.

56. On 5 June 2019 and the Second Respondent wrote to the claimant inviting him to a welfare meeting on 18 June 2019. At that point he believed that the claimant was absent as a result of stress at home, as stated on the claimant's medical certificates, and that this was as a result of his wife's health. He requested in the letter that the claimant return his mobile telephone, as he was aware from clients that business calls to that number were not being responded to. The letter sent by recorded delivery, as a result of advice provided to the Second Respondent from Empire HR.

57. The claimant wrote to the Second Respondent on 6 June 2019 by email. He raised concerns about being contacted by recorded delivery letter and at the lack of contact from the company to him during his absence. He stated that both demonstrated a difference in treatment towards him. He stated that he could not meet on 18 June 2019 but he was happy to meet at an alternative date at a location away from work provided that his wife (who is an employment lawyer) could accompany him to the meeting. He indicated he would bring the mobile phone to the meeting.

58. The Second Respondent responded on 18 June 2019, suggesting a date of 2 July 2019 for a meeting. He requested that he also bring the company laptop with him to the meeting, as well as his mobile phone. He referred to a previous letter of 16 May 2019, which he felt the claimant had not responded to.

59. The claimant responded by email dated 25 June 2019. He confirmed that he had not received any correspondence dated 16 May 2019 and requested a copy of this. He indicated that he was waiting to hear back about some medical appointments on 2 July 2019, so could not currently confirm when he would be available that day for a meeting, but would confirm as soon as possible. He stated '*My absence is due to stress at home as stated in my sickness certificates. My diagnosis with cancer last year was difficult and not easy to come to terms. As a result of the stress caused by that I was prescribed antidepressants and have been taking them since then. I also found it stressful dealing with work related messages when I was on holiday in April and in need of a break. That was the reason I advised you I was switching off my work mobile phone. [My wife's] subsequent diagnosis has, of course, contributed to my stress and my antidepressants have been increased recently. It has not helped that my back pain has returned (for which I have been referred to a consultant) as well as developing tennis elbow, the pain from which are all impacting on my sleep, which is already affected by the stressful situation. The way in which my absence has been handled and responded to has also contributed to my current situation and stress. I do not feel there is any genuine concern for my welfare or [that of my*

wife]. Had there been I would have expected, as has happened before, a text or email to say "how are you" and "hope you are okay".' He also raised that he had not had any response to his emails of 22 April and 31 May.

60. The Second Respondent responded by email on 25 June 2019 stating '*I will deal with your previous and current emails when we meet in the hopefully not too distant future! I look forward to you confirming a date that suits, I will then confirm who will be in attendance.'*

61. The claimant wrote back to the Second Respondent on 26 June 2019 asking what was to be discussed at the meeting and whether it was intended that the claimant's emails of 22 and 31 May 2019 regarding his pay and bonus would be discussed. He highlighted that the Second Respondent had previously indicated that "business matters" would be discussed and asked for clarification of what those were. Finally he reiterated his request for a copy of the letter dated 16 May 2019.

62. In an email dated 28 June 2019 the Second Respondent stated *'I know that you are under considerable stress at the moment and so I would suggest that if you need to contact anyone at work that you relay everything through myself, this way I can hopefully manage and control everything as smooth as possible for you.'*

63. In a further email to the claimant, dated 2 July 2019, the Second Respondent stated *'I can confirm that I have now resolved the business questions I wanted to discuss with you so hopefully this helps reduce any stress you were having regarding this meeting. If there is anything that you would like to discuss with me from a business perspective please just let me know. In relation to Company Sick Pay I can confirm that, in line with your contract of employment dated 22/09/15, it is my position that this is discretionary and therefore non-contractual. I can confirm that, unfortunately, I am not in a position to continue to pay you any sick pay over and above your statutory entitlement to statutory sick pay. You have referred to an email you received from [the accountant] previously which you allege confirms that you are entitled to 12 months Company Sick Pay. I have investigated this and can find nothing to confirm*

that this is the case. However if you can provide me with a copy of this email I will review this and revert to you with my position on the matter. In the meantime I note you still have the company phone and computer. As you are currently absent and therefore to not require these for business purposes, I would appreciate it if you could please advise a convenient date and time that I can arrange for these items to be collected.' He also requested the claimant's consent to attend an appointment with the First Respondent's occupational health provider.

64. The Second Respondent wrote to the claimant on 23 July 2019, chasing for a response in relation to the matters raised in his email of 2 July 2019. He indicated that he would look to meet with the claimant, once he had received the report from occupational health. Medical consent forms were attached, for the claimant to complete and return.

65. The claimant responded on 26 July 2019. He indicated that he did not have a printer at home, so asked for the medical consent forms to be sent by post. In his email he stated *'I am unhappy with the response to my grievance regarding sick pay. The contract which you refer was the contract that was in place before I was promoted. The sick pay arrangements were subsequently changed for myself and other senior staff as you are aware. The position was confirmed in the presence of the accountant. Myself and others have been paid consistent with the new arrangements since then.'*

66. On 30 July 2019 it transpired that the recorded delivery letter enclosing the medical consent forms for completion, had not been received by the claimant. The Second Respondent sent an email to the claimant on 1 August 2019 stating *'We will resend the documents. The post office has informed us that the postman had signed for your letter and put it through your letterbox as apparently he has done this a few times previously. This morning we have requested an investigation by the post office to establish what happened to the letter as they have responded saying the postman is adamant he put it through your letterbox. I have also reported the incident as theft to the police and asked them to investigate.'* The claimant responded later that day as follows *'Yeah he claimed he has done this for others in the village but never*

for us. [My wife] is somewhat livid with him as this could have been something of value gone missing. I guess we shall be getting a new postman when he gets sacked and charged with theft.' The claimant returned his laptop and mobile phone to the First Respondent on that date.

67. As a result of requiring to become more involved in the day to day running of the business of the First Respondent, during the claimant's absence, the Second Respondent ascertained that the claimant still had a fuel card in his own name. Over £3,000 worth of charges had been incurred on the claimant's fuel card since January 2018, in addition to the claimant, on occasion, using the Sales Department's fuel card. The claimant continued to use the fuel card during his absence to purchase fuel for personal milage. The Second Respondent was surprised to discover this, as he had understood that all personal fuel cards had been cancelled, albeit that he had not directly discussed the cancellation of the claimant's fuel card with him. The Second Respondent determined that the claimant's fuel card should be cancelled, to bring his position in line with everyone else in the business and to restrict and control the sums claimed for personal milage. He wrote to him to confirm this on 8 August 2019 and sent the letter by recorded delivery only. Whilst the Second Respondent understood that this letter would be received by the claimant the next day, that was not the case.

68. On Sunday 18 August 2019, the claimant attempted to use his fuel card to purchase fuel. He was informed that the card had been declined and the petrol station manager was called. The claimant was asked to prove his identity, prior to the card being returned to him. He produced his driver's licence and the fuel card was returned to him. He required to pay for the fuel by other means. The claimant was upset and embarrassed by the incident.

69. On 19 August 2019, the claimant attended the post office and collected the recorded delivery letter, dated 8 August 2019, from the Second Respondent. The letter stated that, due to an admin error, the letter of 16th May had not been sent to the claimant. The Second Respondent also stated *'I am looking to touch base with you regards the fuel card for your company car. I agree that some personal mileage can be claimed went off, however I would like to*

propose a revision of the way this is controlled. I would request that you return the fuel card to Mackie Motors as this account will be placed on hold from 09/08/19 as you remain absent from work at this time. The company will however authorise up to £50 per month for personal fuel. The £50 would need to be claimed back through expenses and therefore ask that you keep hold of your fuel receipts. I'm happy for this to be posted to the company address in Brechin, for the attention of myself, if this is easier for you than personally coming to the office each month.' The letter also stated *'I would also just like to remind you to ensure that any communication, as you remain absent, is directed through myself. As discussed previously, this is so that the correct information is received at all times and nothing is missed out or misinterpreted, together with maintaining your right to confidentiality as much as possible. I can completely understand that this is a very stressful time for you and therefore I would like to try and limit as much unnecessary communication from the company to you as you take the time to recover.'* The letter concluded by requesting again return of the signed medical consent forms.

70. The claimant responded to the letter by email of 22 August 2019. He stated that he was not agreeable to the change to his contract in relation to personal fuel and that, whilst it was stated to be a 'proposal' the change had been implemented already, without discussion. He stated that he was being treated differently to others who did not have their fuel cards restricted during periods of absence. He asked for his fuel card to be reactivated, or that the long range electric vehicle, which he was using previously, be returned to him.

71. Five days later, on 27 August 2019, at 21:24, the claimant sent an email to the Second Respondent headed 'Notice of Resignation'. He stated that he was obliged to give 12 weeks' notice, but would be happy to agree to an 8 week notice period, as per his previous contract of employment. He stated '*I am left with no other option but to resign in light of my treatment duration my sickness absence which has left me with no trust and confidence in you or the company. Throughout my absence my contract has been breached, I have been discriminated against due to my disabilities and that of my wife,*

my grievances have not been properly addressed in accordance with the Company's handbook or the ACAS Code of practice, I have been treated differently and unfavourably and I have been deliberately isolated, bullied and harassed. I have received absolutely no support during my absence and instead been treated in a confrontational manner similar to someone who has been suspended. There has been no genuine concern of my health, or indeed that of my wife, or the impact that that has had on my well-being and ability to work. The latest episode in relation to the handling of my fuel card is unacceptable and I am no longer prepared to be treated in this way.'

72. The Second Respondent acknowledged receipt of the claimant's resignation by email dated 2 September 2019.

73. On 7 September 2019 the claimant collected a recorded delivery letter from the post office. This was a letter from the Second Respondent dated 23 August 2019. The letter stated *'after further consideration I have taken the decision to reinstate your fuel card. I would however wish to come to an agreement with you regards to personal usage. Since January 2018 the card has incurred charges in excess of £3000 and furthermore, I have been made aware that you may also have been requesting that your vehicle was fuelled using the sales departments fuel card. I do deem this level of personal mileage claim excessive when comparing this to other employees within the business and therefore if you could make contact with me at your earliest convenience, we can discuss and agree a reasonable limit.'*

74. The claimant's employment terminated on 22 October 2019.

75. Throughout the period he was absent from work, the claimant remained on anti-depressants, as prescribed by his GP. He also attended consultations with a mental health worker with Penumbra and for 8 psychological treatment sessions, which were privately funded, in the period from June to September 2019. The Consultant Clinical Psychologist he saw at that time felt that he was suffering from *'an adjustment disorder with depression and anxiety as a reaction to the various stressors in his life.'*

76. Following the termination of his employment with the First Respondent, the claimant attempted to retrain as a driving instructor, but was not successful. He received benefits in the period from 22 October 2019 to February 2020. He secured some temporary work with Royal Mail and Tesco, earning £5,488.03 net, in total. He has recently secured a role with the Scottish Prison Service, which he expects to commence on 19 April 2021. The salary attached to the role is £25,978 gross initially, increasing to £36,000 after the first year.

Claimant's submissions

77. Mr McMillan, for the claimant, lodged a written submission, extending to 17 pages. This was supplemented by a brief oral submission.

78. He stated that the claimant's evidence should be preferred over that of the Second Respondent, which lacked credibility.

79. The Tribunal should conclude that the claimant's contract was amended in 2016 and the new contract expressly stated that the claimant was entitled to full pay if unable to work due to illness and a bonus. Failing which, these terms were established through custom and practice.

80. The claimant was entitled to full pay from 1 May 2019 to the date his employment terminated. He was paid SSP only. The difference was unlawfully deducted from the claimant's wages contrary to s13 ERA.

81. The non-payment of bonus for 2018 should be dealt with as a breach of contract claim. In the absence of the contract document, the Tribunal has to take a view on this. The claimant is willing to limit this claim to £15,000 (less tax in normal course) being exactly the same sum as that paid to him in 2018 for 2017. If the Tribunal is not satisfied that there was an express contractual entitlement to bonus then it should find that there was an implied term (which must include an element of discretion). That 'discretion' must not be applied capriciously (see ***Clark v Nomura International plc*** 2000 IRLR 766, QBD). Here any such exercise was patently capricious. Without that capriciousness, £7,500 net would have been paid to the claimant.

82. In relation to the constructive dismissal claim, The First Respondent was in breach of the claimant's contract of employment by:

a. Breaching the implied term of trust and confidence;

b. Breaching the claimant's contract of employment in relation to company sick pay and fuel expenses during his absence

c. Failing to address the claimant's grievance; and

d. Subjecting the claimant to disability discrimination.

83. The breaches, individually and collectively, were sufficiently serious to constitute a repudiatory breach of contract. The final straw was the cancellation of the claimant's fuel card. The claimant gave the Second Respondent a chance to resolve things on 22 August 2019 to which no immediate response was given and the claimant resigned timeously on 27 August 2019. He was entitled to do so on the basis that the combination of things (non-payments, fuel card breach and non-attention to the grievance) taken individually, or collectively, were enough to justify that termination action and/or that the cancellation of the fuel card was the last straw in a series of events.

84. The following cases were referred to

a. ***Western Excavating v Sharp*** [1978] I.C.R. 221

b. ***Chemcem Scotland Ltd v Ure*** UKEATS/0036/19/SS

c. ***Malik v Bank of Credit and Commerce International SA*** [1997] ICR 606.

d. ***Gordon v J & D Pierce (Contracts) Ltd*** 2021 WL 00229241

e. ***Goold v McConnell*** 1995 IRLR 516

f. ***Waltons and Morse v Dorington*** 1997 IRLR 488

g. ***Sweetin v Coral Racing*** 2006 IRLR 253

h. ***Kaur v Leeds Teaching Hospitals NHS Trust*** [2019] ICR 1

i. ***Omilaju v Waltham Forest*** [2005] ICR 481

85. The Claimant was at all material times disabled as a result of stress and depression within the definition set out in section 6 of the Equality Act 2010. The respondents were aware of this.

86. Associative discrimination has been recognised since ***Coleman v Attridge*** [2008] ICR 1128 per the CJEU. The following cases were also referred to

a. ***McCorry and Others as the committee of the Ardoyne Association v McKeith*** [2017] IRLR 253

b. ***Price v Action-Tec Services*** [2013] EqLR 429, Employment Tribunal

c. ***MacDonald v Fylde Motor Co Ltd*** [2011] EqLR 660, Employment Tribunal

d. ***Bainbridge v Atlas Ward Structures Limited*** ET 1800212/12

87. The claimant was treated less favourably because of his own disabilities, or that of his wife. There is no other explanation for the change in the relationship between the parties. A hypothetical comparator would not have been treated in this way. The burden of proof shifted and the respondents have not discharged the burden on them. The following cases were referred to

a. ***Glasgow City Council v Zafar*** [1998] IRLR 36

b. ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337

c. ***Hewage v Grampian Health Board*** 2012 ICR 1054, SC

88. The Second Respondent's conduct amounted to unlawful harassment for which he and/or the First Respondent are liable. It was unwanted conduct related to disability (the claimant's disability and/or his wife's), carried out in the course of employment, which had the purpose or effect of violating my dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

89. Further and/or alternatively the Second Respondent discriminated against the claimant by treating him unfavourably because of his absence which arose from his disabilities.

Respondents' submissions

90. Mr O'Carroll for the respondents also lodged a written submission. This extended to 18 pages. This was also supplemented by a brief oral submission.

91. He submitted that the claimant's mental health issues did not amount to a disability, particularly there was no evidence to suggest it was long term. The cases of ***McDougall v Richmond Adult Community College*** [2008] ICR 431, ***Russell v Fox Print Services*** UKEAT/0544/12/KN and ***SCA Packaging v Boyle*** 2009 ICR 1056 were referred to.

92. In relation to the claims of direct discrimination

a. The claimant's only contractual entitlement was to SSP, albeit discretion was exercised by the Second Respondent to pay full pay, on occasion. The claimant was aware of this, hence why he sought clarification at the start of his absence as to what he would be paid. The claimant has not produced the new contract he asserts was entered into in 2016, or the email from the company accountant which he sought to rely on. These never existed. No such term had been agreed: the First Respondent could not afford to pay senior employees full pay for up to 12 months if they were absent. The claimant was not treated less favourably than other non-disabled employees, it was the same treatment

b. Any bonus payments under the claimant's original terms and conditions of employment were discretionary. As of 1 April 2016 he had a fixed salary, with no bonus entitlement. The claimant has not produced any documentation which indicates that he was due to be paid a bonus at a particular level in 2019 in respect of previous year and at no point stated in evidence what the actual amount of any bonus in respect of 2018 ought to have been. He was not paid a bonus during 2019 because he was not

entitled to one. The claimant has not been treated less favourably than non-disabled members of senior staff.

c. The respondents did not fail to respond to correspondence sent by the claimant, with the limited exception of the grievance. The grievance was in fact dealt with in substance. The Second Respondent's failure to deal with that in the manner envisaged in the company handbook was as a result of the unique situation which existed and the Second Respondent's inexperience in relation to grievance procedures. It was not because of the claimant's disability. No other employee within the company had raised a grievance the claimant was therefore not treated less favourably than any other non-disabled employee in this respect.

d. Recorded delivery letters were sent to the claimant on the advice of the First Respondent's HR advisors, to ensure that important correspondence was received by the claimant. It was reasonable for the respondents to do so. The recorded delivery correspondence was not sent to the claimant because of his disability. No evidence was led to suggest that non-disabled employees on long-term sick leave were not sent recorded delivery post.

e. The withdrawal of the fuel card from all staff reporting to the claimant in February 2018 was a cost-cutting measure. The fuel card was withdrawn from all members of staff, including those without a disability. The claimant was therefore not treated less favourably than other members of staff.

f. The claimant was required to return his laptop and company telephone because he was not accessing his emails or phone during his absence. The return of these items was not required because of the claimant's disability. Their return was required for business reasons. The claimant was not treated less favourably than other non-disabled employees of the First Respondent.

g. The respondents did not cause access to the claimant's email access to be removed or emails deleted.

h. The respondents did not instruct the claimant not to contact colleagues, they simply suggested that if he needed to contact anyone at work it was relayed through the Second Respondent. The motivation for this was the claimant's statement on 20 May 2019 that he hadn't switched on his laptop in order to avoid stress. The suggestion was as a result of the claimant's medical condition, in order to support the claimant and facilitate his recovery and return to work. The treatment of the claimant in this regard was not less favourable treatment compared to a non-disabled employee.

i. The Second Respondent did try to limit unnecessary communication from the company to the claimant during his absence they did so to minimise stress and the claimant in order to facilitate his recovery and return to work. This was in relation to work matters only and there was no instruction to staff not to speak to the claimant following his resignation.

93. The appropriate comparator for the direct discrimination claims was George Ross. There is no need to construct a theoretical comparator when you have an actual one which may be used (***Williams v HM Prison Service*** EAT/1236/00)

94. The claimant has not demonstrated a prima facie case therefore with the burden of proof has not shifted (***Igen v Wong*** [2005] ICR 931 and ***Efobi v Royal Mail Group*** [2019] ICR 750 referred to).

95. In relation to the section 15 claim, particularly failure to pay sick pay, that treatment was a proportionate means to achieve a legitimate aim. The legitimate aim being the financial viability of the company. The First Respondent could only afford to pay full pay for short periods of time, in exceptional circumstances. The proportionate means of achieving that legitimate aim was to restrict payments during extended periods of absence to SSP only. In relation to the other asserted section 15 claims it is not accepted that sending recorded delivery letters amounts to unfavourable treatment. In relation to the remaining claims, the treatment was a proportionate means of achieving a legitimate aim.

96. In relation to the harassment claims it was reasonable for the respondent to report missing post to the Post Office and the police. Doing so did not have the proscribed purpose or effect. It is not reasonable for the claimant to maintain that the conduct complained of had the relevant effect for the purposes of section 26(1).

97. In relation to the constructive dismissal claim the respondents did not repudiate the claimant's contract of employment. At all times, the Second Respondent was seeking to find ways to enable the claimant to return to work. He did not want the claimant to leave, as he wished him to go back to running the company as before. That is inconsistent with a desire to repudiate the contract of employment between the parties. The Second Respondent has not yet found a replacement for the claimant. The claimant's position in relation to the final straw lacks credibility. The cases of ***Heafield v Times Newspapers Ltd*** ET/3202080/10, ***Western Excavating ECC Ltd v Sharp*** [1978] ICR 221, ***Morrow v Safeway*** [2002] IRLR 9, ***Millbrook v McIntosh*** [1981] IRLR 309 and ***Savoia v Chiltern Herb Farms*** Ltd 1982 IRLR 166 were referred to.

98. The breach of contract and lawful deductions claim should be dismissed. The claimant was not entitled to enhanced sick pay and was not entitled to a bonus.

99. The claimant has failed to mitigate his loss. Any award for injury to feelings should be in the lower Vento band. There should be no uplift for a failure to follow the ACAS code.

Relevant Law

Disability Status

100. Section 6(1) EqA provides:

> *A person (P) has a disability if —*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

101. Schedule 1 of the EQA contains supplementary provisions in relation to the determination of disability. Schedule 1, paragraph 2, EqA provides:

2(1) The effect of an impairment is long-term if-
(a) it has lasted at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of life of the person affected.

102. The '*Guidance on matters to be taken into account in determining questions relating to the definition of disability'* (the Guidance) does not itself impose legal obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12 EqA).

103. The Guidance at paragraph B1 deals with the meaning of '*substantial adverse effect'* and provides:

'The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.'

104. Paragraphs B4 and B5 provide that:

'An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effect on more than one activity, when taken together, could result in an overall substantial adverse effect.
For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of day-to-day activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.'

105. Paragraph B1 should be read in conjunction with Section D of the Guidance 15, which considers what is meant by 'normal day-to-day activities'.

106. Paragraph D2 states that it is not possible to provide an exhaustive list of day-to-day activities.

107. Paragraph D3 Provides that:

'In general, day-to-day activities are things that people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.'

108. D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.

109. In ***Goodwin v Patent Office*** [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:

a. Does the person have a physical or mental impairment?

b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?

c. Is that effect substantial?

d. Is that effect long-term?

110. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.

Direct Discrimination

111. Section 13(1) EqA provides that:

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

112. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed*** [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council*** [1990] IRLR 288 and (ii) in ***Nagaragan v London Regional Transport*** [1999] IRLR 572. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another*** [2009] UKSC 15.

113. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of ***Anya v University of Oxford*** [2001] IRLR 377.

114. In ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may wish to concentrate initially on why the claimant was treated as they were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer's conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?

115. The ***EHRC: Code of Practice on Employment (2011)*** states, at paragraph 3.5 that *'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to have be treated differently from the way the employer treated – or would have treated – another person.'*

116. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment *'but does not need to be the only or even the main cause' (*paragraph 3.11, ***EHRC: Code of Practice on Employment (2011)***). The protected characteristic does however require to have a '*significant influence on the outcome'* (***Nagarajan v London Regional Transport*** 1999 ICR 877).

Discrimination arising from disability

117. Section 15 EqA states:

"(1) A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

118. Guidance on how this section should be applied was given by the EAT in ***Pnaiser v NHS England*** [2016] IRLR 170, EAT, paragraph 31. In that case it is pointed out that 'arising in consequence of' could describe a range of causal links and there may be more than one link. It is a question of fact whether something can properly be said to arise in consequence of disability. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

119. There is no need for the alleged discriminator to know that the 'something' that causes the treatment arises in consequence of disability. The requirement for knowledge is of the disability only (***City of York Council v Grosset*** [2018] ICR 1492, CA).

120. The EAT held in ***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090 that:

'the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.'

121. The burden is on the respondent to prove objective justification. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601).

Harassment

122. Section 26(1) EqA provides as follows:

' (1) 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.'

123. Section 26(4) EqA provides that:

'(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.'

124. There are accordingly 3 essential elements of harassment claim under section 26(1), namely (i) unwanted conduct, (ii) that has the prescribed purpose or effect and (iii) which relates to a relevant protected characteristic.

Burden of proof

125. Section 136 EqA provides:

'If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'

126. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of direct discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

127. In ***Madarassy***, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the tribunal "could conclude" that on a balance of

probabilities the respondent had committed an unlawful act of discrimination. The tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748***,*** an EAT authority approved by the Court of Appeal in ***Madarassy***.

Constructive Unfair Dismissal

128. Employees with more than two years' continuous employment have the right not to be unfairly dismissed, by virtue of s94 ERA. 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it by reason of the employer's conduct (s95(1)(c) ERA).

129. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (***Malik v Bank of Credit and Commerce International Ltd*** [1998] AC 20).

130. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (***Lewis v Motorworld Garages Ltd*** [1986] ICR 157).

131. As to what can constitute the last straw, the Court of Appeal in ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy, but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

132. In order for there to be a constructive dismissal, not only must there be a breach by the employer of an essential term such as the trust and confidence obligation; it is also necessary that the employee resigns in response to the employer's conduct (although that need not be the sole reason - see ***Nottinghamshire County Council v Meikle*** [2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.

133. The Court of Appeal in ***Kaur v Leeds Teaching Hospital NHS Trust*** [2018] EWCA Civ 978 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

(5) Did the employee resign in response (or partly in response) to that breach?

134. If an employee establishes that they have been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA. If that is shown, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

Unauthorised deductions from wages

135. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from a worker's wages unless:

a. The deduction is required or authorised by statute or a provision in the worker's contract; or

b. The worker has given their prior written consent to the deduction.

136. Section 13(3) ERA provides that '*Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated … as a deduction made by the employer from the worker's wages on that occasion'*.

137. Wages are properly payable where a worker has a contractual or legal entitlement to them (***New Century Cleaning Co Limited v Church*** [2000] IRLR 27).

Discussion & Decision

Unauthorised Deductions from Wages/Breach of Contract

138. The claimant stated that he had a contractual entitlement to 12 months' full pay in the event he was unable to work due to illness and that he also had a contractual entitlement to a bonus. The claimant's position was that both of these entitlements were documented in a new written contract of employment which was prepared and signed following his promotion in 2016. No such contract was produced to the Tribunal. The respondents' position was that no such contract was prepared and agreed and that the claimant was not contractually entitled to enhanced sick pay or a bonus.

139. The Tribunal concluded that a second contract was not prepared and agreed in 2016. The only contract of employment in place was that agreed on the commencement of the claimant's employment in October 2015, which was varied by agreement on the claimant's promotion with effect from 1 April 2016, to increase the claimant's basic salary to £60,000 with the potential of a bonus, at the sole discretion of the Second Respondent. That was the only change agreed. In reaching the conclusion that a second contract was not prepared and agreed in 2016, the Tribunal took into account the following:

    a. The Tribunal concluded that the Second Respondent would not have agreed to a term entitling the claimant to 12 months' full pay for any period of absence. That being the case, there would be no reason for him not to produce the second contract of employment, if one had in fact been prepared and agreed;

    b. The Tribunal considered that any contract of employment, with terms which departed from the standard template, would have been prepared by Empire HR, so they would have retained a copy on their file;

    c. The Tribunal accepted the Second Respondent's evidence that, if a contract had been prepared and agreed, a copy would have been given to the claimant and copies retained by the respondents and Empire HR.

The fact that no one was able to locate and produce a copy of the contract, pointed to the fact that one was not in fact prepared and agreed;

d. If the claimant did have a contract of employment providing a contractual entitlement to 12 months' full pay in the event of absence, he would simply have referred to this in correspondence with the Second Respondent. Instead, he continuously referred to his entitlement to full pay being as a result of the email from the company accountant, sent in 2016 (in his emails of 22 April, 20 & 31 May and 26 July 2019, as well as in the impact statement he presented to the Tribunal);

e. On only one occasion did the claimant state this was as a result of his contract of employment (in one of the emails sent on 22 April 2019). He did not however state that the entitlement was to 12 months' full pay, which the Tribunal believe he would have done, if the contract did indeed contain a precise entitlement of that nature.

f. While the existence of a second contract was referenced in the claimant's resignation letter, in relation to a notice period of 12 rather than 8 weeks, and not disputed by the respondents, the Tribunal concluded that this was simply not checked, as the respondents were quite happy to agree to an 8 week notice period. Given the Tribunal's findings, the actual contractual requirement was to 8 weeks' notice only.

140. Having reached the conclusion that a second contract was not prepared and agreed in 2016, the Tribunal considered what was agreed in relation to sick pay when the claimant was promoted. The Tribunal concluded that there was no change to the position set out in the original contract of employment, when the claimant was promoted. The Tribunal concluded that it was very likely that the email which the claimant referred to from the company accountant was in fact the email of 3 March 2017 from the Second Respondent, confirming that Lorraine and Graham *'are to be paid if they are off'*. This post-dated the claimant's promotion (so would not have prompted a discussion regarding sick pay entitlement on his promotion) and, while he was copied into the email, it did

not reference or change any entitlement which the claimant had to sick pay. It also did not state that the entitlement was to payment for 12 months.

141. The claimant's contractual entitlement when absent was accordingly to SSP only. Whilst discretion had been exercised to pay full pay for a number of short-term absences in the past, the Tribunal did not accept that this practice established an entitlement, through custom and practice, to full pay for the duration of a long-term absence, or for the first 12 months of any period of long term absence.

142. For these reasons the claimant's claim that there was an unauthorised deduction from his wages in relation to sick pay is not successful.

143. In relation to bonus, the original contract contained an entitlement to an annual bonus potential up to £25,000. On the claimant's promotion, the Tribunal found that the agreement was simply that the claimant would be entitled to a basic salary of £60,000 plus a discretionary bonus. It is clear that the claimant received no bonus in respect of 2016, but did receive a payment in respect of 2017 as well as a further payment in April/May 2018. No targets were agreed in relation to the bonus and there was no formula to calculate the sum which could be paid as a bonus: it was entirely at the discretion of the Second Respondent whether a bonus would be paid and, if so, the amount of this and the date of payment. Given the performance of the business and the financial position of the First Respondent at the start of 2019, there were cogent reasons why a bonus was not paid to the claimant in respect of 2018. The discretion in relation to bonuses was accordingly not exercised in a capricious manner.

144. As the claimant had no contractual entitlement to a bonus, the Tribunal concluded that his claim for breach of contract in relation to this, failing which unauthorised deductions from wages, is not successful.

Disability Status

145. It was conceded by the respondents that the claimant was a disabled person at the relevant times as a result of CLL and that his wife was also a disabled

person as a result of her cancer diagnosis. The respondents also conceded that they had knowledge of both disabilities.

146. The Tribunal considered was whether the claimant was a disabled person in terms of section 6 of the EqA, as a result of suffering from stress and depression.

147. The Tribunal accepted that the claimant had a mental impairment from 2016 onwards. He was diagnosed with depression in 2016 and was on anti-depressants from then to May 2018 and then from June 2018 onwards. The Tribunal was satisfied that depression is an impairment, as defined by section 6(1) of the EqA. The Tribunal were not satisfied that 'stress' is a mental impairment.

148. Very little evidence was given to the Tribunal about the adverse impact the claimant's depression had on him initially. The claimant did however state that following his diagnosis with CLL in June 2018, he did not feel able to properly cope with what was going on, or to concentrate on work with worry and tiredness. He was having trouble sleeping and was often tearful. He was prescribed anti-depressants and remained on these for the remainder of that year. In February 2019, the claimant again attended his GP with symptoms of depression. He was suffering from low mood, anhedonia and sleep disturbances, as well as fatigue and difficulties with concentration. He was again prescribed anti-depressant medication, which he continued to take up to the date his employment terminated. His symptoms intensified following his wife's diagnosis in April 2019 to the extent that he was unable to attend work.

149. The Tribunal was satisfied that from June 2018 onwards, the adverse effects on the claimant's ability to carry out day-to-day activities (discounting the treatment he was receiving by way of anti-depressants and, latterly, treatment through Penumbra and the Consultant Clinical Psychologist) were substantial: they were not minor or trivial.

150. By June 2018, the claimant had been suffering from depression for over 12 months. The effects of the mental impairment were accordingly, by that stage, long-term.

151. In light of the above, the Tribunal concluded that the claimant has demonstrated that he was a disabled person, for the purposes of s6(1) EqA, from June 2018 onwards.

Knowledge of disability

152. The Tribunal then considered whether the respondents had actual or constructive knowledge that the claimant was a disabled person as a result of depression at the time of the alleged discrimination.

153. The Tribunal found that the respondent had knew that the claimant had a disability, or ought to have known of this, from 25 June 2019, when the claimant informed the Second Respondent that he had been on anti-depressants for a year. Prior to that the Second Respondent, reasonably, assumed that the claimant's absence was due to stress at home, related to his wife's medical condition. He was not aware, prior to 25 June 2019, that the claimant was taking anti-depressants, or that he had a history of depression.

Direct Discrimination

154. The Tribunal considered each allegation of direct discrimination, considering whether the alleged treatment occurred, whether it amounted to less favourable treatment and if so, what the reason for that treatment: was it because of disability? The Tribunal reached the following findings in relation to each alleged act of direct discrimination.

a. **Failing to pay enhanced sick pay, in addition to statutory sick pay.** The claimant was paid full pay when he was absent from work on 15, 16 and 18-30 April 2019. He then received SSP only from 1 May to 22 October 2019. To that extent the alleged treatment occurred. There was no evidence before the Tribunal to suggest that any other employee had been absent for more than 2 weeks continuously had

been paid enhanced sick pay. The Second Respondent's evidence was that would usually authorise payment for short term absences, but couldn't afford to do so for longer absences. The Tribunal accepted this evidence. The Tribunal concluded as a result that the claimant had not been treated less favourably than the respondents treated, or would treat, others who were off for more than two weeks continuously. Given the finding that this did not amount to less favourable treatment, there was no requirement to consider the reason for the treatment complained of.

b. **Failing to pay a bonus for 2018.** The claimant received no bonus in January 2017, in respect of 2016. He was paid a discretionary bonus payment of £7,500 in January 2018, in respect of 2017. He had no contractual entitlement to a bonus. Any payment was entirely discretionary. The Tribunal concluded that the reason the claimant was not paid a bonus in January 2019 was due to the fact that the Arbroath showroom had not performed particularly well in 2018 and, while the business as a whole was profitable, it was at the lower end of expectations. In addition the First Respondent was operating with an overdraft of around £600,000 at the time. The reason he was not paid a bonus in January 2018 was not because of he was a disabled person as a result of having CLL. The respondents were unaware of the claimant's depression in January 2019, so it could not have been because of that. The claimant's wife did not have a disability at that time, so it could not have been because of that.

c. **Failing to respond to correspondence from the claimant.** The Tribunal found that, whilst the respondents did not respond to the claimant's grievance in accordance with the provisions of the Acas Code, and there may have been a delay in responding to some correspondence, the respondents did respond to correspondence from the claimant. The Tribunal accordingly did not accept that the conduct alleged was established.

d. **Sending recorded delivery letters to the claimant**. The respondents did send a number of letters to the claimant by recorded delivery. The Tribunal therefore accepted that the alleged treatment occurred. The respondents did so as a result of guidance from their HR providers, to ensure communications reached the claimant. The Tribunal found that the claimant was not treated less favourably than others were or would have been treated. The Tribunal concluded that any employee of the First Respondent on long term absence would also have been sent letters by recorded delivery, due to the advice received from Empire HR. Given the finding that this did not amount to less favourable treatment, there was no requirement to consider the reason for the treatment complained of.

e. **Cancelling the claimant's fuel card**. The claimant's fuel card was cancelled with effect from 9 August 2019. All other personal fuel cards had already been cancelled: for staff in February 2018 and for the Second Respondent's family members in September 2018. The claimant was not treated less favourably than others were or would be treated. Everyone else had already had their fuel cards cancelled. Given the finding that this did not amount to less favourable treatment, there was no requirement to consider the reason for the treatment complained of.

f. **Failing to ensure the claimant was notified of the cancellation of his fuel card.** The claimant's fuel card was cancelled with effect from 9 August 2019. Whilst the letter advising him of this was dated 8 August 2019 and sent by recorded delivery, it was not received by the claimant until 18 August 2019. The claimant accordingly did not receive advance notification of the cancellation of his fuel card. The treatment alleged is accordingly established. The Tribunal accepted that this amounted to less favourable treatment, as the claimant had conducted a consultation exercise with the other employees, prior to the cancellation of their fuel cards. They accordingly had advance notification that this would be done. Whilst the cancellation of the

claimant's fuel card was badly handled, without something more the Tribunal did not feel there was sufficient material on which the Tribunal could conclude, on the balance of probabilities, that the respondents had committed an unlawful act of discrimination so as to shift the burden of proof to the respondents. Even if the burden had shifted however, the Tribunal would have found that the fact that the claimant was not notified in advance was due to the Second Respondent's erroneous understanding that recorded delivery mail would be received by the recipient the next day. It was not due to the claimant's disabilities, or those of his wife.

g. **Requiring the claimant to return his company laptop and mobile phone during his sickness absence.** The claimant was required to return both items by the respondents. The treatment alleged was accordingly established. The Tribunal did not however accept that this amounted to less favourable treatment. The Tribunal concluded that any employee of the First Respondent who was on long term sick leave, and who indicated that they had not switched on their laptop or mobile phone during their long-term absence, would be asked to return these items. There was no detriment to the claimant as, whilst he could have used the laptop and mobile phone for personal use also, he did not do so. He had his own mobile telephone and iPad for personal matters and, by his own admission, was not using the company equipment provided to him. Given the finding that this did not amount to less favourable treatment, there was no requirement to consider the reason for the treatment complained of.

h. **Causing the claimant's access to emails to be removed (or his emails deleted).** The Tribunal did not accept that the conduct alleged was established. Beyond a broad assertion, no evidence was led to establish this.

i. **Instructing the claimant not to contact colleagues.** In the email from the second respondent to the claimant on 28 June 2019, it was *suggested* that if he needed to contact anyone at work that he relayed

things through the second respondent. The letter dated 8 August 2019 did however provide an instruction. The conduct alleged is accordingly established. The reason was to manage and control everything as smoothly as possible for the claimant and to try to limit as much unnecessary communications to allow the claimant time to recover. This related directly to the claimant's request at the commencement of his absence, that he not be contacted during his absence, to give him the breathing space he required and his statement on 20 May 2019, when he indicated that he hadn't switched on his laptop during his absence in order to avoid stress altogether. Any employee in these circumstances would have been treated in the same way as the claimant. The Tribunal therefore concluded that the instruction did not amount to less favourable treatment. In any event, the reason for the instruction was not because of the claimant's disabilities, or that of his wife. Rather the step was taken to support the claimant.

j. **Instructing staff not to speak to the claimant following his resignation.** The Tribunal did not accept that the conduct alleged was established.

155. In light of the above, the claimant's claims of direct discrimination because of disability do not succeed and are dismissed.

Discrimination Arising from Disability

156. In relation to the claims of discrimination arising from disability the Tribunal started by referring to section 15 of the EqA.

157. Section 15(2) states that section 15(1) will not apply if the employer did not know, and could not reasonably have been expected to know the claimant had the disability. The respondents accepted that they were aware that the claimant had CLL. The Tribunal found that the respondents could reasonably have been expected to know that the claimant had depression from 25 June 2019.

158. The Tribunal considered the guidance ***Pnaiser***. The first question is whether the claimant was treated unfavourably. In determining this, no question of comparison arises. The EHRC Employment Code indicates that unfavourable treatment is treated synonymously with disadvantage. It is something about which a reasonable person would complain. The Tribunal considered each allegation of discrimination arising from disability, to ascertain whether unfavourable treatment was established, and found as follows in relation to each:

a. **Failing to pay enhanced sick pay, in addition to statutory sick pay.** The Tribunal accepted this occurred and amounted to unfavourable treatment.

b. **Failing to pay a bonus for 2018.** The Tribunal accepted this occurred and amounted to unfavourable treatment.

c. **Failing to respond to correspondence from the claimant.** The Tribunal found that, whilst the respondents did not respond to the claimant's grievance in accordance with the provisions of the Acas Code and there was a delay in responding to some correspondence, the respondents did respond to correspondence from the claimant. The Tribunal accordingly did not accept that the conduct alleged was established.

d. **Sending recorded delivery letters to the claimant**. The respondents did send a number of letters to the claimant by recorded delivery. The Tribunal therefore accepted that the alleged treatment occurred. The Tribunal did not however accept that this amounted to unfavourable treatment. It is a standard practice and not something about which a reasonable person would complain.

e. **Cancelling the claimant's fuel card**. The claimant's fuel card was cancelled with effect from 9 August 2019. The Tribunal accepted this occurred and amounted to unfavourable treatment.

f. **Failing to ensure the claimant was notified of the cancellation of his fuel card.** The Tribunal accepted this occurred and amounted to unfavourable treatment.

g. **Requiring the claimant to return his company laptop and mobile phone during his sickness absence.** The claimant was required to return both items by the respondents. The treatment alleged was accordingly established. There was no detriment to the claimant as, whilst he could have used the laptop and mobile phone for personal use also, he did not do so. He had his own mobile telephone and iPad for personal matters and, by his own admission, was not using the company equipment provided to him. The treatment complained of accordingly did not amount to unfavourable treatment.

h. **Causing the claimant's access to emails to be removed (or his emails deleted).** The Tribunal did not accept that the conduct alleged was established. Beyond a broad assertion, no evidence was led to establish this.

i. **Instructing the claimant not to contact colleagues.** In the email from the second respondent to the claimant on 28 June 2019, it was *suggested* that if he needed to contact anyone at work that he relayed things through the second respondent. The letter dated 8 August 2019 did however provide an instruction. The conduct alleged is accordingly established and the Tribunal is satisfied that it amounted to unfavourable treatment.

j. **Instructing staff not to speak to the claimant following his resignation.** The Tribunal did not accept that the conduct alleged was established.

159. The next questions concern the reason for the alleged treatment. The Tribunal firstly require to determine what caused the treatment, focussing on the respondents' conscious or unconscious thought process. If there is more than one reason, then the reason allegedly arising from disability need only be a significant (in the sense of more than trivial) influence on the

unfavourable treatment, it need not be the main or sole reason. The Tribunal must then determine whether the reason for any unfavourable treatment established was something 'arising in consequence of' the claimant's disability. It was held in ***Pnaiser*** that the expression 'arising in consequence of' could describe a range of causal links. More than one relevant consequence of the disability may require consideration and whether something can properly be said to arise in consequence of disability is a question of fact in each case. It is an objective question, unrelated to the subjective thought processes of the respondent, and there is no requirement that the respondent should be aware that the reason for treatment arose in consequence of disability.

160. Applying those tests to unfavourable treatment established, the Tribunal found as follows:

a. **Failing to pay enhanced sick pay, in addition to statutory sick pay.** The Tribunal found that this occurred because of the long term nature of the claimant's absence, which arose in consequence of the claimant's disabilities.

b. **Failing to pay a bonus for 2018.** The Tribunal found that this occurred because the Arbroath showroom had not performed particularly well in 2018 and, while the business as a whole was profitable, it was at the lower end of expectations. In addition the First Respondent was operating with an overdraft of around £600,000 at the time. The reason for the treatment was not something arising in consequence of the claimant's disabilities, namely his absence.

c. **Cancelling the claimant's fuel card**. The claimant's fuel card was cancelled because the Second Respondent had taken the view that all personal fuel cards should be cancelled to better control and monitor costs. This followed an investigation of the respondent's practices by HMRC which highlighted that personal mileage, if paid by the First Respondent, would be deemed to be a taxable benefit, even if this only covered travel from home to work. The reason for the treatment was

not something arising in consequence of the claimant's disabilities, namely his absence.

d. **Failing to ensure the claimant was notified of the cancellation of his fuel card.** The claimant was not notified in advance as a result of the Second Respondent's erroneous understanding that recorded delivery mail would be received by the recipient the next day. The reason for the treatment was not something arising in consequence of the claimant's disabilities, namely his absence.

e. **Instructing the claimant not to contact colleagues.** The reason the instruction was given was to seek to manage and control everything as smoothly as possible for the claimant and to try to limit unnecessary communication with the claimant, to allow the claimant time to recover. This related directly to the claimant's requests, both at the commencement of his absence, that he not be contacted during his absence, to give him the breathing space he required and, on 20 May 2019, when he indicated that he hadn't switched on his laptop during his absence in order to avoid stress altogether. The reason for the treatment was to support the claimant. It was not something arising in consequence of the claimant's disabilities, namely his absence.

161. Having found that failing to pay enhanced sick pay, in addition to statutory sick pay, amounted to unfavourable treatment which occurred because of something arising in consequence of the claimant's disabilities, namely his absence, the Tribunal moved on to consider whether the failure to pay enhanced sick pay was a proportionate means of achieving a legitimate aim. The Tribunal found that it was. The legitimate aim was the financial liability of the company to its staff in respect of wages and the financial viability of the business. The First Respondent could not afford to pay more than SSP, except for short periods of time in exceptional circumstances. There was no contractual right to sick pay. While some discretion in relation to sick pay had been exercised for the claimant's prior periods of short-term absence, it was proportionate for that discretion not to have been exercised in relation to his subsequent long-term sickness absence.

162. For these reasons the Tribunal concluded that the claims of discrimination arising from disability do not succeed.

Harassment related to disability

163. The Tribunal considered each allegation of harassment, considering whether there was unwanted conduct, whether the conduct had the proscribed purpose or effect and, if so, whether it related to disability. The Tribunal reached the following findings in relation to each alleged act of harassment.

a. **Failing to respond to correspondence from the claimant.** The Tribunal found that, whilst the respondents did not respond to the claimant's grievance in accordance with the provisions of the Acas Code and there was a delay in responding to some correspondence, the respondents did respond to correspondence from the claimant. The Tribunal accordingly did not accept that the conduct alleged was established.

b. **Sending recorded delivery letters to the claimant**. The respondents did send a number of letters to the claimant by recorded delivery. The Tribunal accepted the claimant's evidence that this was unwanted conduct. The Tribunal did not however accept that this had the proscribed purpose or effect. There was no intention on the part of the Second Respondent to violate the claimant's dignity, or to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant by sending the letters by recorded delivery. The Second Respondent sent letters this way as he had been advised to do so by Empire HR. In determining whether the fact that he did so had the proscribed effect, the Tribunal took into account the claimant's perception the circumstances of the case and whether it was reasonable for the conduct to have that effect. The Tribunal concluded that it wasn't reasonable for the claimant to find sending him recorded delivery letters had the proscribed effect.

c. **The Second Respondent's response to a letter going missing on or around July 2019**. This allegation related to the Second

Respondent's email to the claimant dated 1 August 2019, when Second Respondent stated to the claimant that he had reported the lost recorded delivery letter as theft to the police. The Tribunal found that this did not amount to unwanted conduct. At no stage did he indicate to the respondents that he objected to this: rather he responded stating '*I guess we shall be getting a new postman when he gets sacked and charged with theft*.' That does not suggest that the Second Respondent's conduct was in any way unwanted. Rather, it suggests that the claimant was in agreement with the actions taken by the Second Respondent. In any event, the response was not related to disability: It was related solely to the fact that mail sent to the claimant had gone missing, despite the fact that it was signed for as being received.

d. **Cancelling the claimant's fuel card.** The Tribunal accepted that this occurred and amounted to unwanted conduct, which had the proscribed effect (but not purpose). The Tribunal found however that this was not related to disability. The claimant's fuel card was cancelled because the Second Respondent had taken the view that all personal fuel cards should be cancelled to better control and monitor costs. This followed an investigation of the respondent's practices by HMRC which highlighted that personal mileage, if paid by the respondent, would be deemed to be a taxable benefit, even if this only covered travel from home to work.

e. **Failing to ensure the claimant was notified of the cancellation of his fuel card**. The Tribunal accepted that this occurred and amounted to unwanted conduct, which had the proscribed effect (but not purpose). The Tribunal found however that this was not related to disability. The claimant was not notified in advance due to the Second Respondent's erroneous understanding that recorded delivery mail would be received by the recipient the next day.

f. **Requiring the claimant to return his company laptop and mobile phone during his sickness absence**. The claimant was required to

return both items by the respondents. The Tribunal did not accept that this amounted to unwanted conduct. Whilst the claimant could have used the laptop and mobile phone for personal use also, he did not do so. He had his own mobile telephone and iPad for personal matters and, by his own admission, was not using the company equipment provided to him during his sickness absence. In response to the requests for return of the items, he simply agreed to this. At no stage did he indicate to the respondents that he objected to this. In any event, the requests were entirely unrelated to disability. Rather they were to ensure that business calls and emails were responded to, given the claimant's statement that he had not turned either device on during his absence.

g. **Causing the claimant's emails to be deleted**. The Tribunal did not accept that the conduct alleged was established. Beyond a broad assertion, no evidence was led to establish this.

h. **Instructing the claimant not to contact colleagues.** The letter dated 8 August 2019 provided an instruction of this nature. The conduct alleged was accordingly established. The Tribunal accepted that this was unwanted conduct, which had the proscribed effect (but not purpose). The reason for the instruction however was to manage and control everything as smoothly as possible for the claimant. This related directly to the claimant's request at the commencement of his absence, that he not be contacted during his absence, to give him the breathing space he required and his statement on 20 May 2019, when he indicated that he hadn't switched on his laptop during his absence in order to avoid stress altogether. It did not relate to disability.

i. **Instructing staff not to speak to the claimant following his resignation.** The Tribunal did not accept that the conduct alleged was established. No evidence was led to establish this.

164. For these reasons the Tribunal concluded that the claims of harassment related to disability do not succeed.

Constructive Unfair Dismissal Claim – s94 ERA

165. The claimant claimed that the First Respondent was in breach of his contract of employment by

a. Breaching the implied term of trust and confidence;

b. Breaching his contract of employment in relation to company sick pay and fuel expenses during his absence

c. Failing to address his grievance; and

d. Subjecting him to disability discrimination.

He stated that the breaches, individually and collectively, were sufficiently serious to constitute a repudiatory breach of contract. The final straw relied upon was the cancellation of the fuel card.

166. In considering the claimant's claim of constructive dismissal, the Tribunal considered the tests set out in ***Kaur v Leeds Teaching Hospital NHS Trust***. The Tribunal's conclusions in relation to each element were as follows:

a. **What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?** The Tribunal noted that the most recent act on the part of the First Respondent which the claimant relied upon was the cancellation of the fuel card.

b. **Has he or she affirmed the contract since that act?** The Tribunal noted that the claimant resigned on 27 August 2019. The Tribunal found that the claimant had not affirmed the contract since he formally became aware of the cancellation of his fuel card on 18 August 2019.

c. **If not, was that act (or omission) by itself a repudiatory breach of contract?** The Tribunal found that the cancellation of the fuel card was, by itself, a repudiatory breach of contract. The claimant had a contractual entitlement to a fuel card from the commencement of his employment. He was authorised to use the card to pay for all business, as well as all

personal, fuel. There were no limits placed on this. To remove this right, without consultation or notice, amounted to a repudiatory breach of contract.

d. **If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?** The Tribunal considered this point also, notwithstanding that it was not necessary to do so, given the findings at c. above. The Tribunal concluded that, even if the removal of the fuel card had not been a repudiatory act of itself, it would have concluded that it was nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the ***Malik*** term. Whilst the Tribunal did not find that the claimant had been discriminated against, and found there was no breach of his contract in relation to sick pay, the manner in which the fuel card, and the claimant's entitlement re payment of personal milage, was removed was entirely unreasonable. It was a unilateral change to the claimant's contractual terms, without consultation. That, coupled with the failure to hold a grievance meeting with the claimant, failure to address in full each of the points raised by the claimant and failure to offer him the opportunity to appeal against the findings intimated to him, viewed cumulatively, certainly amounted to a breach of the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties.

e. **Did the employee resign in response (or partly in response) to that breach?** The Tribunal concluded that the claimant did resign in response to the breach.

167. Given these findings the Tribunal concluded that the claimant was constructively dismissed by the First Respondent. The Tribunal found that this was an unfair dismissal.

Calculation of Compensation - Unfair Dismissal

168. The claimant presented a schedule of loss. This confirmed that the employer contributions to the claimant's pension were £1,440 per annum and the value of the other benefits received by the claimant related to his employment was £6,600 per annum. The respondents did not challenge the schedule of loss presented by the claimant in respect of his unfair dismissal claim, or seek reductions in relation to any award made, other than in relation to mitigation and to assert that an uplift for failure to follow the Acas Code was not appropriate.

Mitigation

169. The claimant presented evidence of numerous roles he had applied for. The First Respondent submitted that the claimant had not done enough to mitigate his loss of earnings. The Tribunal noted that the onus is on a respondent to demonstrate that there were other reasonable steps that the claimant could have taken, but did not take, and that the claimant acted unreasonably in not taking those steps. In the absence of any evidence presented to the Tribunal of steps that the claimant should have taken, but did not (such as particular suitable job vacancies which were available during the time he was seeking work, but which he failed to apply for) the Tribunal found that the First Respondent had not discharged that burden. The Tribunal was accordingly satisfied that the claimant has taken reasonable steps to mitigate his loss.

Acas Code

170. The Tribunal found that the First Respondent unreasonably failed to comply with the Acas Code in certain respects, but noted that there was an attempt to respond to the points raised. The Tribunal find that an uplift in compensation by 10% is just and equitable in the circumstances.

Basic Award

171. Given the claimant's age at the date his employment terminated (50 years' old), length of service (4 years) and gross weekly salary (£1,154) the claimant's basic award is **£3,150**.

Compensatory Award

172. The claimant's employment terminated on 22 October 2019. As at the date of the Hearing, the claimant had secured alternative employment, which he expected to commence on 19 April 2021. The Tribunal concluded that the claimant was unlikely to continue to seek alternative employment once he commenced that role, so it was just and equitable to only award losses up to that date. Given that the net losses exceed the statutory cap, the Tribunal felt it unnecessary to conduct a grossing-up calculation. The Tribunal calculated the compensatory award as follows:

Loss of earnings – 77.7 weeks at £760	£59,052.00
Pension contributions – 77.7 weeks at £27.69	£ 2,151.51
Loss of benefits – 67.5 weeks at £126.92	£ 9,861.68
Loss of statutory rights	£ 300.00
Sub-total	£ 71,365.19
Less earnings from alternative employment	£ 5,488.03
Sub-total before adjustments	£ 65,877.16
Uplift re Acas Code – 10%	£ 6,587.72
Subtotal	£ 72,464.88
Restricted to statutory cap	£ 60,000.00
Total Compensatory Award	**£ 60,000.00**

Employment Judge: **Mel Sangster**

Date of Judgment: **19 April 2021**

Date Sent to Parties: **20 April 2021**