



# EMPLOYMENT TRIBUNALS

**Claimant:**

Mrs C Owen (deceased)

v

**Respondent:**

Mr D Pattni

**Heard at:**

Reading

**On:** 11 and 12 September 2019  
and  
16 October 2019 (in chambers)

**Before:**

Employment Judge Hawksworth  
Members: Mrs AE Brown and Ms H Edwards

**Appearances**

**For the Claimant:** Mrs J Coote (Lay representative)

**For the Respondent:** Mr C Payne (Counsel)

## RESERVED JUDGMENT

The complaint of discrimination arising from disability contrary to section 15 of the Equality Act 2010 succeeds.

## REASONS

### Introduction and parties

1. By a claim brought on 3 April 2017 after early conciliation from 24 January 2017 to 10 March 2017, Mrs Claire Owen complained of unfair dismissal, disability discrimination, breach of contract (notice pay) and unpaid holiday.
2. The claim was initially brought against Rogers Auto Factors Limited. Rogers Auto Factors Limited failed to present a response and a rule 21 judgment (liability only) was issued in Mrs Owen's favour on 6 June 2017.
3. At a preliminary hearing on 8 June 2017, Employment Judge Gumbiti-Zimuto added Mr Dipen Pattni as a second respondent. He did so because it had been reported to Mrs Owen by the Acas officer that Mr Pattni was intending to dissolve Rogers Auto Factors Limited to avoid having to pay any judgment made by the tribunal in favour of Mrs Owen.
4. Mr Pattni sold Rogers Auto Factors Limited in July 2017.

5. Very sadly, Mrs Owen died on 7 September 2017. She had written to the tribunal on 1 September 2017 to say that she wished her husband Mr Lee Owen to continue her claims against both respondents. Mr Owen was named in the grant of probate dated 13 October 2017 as Mrs Owen's personal representative and is continuing her claim under section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934.
6. Rogers Auto Factors Limited ceased trading and was subject to a creditors' voluntary liquidation which commenced on 13 August 2018.
7. At a preliminary hearing on 29 November 2018, Employment Judge Vowles clarified the issues in the claims against both respondents, and listed a hearing for 11 and 12 September 2019 to decide merits (in respect of the claim against Mr Pattni) and remedy (in respect of Rogers Auto Factors Limited and, if the claim against him was successful, Mr Pattni).
8. On 11 February 2019, the claim against Rogers Auto Factors Limited was withdrawn. It was dismissed on 21 February 2019. The only claim remaining for determination is the claim against Mr Pattni for discrimination arising from disability under section 15 of the Equality Act 2010.
9. For clarity, in these reasons the first respondent is referred to as Rogers Auto Factors Limited, and the second (the remaining) respondent as Mr Pattni.

### **Hearing and evidence**

10. The claim against Mr Pattni was heard on 11 and 12 September 2019.
11. Mrs Coote (who represented Mrs Owen) had prepared a bundle for the hearing. This contained 108 pages and was comprised of tribunal documents and Mrs Owen's documents. A direction for disclosure by 28 February 2019 had been given on 29 November 2018 and Mrs Coote sent a copy of the bundle to Mr Pattni in advance of the hearing. Mr Pattni did not however provide any disclosure prior to the hearing.
12. At the start of the first day of the hearing, Mrs Coote submitted an updated schedule of loss for injury to feelings and aggravated damages. This was added to the bundle at pages 41a and 41b. Mr Payne (representing Mr Pattni) submitted a Companies House record for Rogers Auto Factors Limited. This was added as page 109.
13. On the morning of the second day of the hearing, Mr Pattni sought permission to rely on a document which had not previously been disclosed. This was a three page 'Sickness Report SSP1' showing Mrs Owens' entitlement to statutory sick pay for the period from 28 October 2015 to 29 February 2016. For reasons given at the hearing, we gave permission for Mr Pattni to rely on this document. It was added to the bundle as pages 110 to 112.

14. Mrs Owen had made a witness statement which she signed on 29 July 2017. It included a statement of truth. We considered our approach to Mrs Owen's statement carefully, bearing in mind that it was not possible for her evidence to be tested in cross-examination. We have explained in our findings of fact those areas where we have accepted Mrs Owen's evidence on factual issues which were in dispute, and why we have done so.
15. At the hearing we heard evidence on behalf of Mrs Owen from Mr Shaun Waine, a former colleague of Mrs Owen.
16. For Mr Pattni, we heard evidence from Mr Pattni himself and from Mr A J Kara (Mr Pattni's brother and business partner).
17. Mr Pattni also provided a witness statement of Mr Raman Kapur. Mr Kapur was not able to attend the tribunal. We informed Mr Pattni that we would consider the statement and attach such weight to it as we thought appropriate.

### **Issues**

18. The complaint against Mr Pattni is of discrimination arising from disability under section 15 of the Equality Act 2010. The discrimination was said to have taken place between 3 and 15 November 2016.
19. Based on the list of issues prepared by Mr Payne, and the issues set out in the case management summary of 29 November 2018, the issues which the tribunal needs to determine are as follows:-
  - (a) (It is accepted that at all material times Mrs Owen was disabled by reason of cancer (acute myeloid leukemia) for the purpose of section 6(1) and schedule 1 of the Equality Act 2010.)
  - (b) Mr Pattni accepts that he knew that Mrs Owen had cancer. Did he know or could he reasonably have been expected to know that this was a disability?
  - (c) Did Mr Pattni treat the claimant unfavourably? The unfavourable treatment was said by Mrs Owen to be i) denial of payment of monies owed to her by Rogers Auto Factors Limited and ii) the discriminatory dismissal (this issue includes consideration of whether Mrs Owen was dismissed).
  - (d) Was Mrs Owen's sickness absence from 25 September 2015 to 15 November 2016 'something arising' in consequence of the claimant's disability?
  - (e) If so, and if Mr Pattni did treat Mrs Owen unfavourably, was the unfavourable treatment because of Mrs Owen's sickness absence from 25 September 2015 to 15 November 2016?

- (f) Mr Pattni does not say that any unfavourable treatment was a proportionate means of achieving a legitimate aim.
20. The case management summary of 29 November 2018 set out that at the hearing on 11 and 12 September 2019, the full merits hearing against Mr Pattni would be heard first, and this would be followed by the remedy hearing against Rogers Auto Factors Limited (and against Mr Pattni if the claim against him is successful).
21. In the event, the claim for remedy against Rogers Auto Factors Limited was withdrawn prior to the hearing, and we reserved judgment on liability in respect of the claim against Mr Pattni. Neither party made submissions on remedy. We have determined liability in the claim against Mr Pattni, and a separate hearing will be listed to deal with remedy. Case management orders for the remedy hearing will be sent separately.

### **Findings of fact**

22. The facts set out here are those which we considered to be helpful to assist us in determining the issues we had to decide. Where we make no finding about a factual matter, or where we make a finding with less detail, this is not because of oversight or omission, but reflects the extent to which we found the point of assistance in determining the issues before us.
23. Mrs Owen started working for Rogers Auto Factors Limited as a trainee, on 1 August 1994 when she was 17 (page 65). The company was founded and owned by her father (and later both her parents).
24. By 2015 Mrs Owen had the role of Office Administrator, working part-time 2 days a week (ET1). Rogers Auto Factors Limited had around five staff at this time.
25. In August 2015, there was a meeting at which the staff of Rogers Auto Factors Limited were introduced to Mr Pattni. Mr Pattni together with his brother Mr Kara ran a group of eight companies. Mr Waine (whose evidence is consistent with Mrs Owen's on this point) said that Mr Pattni was introduced as the new owner of the business. Mr Pattni's evidence was that this was a preliminary meeting and that he had not at this stage bought the business. Nothing turns on this difference; it is agreed that the meeting took place and that Rogers Auto Factors Limited became part of Mr Pattni's group of companies.
26. On 25 September 2015, Mrs Owen was diagnosed with acute myeloid leukemia. She was signed off sick by her doctors and spent the majority of the next eight months in hospital undergoing chemotherapy.
27. On 1 October 2015, Mr Pattni was appointed as the sole director of Rogers Auto Factors Limited (page 85). Mr Pattni was the sole director of Rogers Auto Factors Limited until his appointment terminated on 31 August 2017.

28. Mr Pattni attended the offices of Rogers Auto Factors Limited once or twice a month. He appointed Mr Kara as managing consultant of the group from October 2015. Mr Kara (together with Mr Kapur, who was appointed in July 2016 by Mr Pattni as sales director for the group) oversaw the operations and staff of the business which included Rogers Auto Factors Limited. In light of the appointment of Mr Kara by Mr Pattni, we find that Mr Kara was acting on Mr Pattni's behalf and with his authority in his dealings with the operations and staff of Rogers Auto Factors Limited.
29. Mr Viv Innes was the general manager of Rogers Auto Factors Limited.
30. Mr Pattni said that he did not deal with day to day issues at Rogers Auto Factors Limited. However, Mr Pattni accepted that he dealt with staff pay in that Mr Innes sent timesheets to him and Mr Pattni then passed them on to the accountant for them to pay the staff.
31. We find that Mr Pattni's involvement with staff pay for Rogers Auto Factors Limited went beyond this. This was apparent from email exchanges between Mr Pattni and Mr Innes. In one email Mr Pattni provided Mr Innes with a detailed breakdown of pay and deductions which he asked Mr Innes to pass on to Mr Waine, an employee of Rogers Auto Factors Limited who worked in sales. Mr Pattni also said in the email that he 'will make sure Jan wage slip includes breakdown for commission fuel etc' (page 71). In a later email Mr Innes asked Mr Pattni not to forget a commission payment which was due to Mr Waine (page 72).
32. In addition, Mr Waine's evidence was that Mr Pattni dealt personally with pay matters. Mr Waine experienced problems with the payment of his monthly commission, although he continued to receive his monthly payslips. When he raised the problem with Mr Kara he was told he would have to query it with Mr Pattni as Mr Pattni was the director and owner of the company. After this, Mr Waine spoke to Mr Pattni directly and texted him directly about pay. He raised issues regarding unpaid commission with Mr Pattni on numerous occasions. Mr Pattni told Mr Waine that he would rectify the situation and that the commission would be paid with his wages the following month. Mr Pattni did not ask Mr Waine to speak to someone else or suggest that he could not deal with pay matters.
33. We find that Mr Pattni dealt with and took responsibility for pay issues for staff at Rogers Auto Factors Limited, and that this involved more than acting as a conduit between Mr Innes and the accountant.
34. Mrs Owen's period of sickness absence started on 25 September 2015. Mr Pattni became aware in October 2015 that Mrs Owen had cancer. Cancer is a disability under the Equality Act 2010. We find that, as a director of a group of eight companies with around 35-40 employees at this time, Mr Pattni could reasonably have been expected to know that Mrs Owen's condition amounted to a disability for the purposes of the Equality Act 2010.

35. After she went on sick leave, Mrs Owen was paid in full as normal on 20 October 2015, but then her pay stopped. This was confirmed by her bank statements (pages 53-63) and was not disputed by Mr Pattni. Mrs Owen also received no payslips after this time (other than in February 2016 which we explain below).
36. Mrs Owen was paid £640.71 on 20 October 2015 (page 55). She did not receive any pay for November 2015, December 2015 or January 2016. Although she was entitled to receive statutory sick pay (SSP), she was not paid any SSP for these months (pages 56 to 58). In response to a question by Mrs Coote, Mr Pattni said that he could not give any answer as to why Mrs Owen was not paid during this period.
37. Mrs Owen sent a text message to Mr Pattni on 26 February 2016 about her pay (page 50). It is clear from the text that this was not the first time she had contacted Mr Pattni as she said, *'I thought I'd wait until pay day before I contacted again'* [sic]. She said, *'It's been 4 months now since I was last paid, & really need to pay some bills before I have to go back in to hospital'*. Mr Pattni replied, *'Hi Claire sorry for delay accountant has done payslips today will be in your account before the end of today'*.
38. Mrs Owen received two BACS payments from Rogers Auto Factors Limited on 26 February 2016 in the sums of £371.49 and £990.64 (page 59). These two payments amounted to £1,362.13.
39. At around this time Mrs Owen was also sent five payslips which were said to be for the pay periods October, November and December 2015, February and March 2016 (pages 51 and 52). It is clear from Mrs Owen's bank statements that no payments were made to her on the pay dates given on the payslips. The payments recorded as due on the November 2015 and March 2016 payslips were not paid at all.
40. Mr Pattni said that the failure to pay SSP to Mrs Owen during her sick leave was because of an error by the company's accountants, and that the payslips were retrospective. He said that the payments on 26 February 2016 were for Mrs Owen's full statutory sick pay (SSP) taking into account that Mrs Owen had been paid in full for October.
41. The sums paid to Mrs Owen on 26 February 2016 are not reflected in the payslips she was sent. There was no payslip with the figure of £1,362.13 which Mrs Owen received on 26 February 2016 and the sums on the payslips (or a combination of the payslips) do not add up to £1,362.13.
42. The sums paid to Mrs Owen on 26 February 2016 are also not the same as the 'SSP due' figures in the SSP1 report disclosed by Mr Pattni on the second day of the hearing (pages 110 to 112). Mr Pattni obtained a copy of this document following an enquiry he made on the first day of the hearing. It is from a computer system and Mr Pattni was able to obtain it because Rogers Auto Factors Limited's password to access the system had not been changed after Rogers Auto Factors Limited went into liquidation.

43. The document is headed 'Rogers Auto Factors Limited 2015-16 Sickness Report SSP1'. It is not clear whether it was completed by an accountant or by someone at Rogers Auto Factors Limited. The figures in the typed section of the SSP1 form do not reflect the sums paid to Mrs Owen on 26 February 2016.
44. The SSP1 form sets out an entitlement to £88.45 per week (the rate of SSP at the time) for the period from 5 November 2015 to 29 February 2016. As Mrs Owen qualified for SSP, she was entitled to receive it at the weekly rate of £88.45. The weekly rate is not pro-rated for part-time employees; Mrs Owen's daily rate of SSP would have been £44.23 (the weekly rate divided by the number of days in the week that she worked, ie divided by two).
45. The SSP1 form was only completed up to 29 February 2016 but Mrs Owen was entitled to receive SSP until 9 April 2016 (ie for 28 weeks). Mrs Owen's total SSP entitlement was £2,476.60 (28 x £88.45).
46. There are two lines of handwritten notes at the bottom of the SSP1 document which show a calculation totalling £990.64 (one of the payments to Mrs Owen). It is not clear whose handwritten notes these were.
47. The other payment made to Mrs Owen on 26 February 2016 (£371.49) is the same as the net payment on the payslip for February 2016, although the payslip records the pay date as 5 March 2016. We find that the payslips which were sent to Mrs Owen in February 2016 were inaccurate and incomplete.
48. After Mrs Owen received the two payments on 26 February 2016, she did not receive any further pay. The amounts paid to Mrs Owen during her sick leave were £670.71 (October 2015) and £1,362.13 (February 2016), totalling £2032.84. This was £443.76 less than the full 28 week entitlement to SSP. We find that Mrs Owen was underpaid SSP by Rogers Auto Factors Limited.
49. Mrs Owen remained on sick leave. On 28 April 2016, she had a bone marrow transplant. The medical advice she received was that she would need at least six months off after the transplant before being able to return to work.
50. By the end of October 2016, Mrs Owen was feeling better and had been advised by her doctors that she would be ready to return to work in the New Year. At around this time she called into Rogers Auto Factors Limited to see her colleagues. They told her that her role in the office was no longer there and that the office functions had been moved to head office.
51. We accept that this is what Mrs Owen was told by her colleagues, as this account is set out in a contemporaneous email from Mrs Owen to Mr Pattni and Mr Kara (page 43). We return below to the question of whether office functions had in fact been moved to head office.

52. At around the same time, in late October 2016, Mrs Owen asked her pension provider for a pension forecast. Under the terms of her contract of employment, she was a member of a pension scheme to which Rogers Auto Factors Limited made an annual contribution of £500 (page 66).
53. On 3 November 2016 Mrs Owen received a letter from her pension provider, ReAssure, dated 1 November 2016 (page 42). The first paragraph of the letter began:

*"We have been told that you have left your employer's pension scheme on 27 August 2016. We received the last contribution to your plan on 27 August 2015 and have returned any contributions received after this date."*

54. Mrs Owen was shocked and extremely upset about this letter. She took it to mean that Rogers Auto Factors Limited had told her pension provider that she was no longer employed by them. She felt totally humiliated and undervalued as an employee. She was particularly affected by this as her parents had owned Rogers Auto Factors Limited and so she had a close affiliation to the business.
55. Mrs Owen sent an email to Mr Pattni and Mr Kara on 3 November 2016 (page 43). The email said:

*"Dear AJ and Dipen*

*I have received a letter from my pension provider stating that I left my employer's pension scheme on the 27<sup>th</sup> August 2016. I have not left my position within Rogers Auto Factors, and am still currently signed off sick. You have failed to respond to the email that I sent you in September, or the letter that Viv passed on for me, or have contacted me at any point during my illness. May I remind you that you are still legally obliged to pay my pension while I am signed off.*

*I have called into Rogers on a couple of occasions regarding returning to work and have been told that my role in the office is no longer there and everything has been moved to head office.*

*If there is no longer a job for me then you should have made me an offer of redundancy.*

*The lack of communication from you, the failure to pay me what I am legally entitled to, and the cancellation of my company pension without any form of correspondence from you could be seen as constructive dismissal.*

*Could you please forward me a copy of my contract of employment, and the staff handbook."*

56. Mrs Owen received no reply to her email. On 10 November 2016, she emailed Mr Innes enclosing a copy of her email of 3 November (page 44).



Her email to Mr Innes reads: *“This is a copy of the email I sent to and Dipen. Can you please make sure he gets it as he is ignoring all calls and emails.”* (The typos are in the original.)

57. On 11 November 2016, Mrs Owen had still not received any response from Mr Pattni. The failure to respond to her exacerbated her stress levels. There was no evidence that Mr Pattni took any steps to investigate or deal with Mrs Owen’s communications in any way. During the hearing, Mr Pattni was able to obtain a copy of the SSP1 document which set out Mrs Owen’s entitlement to sick pay in the space of one day, and this suggests that he could have checked the position for her fairly quickly and easily.

58. Mrs Owen went in to Rogers Auto Factors Limited and handed in a letter (page 45). It had very similar wording to her email of 3 November 2016 and concluded:

*“The lack of communication from you, the failure to pay me what I am legally entitled to, and the cancellation of my company pension without any form of correspondence from you could be seen as structured [sic] dismissal.”*

59. On 11 November 2016, Mrs Owen received an email from Mr Kara suggesting that they meet in person to discuss the issues she had raised (page 46). The meeting between Mrs Owen and Mr Kara took place on 15 November 2016. This was the only meeting they had. This meeting was the last contact Mrs Owen had from either Mr Pattni or Mr Kara.

60. The day after the meeting, Mrs Owen sent an email to Mr Pattni summarising what had happened at the meeting (page 48). It says:

*“Sadly [Mr Kara] refused to discuss with me why you have not paid me the SSP I was entitled to stating you deal with all issues regarding money, he also refused to discuss why the pension provider was advised the I was no longer working for the company, again stating that you were the director and dealt with these issues.*

*I’ve tried several times to ring you, you have ignored all my calls, I have also e.mailed you, which you have also ignored.*

*Your actions have made it very clear that you do not consider me an employee of the company, you have totally ignored me since I became ill, which had upset me very much.*

*If I do not hear from you within the next seven days I will have no choice but to take further action.”*

61. Mr Kara’s account of this meeting was different. He said that in the meeting with Mrs Owen he addressed all the issues Mrs Owen asked him to address. He said he had told her that he would make a call to the payroll people and make sure the SSP was corrected.

62. Mr Kara did not make a note of the meeting. Mrs Owen's email of 16 November 2016 is the only contemporaneous record of the meeting on 15 November 2016. Neither Mr Kara nor Mr Pattni responded to Mrs Owen's email or said at the time that the account of the meeting it contained was inaccurate.
63. Mrs Owen's account in the email as to what Mr Kara said about pay issues is consistent with Mr Waine's evidence that he was told by Mr Kara that he would have to query pay issues with Mr Pattni. Mr Kara's account is not consistent with what happened after the meeting. If Mr Kara had said to Mrs Owen that he would follow up the SSP issue and make sure it was corrected, there would have been evidence of those further calls, or further correspondence between Mr Kara and Mrs Owen to update her about that, but there were not.
64. For these reasons, we accept that what is said in Mrs Owen's email about the meeting is accurate.
65. In her witness statement of 29 July 2017, Mrs Owen said that at the meeting, Mr Kara also said that the job she was doing was no longer in existence, but he could possibly find her another job in the office as they were looking at restructuring the business and maybe having Rogers Auto Factors Limited as a central hub for credits and returns. He stated however that she was 'definitely still an employee of the business' and that he would be in touch very soon to enable her to return to work.
66. This discussion is not mentioned in Mrs Owen's email of 16 November 2016 and we have considered it carefully. Mrs Owen's statement contains a level of detail (about the central hub) which seems credible. It is consistent with what Mrs Owen said she had been told by colleagues about her job in her email of 3 November 2016. Importantly, it is also consistent with an email sent to the tribunal from Mr Kara's email address but in Mr Pattni's name on 7 June 2017 (page 49) which says:

*"We last had a meeting in December 2016 and discussed the opportunity for [Mrs Owen] to return in a small capacity, however following this meeting, we have not received any communication from [Mrs Owen]."*

67. Although this email refers to a meeting in December 2016, Mr Kara confirmed in his evidence that this was a reference to his meeting of 15 November 2016 with Mrs Owen (as they only had one meeting). It is clear from this email that the capacity in which Mrs Owen could return to work was discussed at the meeting. This suggests that she was not going to be able to return to work in her previous capacity of Office Administrator. Finally, Mr Pattni's witness statement says that in the meeting on 15 November 2016, Mr Kara suggested 'a customer service role which would be a better environment rather than warehouse duties.' There is no reference to Mrs Owen's role as an office administrator, which is consistent with that role being no longer there.

68. For these reasons, we accept what Mrs Owen said in her witness statement as to what was said at the meeting on 15 November 2016, as well as what she said in her email of 16 November 2016. We find that she was told that her role no longer existed. We find that this was not just a situation where another employee was carrying out Mrs Owen's role in her absence. We also find that the discussions about finding her another role were in general terms only and no specific alternative role was identified.
69. After sending her email on 16 November 2016, Mrs Owen received no further pay and had no further contact at all from Mr Pattni or Mr Kara. Mr Pattni said that he was waiting for Mrs Owen to contact him once she was well enough to return to work, and she never did. We do not accept this. It is clear from Mrs Owen's email of 16 November 2016 (which was the last communication of any sort between Mrs Owen and Mr Pattni) that Mrs Owen had asked Mr Pattni to contact her.
70. Mrs Owen presented her employment tribunal claim on 3 April 2017. It included a complaint of unfair dismissal. No response was served. A rule 21 liability judgment was issued. A remedy hearing was listed for 8 June 2017. The email in Mr Pattni's name to the tribunal of 7 June 2017 (page 49) was the first communication with Mrs Owen or the tribunal by Rogers Auto Factors Limited. It was sent at 23.21 on the evening before the hearing on 8 June 2017. The email also said:
- "If we cannot reach an amicable resolution to this matter then Rogers Auto Factors Ltd will cease to exist and there will be no positive outcome for any party."*
71. In her witness statement Mr Owen said that she saw the email from Mr Pattni to the tribunal of 7 June 2017 as a deliberate attempt to prevent her from pursuing her claim and to avoid having to pay any award made to her in the tribunal. We accept Mrs Owen's evidence as to how she saw this email.
72. On 18 July 2017 a P60 end of year tax certificate for the year to 5 April 2016 was put through Mrs Owen's letterbox (page 70). Mr Pattni was unable to say why Mrs Owen received this over a year after the end of the period to which it related. Mrs Owen did not receive a P60 for the year to 5 April 2017.
73. Mr Pattni's appointment as a director of Rogers Auto Factors Limited terminated on 13 August 2017 (page 85). He gave notice of ceasing to be a person with significant control of Rogers Auto Factors Limited on the same date (page 93).
74. Mrs Owen died on 7 September 2017.
75. Rogers Auto Factors Limited went into creditors' voluntary liquidation on 13 August 2018 (page 109).

## The Law

Discrimination arising from disability

76. Section 15(1) of the Equality Act 2010 provides that 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.*
77. There are four elements to section 15(1), as explained by the EAT in Secretary of State for Justice and anor v Dunn EAT 0234/16:
- i. there must be unfavourable treatment;
  - ii. there must be something that arises in consequence of the claimant's disability;
  - iii. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and
  - iv. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.
78. The EHRC Employment Code says that unfavourable treatment should be construed synonymously with 'disadvantage'. In Williams v Trustees of Swansea University Pension and Assurance Scheme and anor 2019 ICR 230, SC the Supreme Court held that little is likely to be gained by seeking to draw narrow distinctions between the word 'unfavourably' in section 15 and analogous concepts such as 'disadvantage' or 'detriment' found in other provisions of the Equality Act. It accepted that the EHRC Employment Code provides helpful advice as to the relatively low threshold of disadvantage required to engage section 15.
79. In T-Systems Ltd v Lewis EAT 0042/15 the EAT held that unfavourable treatment is what the alleged discriminator does or says, or omits to do or say, which then places the disabled person at a disadvantage.
80. In relation to the third element, the causal link between the 'something arising' and the unfavourable treatment, the EAT in Secretary of State for Justice and anor v Dunn held that motive is irrelevant and, in Pnaiser v NHS England and anor 2016 IRLR 170, EAT, that:
- 'there may be more than one reason or cause for impugned treatment....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.'*
81. There is a separate provision in section 15(2) relating to knowledge of the claimant's disability. It provides:

*'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.'*

82. An issue in this case is how subsection (2) applies if A is aware of B's disabling condition, but is not aware that it amounts to a disability for the purposes of the Equality Act. The EHRC Code suggests that the subsection is about awareness of the condition, rather than about awareness that the statutory test is met; an example given in paragraph 5.9, refers to knowledge of the condition (rather than of the statutory test being met):

*'A woman is disciplined for losing her temper with a colleague. However, this behaviour was out of character and is a result of severe pain caused by her cancer, of which her employer is aware. This disciplinary action is unfavourable treatment. The treatment is because of something which arises in consequence of the worker's disability'*

83. The shifting burden of proof in section 136 of the Equality Act applies here.
84. In order to establish a prima facie case of discrimination under section 15 and for the burden of proof to shift to the respondent, a claimant must prove that she has a disability within the meaning of section 6, that the respondent had actual or constructive knowledge of her disability and that the respondent treated her unfavourably. It is also for the claimant to show that 'something' arose as a consequence of her disability and that there are facts from which it could be inferred that this 'something' was a reason for the unfavourable treatment. The claimant needs to satisfy the tribunal in respect of each of these elements for the burden of proof to shift to the respondent.
85. In Deman v Commission for Equality and Human Rights 2010 EWCA Civ 1279, CA, Lord Justice Sedley considered what is required for the burden to shift to the respondent (in the context of a direct discrimination complaint, but this applies to other forms of discrimination as well). He accepted that, as established in Madarassy v Nomura International plc 2007 ICR 867, CA, something 'more' than a finding of less favourable treatment is required before the burden of proof shifts. Nevertheless, Sedley LJ said:

*'the 'more' which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

86. The tribunal must look at the totality of its findings of fact and decide whether those facts add up to a sufficient basis from which to draw an inference of discrimination.
87. Where the burden of proof shifts, the respondent can defeat a complaint under section 15 by proving either that the reason or reasons for the unfavourable treatment were not the 'something arising' in consequence of the disability, or that the treatment was justified as a proportionate means of achieving a legitimate aim.

### Dismissal

88. The unfavourable treatment alleged by Mrs Owen includes dismissal. There is an issue between the parties as to whether Mrs Owen was dismissed.
89. The test as to whether ambiguous words amount to a dismissal is an objective test with two stages:
- First, all the surrounding circumstances must be considered to assess whether the ambiguity can be resolved;
  - If the words are still ambiguous, the tribunal should ask itself how a reasonable employee would have understood them in the circumstances.
90. In Chapman v Letheby and Christopher Ltd 1981 IRLR 440 EAT, a case about the use of ambiguous words in correspondence, the EAT emphasised that the interpretation of the words used 'should not be a technical one but should reflect what an ordinary, reasonable employee...would understand' by them.
91. There are circumstances in which tribunals and the courts have held that a dismissal can be inferred from the actions of the parties. Dismissal can only be inferred from an employer's actions if the employee was aware of the conduct in question (Sandle v Adecco UK Ltd 2016 IRLR 941, EAT).
92. In Hogg v Dover College 1990 ICR 39, EAT, the EAT held that the College's letter to a teacher removing him as head of history and offering him new terms amounted to an express dismissal; the new terms were so different from the old terms that the situation could only be described as the termination of one contract and the formation of a new one.
93. In Kirklees Metropolitan Council v Radecki 2009 ICR 1244, CA, the Court of Appeal held that removing an employee from the payroll while he was suspended and negotiating a settlement agreement was a sufficiently unequivocal statement of the employer's intention to terminate his employment.

### **Conclusions**

94. We have applied these legal principles to our findings of fact as set out above, in order to decide the issues for determination. We have considered the issues in the order set out in the issues section above.

(a) and (b) Knowledge of disability

95. Mr Pattni accepts that Mrs Owen was disabled by reason of cancer (acute myeloid leukemia) for the purpose of section 6(1) and schedule 1 of the Equality Act 2010 at all material times.
96. Mr Pattni also accepts that he knew from October 2015 that Mrs Owen had cancer. He did not accept that he knew that this was a disability for the purposes of the Equality Act.
97. We conclude that Mr Pattni's knowledge that Mrs Owen had cancer means that he had knowledge of her disability within the meaning of section 15(2); the section requires assessment of Mr Pattni's knowledge of Mrs Owen's condition, not his knowledge of the statutory definition of disability. In reaching this conclusion, we have taken into account the EHRC Code, including the wording of the example set out above, which suggests that it is knowledge of the medical condition which is relevant under section 15(2).
98. In any event, we have found that, as a director of a group of eight companies with around 35-40 employees at this time, Mr Pattni could reasonably have been expected to know that cancer amounts to a disability for the purposes of section 6 of the Equality Act 2010.
99. We have concluded therefore that Mr Pattni knew or could reasonably have been expected to know that Mrs Owen had a disability, and therefore that section 15(2) does not disapply section 15(1) in this case.

(c) Unfavourable treatment

100. We have next considered whether Mr Pattni treated Mrs Owen unfavourably. The unfavourable treatment was said by Mrs Owen to be i) denial of payment of monies owed by Rogers Auto Factors Limited and ii) dismissal. Mrs Owen said that she was subject to discrimination arising from disability between 3 and 15 November 2016.
101. We have first considered whether Mr Pattni denied Mrs Owen payment of monies owed by Rogers Auto Factors Limited. We have found that Mr Pattni dealt with pay matters for staff at Rogers Auto Factors Limited, and that Mr Kara referred pay queries on to Mr Pattni. We have found that Mrs Owen was underpaid SSP.
102. Mrs Owen sent an email to Mr Pattni on 3 November 2016 and hand delivered a letter to him on 11 November 2016. In both of these she raised the failure to pay her what she was legally entitled to. Mr Pattni did not respond to Mrs Owen or take any steps to investigate these pay issues, or make any further payment to her in response to her correspondence.

103. We conclude that, in circumstances where Mrs Owen had not been paid since February 2016 and where only Mr Pattni dealt with pay matters, Mr Pattni's failure to respond to Mrs Owen's email and letter about her pay on 3 and 11 November 2016, to take any steps to investigate or to make further payment to her disadvantaged Mrs Owen. She found the failure to respond to her communications stressful.
104. Unfavourable treatment can take the form of an omission, as well as an act. We conclude that the failure to respond to or investigate the concerns about pay during the period 3 to 15 November 2016 (implicitly denying payment of monies owed to Mrs Owen) was unfavourable treatment.
105. We have next considered whether Mrs Owen was dismissed.
106. We have accepted the evidence of Mrs Owen that at the meeting on 15 November 2016, Mr Kara told her that the job she was doing was no longer in existence but that he could possibly find her another job in the office. In the words used in the email of 7 June 2017 signed by Mr Pattni, there were discussions about 'the opportunity for Mrs Owen to return in a small capacity'. Mr Kara went on to say that Mrs Owen was definitely still an employee.
107. We find that Mr Kara's words were ambiguous: there was a conflict between saying that Mrs Owen's job no longer existed (without offering a specific alternative) and asserting that she was still an employee.
108. It is important to consider the statements of Mr Kara at the meeting on 15 November 2016 in the context of their surrounding circumstances. We bear in mind that at the time of the meeting on 15 November 2016, Mrs Owen had not received any pay or sick pay though normal payroll payments for over a year (since 20 October 2015). She was not receiving regular payslips. She received two payments on 26 February 2016, but they were made outside the normal payroll procedures and without being properly recorded in payslips.
109. In circumstances where she was not at work, being paid or receiving payslips, the pension scheme was one of the only continuing connections Mrs Owen had with her employment. This connection was broken when she received the letter from her pension provider which said they had been told that she had left the scheme on 26 August 2016.
110. We conclude that Mr Kara's statements to Mrs Owen about her employment on 15 November 2016 were ambiguous but that in these circumstances an ordinary, reasonable employee would understand from the words used by Mr Kara that they had been dismissed from the role of office administrator (even if it was possible that some other role might be found).
111. If we are wrong about this, we conclude that Mr Kara's discussions with Mrs Owen amounted to the termination of one contract and the proposed



offer or formation of another and therefore amounted to a dismissal, notwithstanding Mr Kara's assertion that Mrs Owen was still an employee. We conclude that this was a situation similar to that in Hogg v Dover College. Mrs Owen's role of office administrator no longer existed; there had been no offer of any other specific role, but even if there was it was clear that it would be in a different capacity.

112. Alternatively, we have concluded that the conduct of Mr Pattni during the period 3 to 15 November 2016 and of Mr Kara on 15 November 2016 amounted to a sufficiently unequivocal statement of the intention to terminate Mrs Owen's contract of employment to amount to a dismissal.
113. This conduct was:
  - a) Mr Pattni's failure to reply to Mrs Owen's email of 3 November 2016 and her letter delivered on 11 November 2016 in which she raised concerns about the lack of communication from Mr Pattni, the failure to pay her, and the cancellation of her company pension and she referred to constructive dismissal; and
  - b) the statements made to Mrs Owen by Mr Kara at the meeting on 15 November 2016 that the job she was doing was no longer in existence but that he could possibly find her another job in the office.
114. Mrs Owen was aware of this conduct and the impact it had on her employment status. She said in her email of 16 November 2016 to Mr Pattni, 'Your actions have made it very clear that you do not consider me an employee of the company'.
115. To summarise our conclusions on this part of this issue, we have found that Mrs Owen was dismissed on 15 November 2016 by ambiguous words used by Mr Kara, or by the termination of her office administrator role and the possibility of an offer of some other unspecified role by Mr Kara or by the conduct of Mr Pattni during the period 3 to 15 November 2016 and Mr Kara on 15 November 2016.
116. The dismissal of Mrs Owen was clearly disadvantageous to her and amounted to unfavourable treatment.
117. We have found that in his oversight of the operations and staff of Rogers Auto Factors Limited, Mr Kara was acting on Mr Pattni's behalf and with his authority. We conclude therefore that Mr Kara was acting as Mr Pattni's agent in his discussions with Mrs Owen on 15 November 2016. As Mr Pattni was Mr Kara's principal, Mr Pattni is treated by section 109(2) of the Equality Act 2010 as having done anything done by Mr Kara. It does not matter whether Mr Pattni knew or approved of Mr Kara's actions on 15 November 2016, he is liable for Mr Kara's actions on 15 November 2016 by virtue of section 109(2).

118. We have concluded therefore that i) the denial of payment of monies owed to Mrs Owen and ii) the dismissal both amounted to unfavourable treatment of Mrs Owen by Mr Pattni.

(d) 'Something arising'

119. Mrs Owen took sick leave during the period 25 September 2015 to 15 November 2016 because she was undergoing treatment for cancer and had been advised by her doctors that she would have to be off work.

120. We conclude that Mrs Owen's sickness absence from 25 September 2015 to 15 November 2016 was something arising in consequence of her disability.

(e) 'Because of'

121. We have concluded therefore:

- a) that Mrs Owen had a disability of which Mr Pattni had actual or constructive knowledge;
- b) that Mr Pattni treated Mrs Owen unfavourably; and
- c) that Mrs Owen's sickness absence during period 25 September 2015 to 15 November 2016 was something that arose as a consequence of her disability.

122. We next have to consider whether there are facts from which it could be inferred that the unfavourable treatment was 'because of' Mrs Owen's sickness absence during the relevant period or, put another way, whether there are facts from which it could be inferred that the sickness absence was an effective reason for or cause of the unfavourable treatment. If there are, the burden of proof shifts to Mr Pattni.

123. Looking at the totality of our factual findings, we have concluded that there are facts from which we could properly and fairly conclude that Mrs Owen's sickness absence was an effective reason for Mr Pattni's denial of payment of monies owed and the dismissal of Mrs Owen. These are:

- a) The fact that Mrs Owen ceased to receive payslips through the normal procedures after her sickness absence started; in a period of absence of over 13 months, she was sent payslips on only one occasion when five inaccurate payslips were sent at once. We note in particular that Mr Waine, who was not absent, also experienced difficulties with pay (specifically commission), but he nonetheless continued to receive monthly payslips;
- b) The fact that after her sickness absence started, Mrs Owen was only paid on the first pay day (in October 2015) and thereafter she was not paid via payroll at all;
- c) Mr Pattni's inability to provide any explanation as to why Mrs Owen was not paid at all in November 2015, December 2015 and January 2016 while she was on sick leave;

- d) The fact that Mrs Owen did not receive a P60 in the time she was on sick leave although she should have received one for the tax year to April 2016;
  - e) the overall timing and context of these multiple issues relating to pay, falling as they did during Mrs Owen's absence on sick leave.
124. We note that these facts all relate to pay and that the obligation to pay Mrs Owen was the obligation of her employer, ie of Rogers Auto Factors Limited. However, we have found that it was Mr Pattni who actually dealt with pay for Rogers Auto Factors Limited. We conclude that these are facts from which we could conclude that Mrs Owen's sickness absence was a reason for Mr Pattni's unfavourable treatment of her.
125. We find therefore that the burden of proof shifts to Mr Pattni. Where the burden of proof shifts in a section 15 claim, a respondent can defeat the claim by proving either that the 'something arising' in consequence of the disability was not a reason for the unfavourable treatment (or was only a trivial one) or that the treatment was justified as a proportionate means of achieving a legitimate aim.
126. Cogent evidence is required from a respondent to satisfy a tribunal that something arising in consequence of disability was not an effective cause of or reason for unfavourable treatment. We note that Mr Pattni did not provide any disclosure in this case other than a Companies House record and the SSP1 document, both of which were provided at the hearing itself.
127. Mr Pattni said that the reason for the denial of payment of monies owed to Mrs Owen was because he was acting on the advice of the accountants. He thought that SSP had been paid in full. However, the only evidence provided by Mr Pattni in support of this was the SSP1 form. It was not clear that this form had been produced by the accountants. The form did not reflect the figures that were paid to Mrs Owen (other than a handwritten note on the bottom) and so the SSP1 form cannot be the explanation for the payment. In any event, the SSP1 form does not explain why Mr Pattni took no steps during the period from 3 to 15 November 2017 to check Mrs Owen's entitlement to SSP.
128. Other than this document, which was provided on the morning of the second day of the hearing, we were not provided with any documents or other evidence to support Mr Pattni's assertions that in denying payment to Mrs Owen he was acting on the advice of accountants. His evidence about the accountants was in very generic terms. We were not told the name of the accountants or provided with any correspondence from them.
129. It was evident from the speed and ease with which Mr Pattni obtained the SSP1 form between the first and second days of the hearing that it would not have been difficult for him to have obtained evidence in support of his assertions about the reason for his treatment of Mrs Owen.
130. Even if Mr Pattni did rely on advice from the accountants when wrongly calculating the SSP to be paid to Mrs Owen, or if he himself made a

mistake in the calculation of SSP, this does not explain why he omitted to respond to (or make any enquiries about) Mrs Owen's email of 3 November 2016 and letter of 11 November 2016 in which she raised the failure to pay her, which omission we have found was unfavourable treatment.

131. We conclude therefore that Mr Pattni has not met the burden of providing cogent evidence to satisfy us that, on the balance of probabilities, Mrs Owen's absence on sick leave was not an effective reason for his denial during the period of 3 to 15 November 2016 of payment of monies owed to Mrs Owen by Rogers Auto Factors Limited.
132. Mr Pattni did not advance any argument that something other than Mrs Owen's absence on sick leave was the reason for the dismissal of Mrs Owen. We have found that Mrs Owen was told by colleagues and by Mr Kara that her role as an office administrator was no longer required by Rogers Auto Factors Limited. If there was a redundancy situation we were not provided with any details about this by Mr Pattni. We conclude therefore that Mr Pattni has not met the burden of providing cogent evidence to satisfy us that, on the balance of probabilities, Mrs Owen's absence on sick leave was not a reason for her dismissal.
133. We have therefore concluded that Mr Pattni has not provided cogent evidence to satisfy us that the unfavourable treatment both in respect of denial of payment of monies owed, and dismissal, was not because of Mrs Owen's absence on sick leave.

(f) Proportionate means of achieving a legitimate aim

134. Mr Pattni did not advance any argument that any unfavourable treatment was a proportionate means of achieving a legitimate.
135. We conclude that Mr Pattni's denial of payment of monies owed and dismissal of Mrs Owen amounted to discrimination arising from disability contrary to section 15 of the Equality Act.

**Remedy**

136. As set out above in the issues section, a separate hearing will be listed to deal with remedy.
137. The updated schedule of loss served on behalf of Mrs Owen includes a claim for reimbursement of the tribunal issue fee of £250. This fee can be recovered directly from HM Courts and Tribunals Service via the online form at: <https://www.gov.uk/employment-tribunals/refund-tribunal-fees>
138. The schedule also included a contribution to copying charges in the sum of £36.00. This has now been paid by Mr Pattni.

139. The remedy hearing will deal with all other aspects of remedy including the application for a preparation time order. Case management orders and notice of hearing will be sent separately.

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**Employment Judge Hawksworth**

Date: 18 October 2019

Sent to the parties on: .....

.....  
For the Tribunals Office

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