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## THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr Charlie Maker

**Respondents:** (1) Retrospective Scooters Limited  
(2) Mr Niall McCart

**Heard at:** East London Employment Tribunal

**On:** 12 and 13 February 2019

**Before:** Employment Judge Burgher

**Members:** Mr N Turner OBE  
Ms S Jeary

### Representation

**Claimant:** Ms E Foubister (Counsel)

**Respondents:** Mr N McCart (Managing Director)

## JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant has withdrawn his complaints for holiday pay under the Working Time Regulations and his direct disability discrimination complaint pursuant to section 13 of the Equality Act 2010. Both of these claims are therefore dismissed on withdrawal.
2. The Claimant was unfairly dismissed by the Respondent.
3. The Claimant was wrongfully dismissed and is entitled to 12 weeks notice pay.
4. The Claimant's claim for unlawful deduction of wages in respect of 4 December 2017 succeeds.

5. The Claimant was not provided with a statement of written statement of particulars of employment.
6. The Claimant's claim that he was dismissed in consequence of a disability fails and is dismissed.
7. The Claimant's claims that he was subject to harassment on grounds of disability fail are dismissed.
8. The First Respondent is ordered to pay the Claimant the sum of £6202.99.

9. The recoupment provisions apply:

Grand total	£6202.99
Prescribed element	£432.55

The period of the prescribed element      4 December 2017 to 13 February 2019

The excess of the grand total over the prescribed element is £5770.44

## REASONS

1 At the outset of the hearing the following issues were identified as the matters to be determined by the Tribunal. The Claimant, through his Counsel, had withdrawn his complaints under holiday pay under the Working Time Regulations and his direct disability discrimination complaint pursuant to section 13 of the Equality Act 2010. Both of these claims are therefore dismissed on withdrawal.

### Unauthorised deductions from wages

2 Did the 1<sup>st</sup> Respondent fail to pay the Claimant's wages for 4<sup>th</sup> December 2017 in contravention of s.13 ERA 1996? The Claimant claimed £100 wages for this claim.

### Detriment as a result of the Claimant proposing to enforce pension auto-enrolment requirements

3 Did the 1<sup>st</sup> Respondent subject the Claimant to the detriment of reducing the Claimant's hours on the ground that the Claimant proposed to exercise his right to require the 1<sup>st</sup> Respondent to enrol the Claimant in a pension scheme and/or make the required pension payments (section 55 Pensions Act 2008)?

4 The Claimant clarified this claim stating that he requested auto enrolment in December 2016 and was subject to detriment by being placed on part time work from mid March 2017.

Particulars of employment

5 The 1<sup>st</sup> Respondent accepts that it did not provide the Claimant with written statement of particulars of employment under sections 1 and 4 ERA 1996.

Unfair dismissal

6 What was the reason (or principal reason) for the dismissal? The Respondent asserts conduct/ capability as potentially fair reason namely the amount of time off the Claimant had taken (section 98(1) ERA 1996).

7 If the dismissal was for a potentially fair reason, was the dismissal fair in all the circumstances? (s.98(4)).

Disability

8 The Claimant maintains that he is disabled for the purposes of the Equality Act 2010. He asserted and relied upon irritable bowel syndrome. The Respondents did not admit that the Claimant is disabled and therefore it is for the Claimant to prove this.

9 The Respondent accepted that the Claimant had told him on at least one occasion that he had irritable bowel syndrome, therefore there was no issue of knowledge.

Discrimination arising from disability: section 15 Equality Act 2010

10 Did the 1<sup>st</sup> and/or 2<sup>nd</sup> Respondents treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability, by dismissing him because of his sickness absence record? The Respondent maintains that the Claimant took too much time off, out of approximately 50 days absence during the relevant year only approximately 20% was sickness related.

11 If so, was the Respondents' treatment of the Claimant a proportionate means of achieving a legitimate aim?

Harassment: Section 26 Equality Act 2010

12 Did the 1<sup>st</sup> and/or 2<sup>nd</sup> Respondent harass the Claimant by engaging in unwanted conduct related to disability on 4<sup>th</sup> December 2017 and 27<sup>th</sup> December 2017?

13 The alleged unwanted conduct of 4<sup>th</sup> December 2017 was the holding of a meeting without notice whereby the Claimant was told that he was sacked, that the 2<sup>nd</sup> Respondent told the Claimant that he was a problem as he was always ill and didn't want him in the shop and did not want the Claimant to work for him anymore and that the Claimant should leave.

14 The alleged unwanted conduct of 27<sup>th</sup> December 2017 was the 2<sup>nd</sup> Respondent's remark about the Claimant and made to the Claimant's father in the Claimant's presence that the Claimant was a 'problem' in the business as the Claimant was 'always ill' and that he had been 'gotten rid of'.

15 If so, did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

16 If the conduct did not have that purpose, was it reasonable for the conduct to have that effect?

### Wrongful dismissal

17 Was the Claimant entitled to notice of the termination of his employment by the 1<sup>st</sup> Respondent?

18 If so, what was that notice period? The Claimant alleges that he was entitled to a statutory notice period of 12 weeks. The Respondent alleges that there was a break in the period of the Claimant's continuous employment in 2011 and that the Claimant is only entitled to 6 weeks notice from 2012.

### **Evidence**

19 The Claimant gave evidence on his own behalf and called his father, Mr Ray Maker to give evidence in support. Written witness statements were provided by both of these witnesses.

20 The Second Respondent, Mr McCart, gave evidence on behalf himself and the First Respondent. Mr McCart did not provide a written witness statement, in breach of the Tribunal order sent on 29 June 2019. The importance of exchange of witness statements by 14 September 2018 was emphasised in bold.

21 The Tribunal took account of the overriding objective in having a fair hearing and concluded that it would be proportionate to refer to the narrative of three separate ET3's that had been submitted on behalf of the Respondent's. Mr McCart agreed to confirming the truth of the contents of the different ET3s as his evidence in truth and said that he had nothing more to add. The Tribunal therefore adopted this course.

22 The Tribunal was referred for relevant pages in an agreed bundle running to some 277 pages.

### **Disability**

23 The Tribunal had regard to the provisions of Section 6 Equality Act 2010 in order to consider whether the Claimant had a disability. It states:

*(1) A person (P) has a disability if—*

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

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

*(2) A reference to a disabled person is a reference to a person who has a disability.*

24 The Claimant's redacted medical notes that were provided to the Tribunal to consider show that he had abnormal weight loss in May 2010, he suffered from diarrhoea in 31 May 2013, renal calculus (kidney stones) on 27 March 2015 and rectal bleeding on 23 June 2015. In respect of the diarrhoea the medical notes state that there was no abdominal pain and the Claimant's diet was poor, mainly McDonalds.

25 A letter from Dr Andrew O'Brien from Islington Central Medical Centre, dated 30 January 2015, confirmed that the Claimant was diagnosed as having irritable bowel syndrome following an assessment by Consultant Gastroenterologist Dr Matthew Banks. It was stated that the Claimant was seeing a dietician with the aim of improving his symptom patterns but it was stated to be an on going condition with occasional flares and symptoms.

26 The Claimant had treatment for his kidney stones and Dr Shabbir Moochhala, Consultant Nephrologist of the Royal Free NHS Foundation Trust, wrote a letter dated 9 June 2016, stating amongst other things that *'there may be an underlying cause for the stone episodes but it sounds of his if he is stone free now. There was a clear history of chronic loose stool together with risky diet which would be in favour stone formation also which now corrected. However his body weight remains low and interestingly the stones or unilateral although this does not exclude metabolic cause by itself.'*

27 A follow up clinic with the Claimant resulted in a further letter from Dr Moochhala on 25 October 2016 where he wrote in summary there are no metabolic risk currently noted there is no doubt of his dietary intake will be contributing to on going stone formation risk. The profound weight loss in two years preceding his first episode I am sure would have been precipitated by initial stones. I understand that this has now been fully investigated by a gastroenterologist at UCH and that he has been given a diagnosis of irritable bowel syndrome. We have had a lengthy discussion today about the merits of eating a decent balanced diet without resulting fizzy drinks and protein supplements. Clearly, he also needs to drink good amount of water. I left him to reflect on this. Healthy eating advice materials are also easily locatable on the NHS website. There is no specific renal underlying secondary course.

28 The Claimant was able to manage his IBS by managing his diet, cutting out dairy products, limiting bread that he eats. He avoids sauces and generally eats plain food. He did not see his GP about his IBS again following and there is medication prescribed.

29 However, despite the dietary management the Claimant still has the odd occasion of being unable to get to a toilet and has soiled himself. Consequently, he only travels by car and carefully plans the routes he takes to ensure there are accessible toilets. In addition to this the Claimant takes medications like imodium that prevent him having an imminent episode.

30 When considering whether the Claimant's condition of IBS amounted to a disability we considered whether managing diet in the way he did amounted to corrective medical treatment for the purposes of schedule 1 section 5 of the Equality Act 2010. This states:

*Effect of medical treatment*

5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) “Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) Sub-paragraph (1) does not apply—

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

31 Counsel for the Claimant, Ms Foubister submitted that the way in which the Claimant managed his diet was a measure, for the purposes of Schedule 1 section 5 of the Equality Act 2010.

32 The Tribunal also had regard to the *Guidance on the Definition of Disability* (2011), paragraph B7 that states:

*Account should be taken of how far a person can **reasonably** be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.*

*For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities. (See also paragraph B12.)*

33 We conclude that it was reasonable for the Claimant to adjust his diet to minimise the risk of a flare up or episode of IBS. However, given that he still has the odd occasion of IBS we conclude that he is disabled for the purposes of section 6 Equality Act 2010 and was at the relevant time.

## **Facts**

34 The Claimant commenced employment with the Respondent on the 1st of June 2005 initially as an apprentice. The Respondent is a micro business with up to 3 people working in the business. Mr McCart is the owner of the business and he had trained the

Claimant how to repair and restore Lambretta and Vespa bikes. This was a bespoke and niche business.

35 Mr McCart runs an informal operation. In previous years Mr McCart had a very forgiving approach to attendance and did not insist on the Claimant working full hours or work on Saturdays. The Claimant simply sent texts the mornings he was not able to attend for work. Mr McCart allowed this situation to happen due to the fact that he had trained the claimant, who was a good worker in the niche business, and there was an element of not wanting to challenge the Claimant's father who had from time to time attended the workplace when issues of concern with his son arose. Mr McCart stated that he had been threatened by the Claimant's father in the past.

36 Mr McCart did not provide any contract of employment to the Claimant and there were no formal policies or procedures in existence. Mr McCart stated that relationships and arrangement in his business were informal and built on trust.

37 Mr McCart asserted that there was a break in employment of up to 3 months in either 2010/11 or 2011/12. The payslips issued to the Claimant during this time did not support this. There was no evidence to support Mr McCart's assertion in evidence that he must have got the dates wrong and that the break was in 2009/10. Therefore, we find that the Claimant had continuous service from 1 June 2005.

38 Over the previous years prior to the Claimant's dismissal, he had a very poor attendance record. We accept that Mr McCart expressed his concerns to the Claimant about his attendance informally on many occasions but there was no formal process, warning or disciplinary action instituted.

39 Pension auto enrolment was a matter that Mr McCart was informed about through his accountant. Mr McCart had limited knowledge of this and he instructed his accountant to complete the formalities of registration. Mr McCart's accountant must have identified NEST as the pension provider for the Respondent and provided relevant employee details to NEST. NEST wrote to the Claimant on 20 October 2016 and the pension account was subsequently operated. The Claimant's NEST account details identify the Claimant as a member from September 2016 and the first pension payments were made into this account in January 2017.

40 The Claimant says that he had a discussion with Mr McCart about pension auto enrolment in December 2016. He asserts that Mr McCart asked him whether he could opt out. We do not accept this. Mr McCart did not know that there was a possibility for he Claimant to opt out. In any event, we find that pension enrolment was not an issue that concerned Mr McCart at all. The amount of the pension payment was 1% of salary which was less than £5 a week. We do not find that Mr McCart was concerned or phased in any way by the requirement for the Claimant to auto enrol in pension.

41 The Claimant stated that he started part time work for the Respondent in mid March 2017. There was some dispute about who instigated this. On the evidence we find that there was no reason for Mr McCart to require the Claimant to work part time. He had recently relocated to a bigger premises with 3 work benches and he was focussing on getting more business in.

42 The Tribunal considered the content of the ET3 completed by Mr McCart dated 10 April 2018. Following question from the Tribunal retracted the paragraphs 1 and 2, and by implication paragraph 3 which stated that the Claimant had worked in full time employment for the Respondent up until his dismissal. It was alleged that the Claimant specifically requested to be paid part-time wage in his bank account and the remainder of his full-time wage to be paid in cash. It was asserted that the reason the Claimant came to the Respondent and asked for this payment method was in order for the Claimant to claim a rent relief for his benefit with his council property.

43 Whilst Mr McCart withdrew these paragraphs of the ET3 as evidence before the Tribunal we considered there was something that was not entirely above board about the purported change in the working hours in March 2017. There was no reason for Mr McCart to want to change the hours given his expanded operations. However, the above assertions provided a possible reason why the Claimant would have requested the change. The Claimant stated that the working arrangement was to work Tuesdays and Wednesdays each week but it is evident that he sent of 20 texts following March 2017 stating that he would not able to attend work for a day other than Tuesday or Wednesday. Finally, there were texts that the Claimant sent to the Mr McCart informing him that he was not able to attend for work as he was having to sort matters out with the Council.

44 For the issues relevant in this case, we find from the evidence that the purported change to part time work was precipitated by the Claimant. Mr McCart required a full-time worker to make full use of the additional space and bench he had not insisted upon the Claimant working part time, whether for reason of auto enrolment to pension, or otherwise.

45 During 2017 the texts sent by the Claimant show that there were 56 occasions of not attending for work, no more than 8 or 9 of which may have been relation to his IBS, stomach condition. The vast majority of the absences related to his dog and there were problems relating to his car problems and other miscellaneous absences.

46 There was a 2 and a half week period in September/ October 2017 when the Claimant did not attend to work due to his dog's health and the Claimant was not paid.

47 On 17 November 2017 the Claimant had a further 5 days off work for pleurisy.

48 On 4 December 2017, the Claimant attended for work and Mr McCart dismissed him without notice, stating that the continued level of absence could not be tolerated. The Claimant not paid for this day.

49 The Claimant asserted in his evidence that at the meeting on 4 December 2017 Mr McCart stated that the Claimant was *'always off sick, and you've always got something wrong with you'*. When cross examined on this Mr McCart denied this and stated that it was just sickness it was all the days the Claimant was having off that were damaging the business, all the reasons the Claimant was off including his dog, his elbow and the car. In view of the text messages that were being sent by the Claimant to Mr McCart during 2017 explaining the reasons for his non- attendance, we accept Mr McCart's evidence in this regard.



50 On 27 December 2017 the Claimant and his father attended the Respondent's premises and spoke to Mr McCart. It was alleged that Mr McCart said he '*had a problem with the business and now I've got rid of the problem*' whilst looking at the Claimant. When cross examined on this Mr McCart stated that he explained the reasons why he dismissed the Claimant and why he was not going to take him back and the Claimant's father threatened legal action. We accept that Mr McCart said that there was a problem in the business with given the Claimant's high level of absence.

## **Law and conclusions**

### Unauthorised deductions from wages

51 The Claimant attended for work and was dismissed on 4<sup>th</sup> December 2017. The Claimant was ready and able to work but was not paid for this day. We therefore conclude that the First Respondent has failed to pay the Claimant's wages for in contravention of section 13 of the Employment Rights Act 1996. The Claimant claimed £100 for a day's wages. The First Respondent is ordered to pay the Claimant this sum.

### Detriment as a result of the Claimant proposing to enforce pension auto-enrolment requirements

52 We have found that Mr McCart was not concerned about the Claimant auto enrolling in the pension scheme at all. Further, we have found that it was the Claimant that precipitated the purported change in hours to part time for reasons known to him.

53 In these circumstances the First Respondent did not subject the Claimant to a detriment of a reduction in hours at all. Therefore, the Claimant's claim, pursuant to section 55 Pensions Act 2008, that he was subject to a detriment because he proposed to exercise his right to require the First Respondent to enrol him in a pension scheme and/or make the required pension payments fails and is dismissed.

### Particulars of employment

54 Mr McCart accepts that he did not provide the Claimant with written statement of particulars of employment under sections 1 and 4 ERA 1996. Whilst the First Respondent is a small micro business, it is unacceptable to have failed to provide the Claimant with written terms. Mr McCart had access to an accountant and other advice during the 12 years continuous employment that the Claimant had. We conclude that an award of 4 weeks pay, pursuant to section 38 of the Employment Act 2002, is appropriate. The Respondent is therefore ordered to pay the Claimant £800 for this matter.

### Unfair dismissal

55 The Tribunal considered section 98 of the Employment Rights Act 1996. The relevant parts provide:

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

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

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

*(2) A reason falls within this subsection if it—*

*(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

*(b) relates to the conduct of the employee,*

*(c) is that the employee was redundant, or*

*(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

*(3) In subsection (2)(a)—*

*(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

*(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*

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

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

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

56 In view of our findings following the evidence we conclude that the Respondent has established a potentially fair reason for dismissal, namely conduct and/or some other substantial reason. Specifically, the Claimant had a history of frequent and sporadic absences in 2017 that was impeding Mr McCart from fully executing and profiting from the expansion plans he had for his small niche business. Mr McCart sought to make full use of the resources he had invested in, he had invested in a larger workshop with three workshop benches, one of which was not being utilised for lengthy periods, due to the Claimant’s absences. Mr McCart’s forbearance with the Claimant’s lax attitude to attendance throughout the year had expired and he no longer accepted the high level of sporadic absences as an option for the future of his business. Mr McCart dismissed the Claimant on 4 December 2017 because of this.

57 When considering whether the dismissal was fair and reasonable in all the circumstances, whilst we have found that Mr McCart expressed his unhappiness to the Claimant informally on several occasions, there was no warning given to Claimant as to the potential consequences of continued intermittent absence; no disciplinary process was followed; the Claimant was not believed in relation to his more recent absence from work for pleurisy; and no enquiries were made by Mr McCart regarding the absences, including whether more predictable attendance could be guaranteed in future. The Claimant was not given an opportunity to improve the predictability of his attendance nor was he made aware of the consequences of continuous sporadic absences. Finally, no appeal was provided.

58 Even in a small business there are minimum standards that should be applied. Mr McCart did not follow such processes. Therefore, we conclude that the dismissal is unfair and the Claimant’s claim for unfair dismissal succeeds. We also conclude that

the failure to follow an ACAS process and offer any appeal should result in an uplift to compensatory award by 15%. We considered that size of the business and the informal way in which it was managed in deciding against increasing it by the maximum of 25%.

59 The Tribunal then considered whether the Claimant caused or contributed to his dismissal and concluded that he had. The Claimant's frequent, sporadic absences, the vast majority of which were unrelated to IBS, was very poor and this demonstrated an irresponsibility and total disregard by him about the impact of his absences on the operations of the small business in which he had worked. The Claimant's irresponsible attitude to attendance had stretched the patience of Mr McCart to the point that it could stretch no more. In these circumstances we find that the Claimant had contributed to his dismissal by the amount of 50%.

60 In respect of a process, the Tribunal considered what would have happened had there been a fair process addressing the Claimant's frequent and sporadic absences and the needs of the business. We conclude that given the numerous different reasons for the Claimant's absences, and his continued lax attitude to attendance even when he was made aware of Mr McCart's unhappiness with his absences having been told informally. We conclude that it is unlikely that the Claimant's attitude and approach to work would have suddenly changed. By December 2017 Mr McCart was determined to make the most of his work benches to develop his business. The Claimant waited over 3 weeks before visiting the Respondent to seek to discuss getting his job back on 27 December 2017 and the medical evidence showed that the Claimant's pleurisy continued during this period. As such further absence would have occurred had he not been dismissed on 4 December 2017. In these circumstances, we conclude that a fair dismissal would have occurred within 3 months had a fair procedure been followed and we limit the Claimant's compensatory award to a 13 week period.

Discrimination arising from disability: section 15 Equality Act 2010

61 Section 15 of the Equality Act 2010 states:

*Discrimination arising from disability*

*(1) A person (A) discriminates against a disabled person (B) if—*

*(a) A treats B unfavourably because of something arising in consequence of B's disability, and*

*(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

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

62 We considered whether Mr McCart has treated the Claimant unfavourably because of something arising in consequence of his disability, by dismissing him because of his sickness absence record.

63 Throughout 2017 the Claimant's absence was woeful. He had 8 or 9 occasions of absence due to IBS out of a total of 56 absences. Therefore, less than 15 % of the

56 absences were related to IBS. The Claimant's final absence was not related to IBS. The Claimant was dismissed for absences affecting the running and profitability of the business and not IBS. There is a clear difference between the Claimant's sickness record for IBS related absences and his total absence record. The Respondent maintains that the Claimant took too much time off, and dismissed him for this and this was not arising from his disability.

64 We accept the Respondent's position in this regard and conclude that the Claimant was not dismissed in respect of the 8 or 9 occasions for which he was suffering from IBS. This was insignificant in the context of the total absences and if the 8 or 9 days were discounted to position would not have changed. There would still have been 48 occasions of sporadic absence when Mr McCart was seeking to expand and develop his business by making full use of his resources and equipment.

65 In these circumstances the Claimant's claim for discrimination arising from disability under section 15 of the Equality Act fails and is dismissed.

#### Harassment: Section 26 Equality Act 2010

66 The Tribunal then considered the Claimant's harassment complaints. Section 26 of the Equality Act 2010 states:

##### *Harassment*

*(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.*

*(2) A also harasses B if—*

*(a) A engages in unwanted conduct of a sexual nature, and*

*(b) the conduct has the purpose or effect referred to in subsection (1)(b).*

*(3) A also harasses B if—*

*(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*

*(b) the conduct has the purpose or effect referred to in subsection (1)(b), and*

*(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*

*(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.*

*(5) The relevant protected characteristics are—*

*age;*

*disability;*

*gender reassignment;*

*race;*

*religion or belief;  
sex;  
sexual orientation.*

67 In view of our findings of fact regarding what was said by Mr McCart at the meetings on 4 and 27 December 2017 we do not conclude that the Claimant was harassed. Specifically, there was no mention by Mr McCart of the Claimant being ill or always being ill. What was said in both of those meetings by Mr McCart was a matter of fact. The Claimant had excessive absence for numerous reasons. Mr McCart did believe that the Claimant's high level of absence which was a problem for the business and expressed this. We conclude that did not amount to harassment whether on the grounds of disability, or at all.

68 Therefore, the Claimant's claim for unlawful harassment pursuant to section 26 of the Equality Act 2010 fails and is dismissed.

#### Wrongful dismissal

69 The Claimant was not given notice of termination of employment. Mr McCart had reached the end of his patience regarding the Claimant's sporadic absences. However, the Claimant was entitled to notice of termination in these circumstances and this was not given.

70 The Claimant had continuous employment since 2005 and was therefore entitled to 12 weeks statutory minimum notice under section 86 of the Employment Rights Act 1996.

#### **Remedy**

71 In view of our conclusions on the issues the Tribunal award the Claimant the following sums:

#### **A Basic award**

<b>12 x £205.87</b>	<b>£2470.44</b>
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#### **B Compensatory award**

1 x £200 (overlap with 12 weeks notice payment below)	£200
13 x £4.02 pension loss	£52.26
Loss statutory rights	£500
Compensatory award before deduction	£752.26
Plus 15% uplift for failing to follow ACAS process	£112.84
Compensatory award before deduction	£865.10

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Less 50% deduction for contributing to dismissal	£432.55
<b>Total compensatory award</b>	<b>£432.55</b>
<b>C Notice period 12 weeks x £200</b>	<b>£2400</b>
<b>D Unpaid wages for 4 December 2017</b>	<b>£100</b>
<b>E 4 weeks for failure to provide written particulars</b>	<b>£800</b>
<b>Total Award A+B+C+D+E</b>	<b>£6202.99</b>

72 The First Respondent is ordered to pay the Claimant the sum of £6202.99.

73 The recoupment provisions apply.

Grand total £6202.99

Prescribed element £432.55

The period of the prescribed element 4 December 2017 to 13 February 2019

The excess of the grand total over the prescribed element is £5770.44

Employment Judge Burgher

Dated: 21 February 2019