Case No: 2600119/2020(V)

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Hardy**

Respondent: **Kaby Engineers Limited**

Heard: **Remotely (by Cloud Video Platform)**

On: **18, 19, 20 and 21 January 2021**

Before: **Employment Judge Faulkner**
Ms H Andrews
Mr R Loynes

Representation: **Claimant - Mr J Small (Counsel)**
Respondent - Mr J Munro (Solicitor)

CORRECTED JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. In contravention of section 39 of the Equality Act 2010, the Respondent discriminated against the Claimant by treating him unfavourably because of something arising in consequence of his disability in the following respects:

1.1. its questioning of the Claimant's wife on or around 29 April 2019 regarding the Claimant's medical treatment;

1.2. its failure to pay the Claimant on 24 May 2019; and

1.3. its dismissal of the Claimant with effect from 5 September 2019.

2. The Claimant's remaining complaints of direct disability discrimination and discrimination arising from disability are dismissed.

3. The Tribunal DETERMINED the question of remedy at a further Hearing.

CORRECTED REASONS

1. Judgment and summary reasons were given to the parties orally on 21 January 2021 and written Judgment signed on the same day was sent to the parties on 27 January 2021. These Reasons are provided in response to the Respondent's request for written reasons made by email dated 9 February 2021. THE CORRECTED JUDGMENT IS ISSUED SIMPLY TO CORRECT THE NAME OF THE RESPONDENT, WHICH WAS ORIGINALLY STATED IN ERROR AS KABY ENGINEERING LTD. THE REMAINING CORRECTIONS ARE CONSEQUENTIAL ON THE FACT THAT THE REMEDY HEARING HAD TAKEN PLACE BY THE TIME THE CORRECTED JUDGMENT AND REASONS WERE PREPARED.

Complaints

2. After Early Conciliation between 29 November and 19 December 2019, by a Claim Form presented to the Tribunal on 13 January 2020, the Claimant made complaints of various forms of disability discrimination contrary to the Equality Act 2010 ("the Act"). These were narrowed to complaints of direct discrimination and discrimination arising from disability in the course of a Case Management Hearing in April 2020.

Issues

3. The Respondent accepted that the Claimant was disabled at all relevant times. The complaints arose out of his dismissal, which the Respondent says was by reason of redundancy, and a number of preceding events which took place during his absence from work on sick leave.

4. At the outset of the Hearing, it was agreed that the Tribunal should initially deal with questions of liability only and that the issues to be determined were accordingly as follows.

Direct discrimination

5. There were two complaints of direct discrimination. One of the complaints related to dismissal; it was accepted that the Claimant was dismissed with effect from 5 September 2019. As to the other complaint, it is alleged that at a meeting on 23 July 2019 the Respondent discouraged the Claimant from returning to work from sick leave. The first issue for the Tribunal was whether he was thereby subjected to a detriment.

6. If the Claimant was subjected to a detriment on 23 July 2019, and in respect of his dismissal or his being selected for redundancy, the second issue was whether the Respondent treated the Claimant less favourably than it would have treated a hypothetical comparator. The Claimant identified the comparator as someone who had been and would continue to be off sick for a similar period to the Claimant, because of a broken leg, and who would need adjustments to be made by the Respondent on his return to work.

7. If the Respondent treated the Claimant less favourably than it would have treated the hypothetical comparator, the third issue was whether that treatment was because of disability.

Discrimination arising from disability

8. In relation to these complaints, the first issue was whether the Respondent treated the Claimant unfavourably in the following respects:

8.1. contacting him in late April 2019 regarding the provision of a fit note;

8.2. at a meeting on or around 29 April 2019, questioning his wife about his condition and treatment;

8.3. not paying him on 24 May 2019;

8.4. questioning him about his condition and treatment, and making comments about further treatment and further sickness absence that would result from that treatment, at a meeting on 23 July 2019;

8.5. at the same meeting, discouraging him from returning to work, specifically by raising the possibility of his working at another location; and

8.6. with effect from 5 September 2019, dismissing him.

9. If in any of the above respects the Respondent did treat the Claimant unfavourably, the second issue was to determine the reason for the treatment. The Claimant says that:

9.1. the reason the Respondent contacted him in April 2019 and questioned his wife about his condition and treatment on or around 29 April 2019 was his sickness absence;

9.2. otherwise, the reason the Respondent treated him as alleged was his past absence, concerns about future absence, concerns about reduced performance on his return to work, and/or concerns about his needing to take regular breaks on his return to work.

10. The third issue for the Tribunal to determine was whether the reasons identified above were something which arose in consequence of the Claimant's disability. The Respondent accepted that they were, with the exception of the need to take breaks.

11. Knowledge of disability was conceded. Accordingly, if the Respondent did treat the Claimant unfavourably because of something arising in consequence of his disability, the final issue for the Tribunal to determine was whether the treatment was a proportionate means of achieving a legitimate aim. The Respondent said that:

11.1. in respect of contacting him in April 2019 regarding the provision of a sick note and in respect of not paying him on 24 May 2019, the legitimate aim was the proper operation of PAYE, so that the Claimant could be paid;

11.2. in respect of questioning the Claimant's wife on or around 29 April 2019 and questioning him on 23 July 2019, the legitimate aim was to clarify the Claimant's condition;

11.3. in respect of raising at the meeting on 23 July 2019 the possibility of the Claimant working at another location, the legitimate aims were economic;

11.4. in relation to the Claimant's dismissal, Mr Munro stated that the Respondent did not seek to show that it was a proportionate means of achieving a legitimate aim, if the Tribunal found that the Claimant's absence was a factor in the decision to dismiss.

12. It was agreed later in the Hearing that depending on the complaints that were successful, if any, the Tribunal might need to consider time limit issues, namely the questions of conduct extending over a period and whether it was just and equitable to extend time.

Facts

13. The parties agreed a bundle of documents approaching 350 pages. References to page numbers below are references to that bundle. They also produced written statements from the Claimant, his wife Mrs Lolita Hardy, Ms Oksana Heanes (the Respondent's HR Manager) and Mr Martin Payne (the Respondent's Operations Manager), from whom we also heard oral evidence. We made clear that it was for the parties to direct our attention to any documents within the bundle that they wished us to take into account in reaching our decision. It was agreed that it was not necessary for us to read the medical evidence which made up a large part of bundle.

14. Both parties also produced written submissions and made comprehensive oral submissions. The latter included submissions on the credibility of the witnesses. We did not believe it appropriate, or necessary, to make general findings about credibility; rather, where there was a dispute on the facts, we resolved each such dispute on its own merits. As ever of course, the Tribunal members were not present at the meetings in relation to which different accounts were presented to us. In such instances, it is rare that a Tribunal can say with certainty what happened. Instead, we made our findings of fact on the balance of probabilities, based on a careful consideration of the evidence before us.

15. Based on the above material and in the way just described, our findings of fact were as follows.

16. The Respondent is a provider of precision machine engineering. It operates from a number of sites in and around Leicester, including Sheene Road, another site adjacent to it, Upper Charnwood Street and Nedham Street. It currently employs around 174 employees.

17. The Claimant was employed from 28 September 2018 (or 1 October 2018, nothing turns on that difference) until 5 September 2019, as a Quality Inspector checking new machine parts. The role was to ensure that parts and equipment had been correctly manufactured. From January 2019, he was one of three inspectors at Sheene Road, which is where he always carried out his work. The others were identified to the Tribunal as "AC" and "SL". The Claimant worked on the afternoon shift. There were more inspectors at Charnwood Road, which appears to be a larger site. There was some dispute about the numbers, but it was not necessary for us to resolve that particular matter. The Claimant's case is that he would take over responsibility for his shift at Sheene Road when his manager was not there, which the Respondent denies. It was not necessary for

us to resolve this dispute either. What is clear is that there was no evidence before the Tribunal of any concerns being raised about the Claimant's performance or the need for close supervision, nor had he taken any previous sickness absence.

18. By agreement, the Claimant was a disabled person at all relevant times by reason of ulcerative colitis, which resulted in him having a stoma fitted after surgery and being in intensive care in April 2019. He was absent from work on sick leave from 5 April 2019. Initially it was believed he was suffering from gastroenteritis. Within the Respondent's Employee Handbook (page 79) there is a standard requirement for employees to notify sickness absence to their line manager on the first day of such absence, at the earliest opportunity; it is said that they should try to give an indication of their expected return date. They are required to provide notification each day for a week, and then on a weekly basis thereafter. Absence may be self-certified for up to seven days, and then doctor's notes are to be provided. Mrs Hardy or the Claimant initially sent messages to the Claimant's line manager, identified to the Tribunal as Evelina, when the Claimant first went into hospital. As will appear below, updates were sent thereafter to Mrs Heanes, who joined the Respondent on 8 April 2019.

19. Whilst he and Mrs Hardy appear to have had no complaint about the need to keep the Respondent informed when he first went into hospital, according to paragraph 32 of his statement the Claimant says that the Respondent made contact with him "repeatedly and unnecessarily". What he specifically alleges (paragraph 8 of his statement) is that he (or it may have been Mrs Hardy) was told by Evelina in a text message later in April 2019 that she was being put under pressure, by HR – Ms Heanes says this would have been payroll, not her – to get a sick note from the Claimant and told him he needed to obtain one urgently, as proof of why he was absent. Mrs Hardy says that Evelina told them that the Respondent needed proof that the Claimant was in hospital as whilst it initially accepted that he had gastroenteritis, it could not accept that he would continue to be absent for that reason and needed to know what was going on.

20. The Respondent did not dispute that this was said, and so although we did not see the text message or messages in question (in all likelihood because of subsequent difficulties the Claimant says he had with his phone), we accept the Claimant's and Mrs Hardy's evidence in this regard. The Claimant obtained some form of note from the hospital. He said in evidence he understood that the Respondent "needed it for [its] paperwork", accepting he had to be contacted. His position was that he thought the Respondent would understand that he could not get a fit note whilst he was in hospital and that providing proof that he was hospitalised would suffice.

21. On or around 29 April 2019, Mrs Hardy went to the Respondent's Upper Charnwood Street site to hand in a note on behalf of the Claimant – in all likelihood this was the note that Evelina had said was needed urgently.

22. There is a material dispute between the parties about who was present at a meeting which took place on her arrival, and what transpired during that meeting. Mrs Hardy says she was taken upstairs to a room to meet with Ms Heanes and Mr Payne. The Respondent's case is that Mr Payne was not present on this occasion at all; he says that the first time he met the Claimant and Mrs Hardy was at the meeting in July 2019, which we refer to below. Ms Heanes also insists that Mr Payne was not present. She says she was told by a colleague on

reception that Mrs Hardy had arrived – it seems to be agreed that the meeting was not pre-arranged. She says that she went and introduced herself to Mrs Hardy who explained the Claimant's situation and handed over the medical note. Ms Heanes says she told Mrs Hardy she would inform Mr Payne and Evelina of what she had been told. Her evidence is that the discussions took place in the reception area.

23. Mrs Heanes subsequently sent a text message to Mrs Hardy (page 119). It read, "Dear Lolita, both Martin and I appreciated you coming in during a difficult time for you and your family. If the company can offer support in any way please contact me. Please send our regards to Andy and let us know when he is well enough to receive visitors at home. Kind regards, Oksana". Mrs Hardy replied, "Thank you so much for your support and kindness. Will pass your message to Andrew. Thx and God bless. Lolita". In response to the suggestion that this text message suggests both she and Mr Payne had met with Mrs Hardy as the latter alleges, Ms Heanes says that she mentioned Mr Payne in the text because when she relayed the content of the discussion to him, he asked that she pass on thanks to Mrs Hardy for providing an update for the Respondent.

24. Paragraphs 11 and 12 of the Respondent's Response (page 35) are inconsistent with the Respondent's position regarding who attended the meeting as outlined above, although Ms Heanes would not admit that was the case. It details what Mr Payne "suggested in the meeting". Further, Mr Payne accepts that Mrs Hardy would not have known who "Martin" was, when she received Ms Heanes' text, had she not met him on that occasion. We accept that it is not always easy to separate multiple meetings when giving evidence of events some time ago, and we also accept that Mr Payne was busy, having recently joined the Respondent and with the financial challenges we refer to below. We nevertheless find that the Respondent's interpretation of the text message strains the natural implications of the words used, given that neither the Claimant nor Mrs Hardy had any prior knowledge of Mr Payne and that he was not the Claimant's manager. We also note that both Ms Hardy and the Claimant gave evidence of how upset Mrs Hardy was as a result of the meeting, so much so that they agreed she should go to Sheen Road to deliver subsequent medical notes, which suggests that the meeting was not the brief discussion in reception that Ms Heanes described. It also seems more likely to us that a conversation about a sensitive matter would take place in a private meeting room and not in reception. For all of these reasons, we find that the meeting took place with both Ms Heanes and Mr Payne, as Mrs Hardy says.

25. As to the content of the meeting, Ms Hardy says (paragraph 6 of her statement) that she felt like she was interrogated by Mr Payne about the Claimant's operation. She says in particular that Mr Payne asked if the Claimant had had a stoma fitted, which was something she did not want to reveal, on the basis that it was for the Claimant to do so, if at all, and only when he was ready. Putting aside their case as to who attended the meeting, both Ms Heanes and Mr Payne deny that he made the enquiries referred to by Mrs Hardy. As we will come to, Mr Payne has a similar medical history; he says that all that he did was offer phone numbers of organisations which might be able to offer the Claimant and Mrs Hardy help and support. The meeting lasted around 30 minutes. No notes appear to have been taken, and certainly none were produced to the Tribunal.

26. This is another material conflict of evidence. We conclude that the meeting took place broadly as Mrs Hardy outlined for the following reasons. First, as outlined above, we were clear that the attendees and location of the meeting were as Mrs Hardy described. Her recollection of the occasion is therefore likely to be the more accurate. Secondly, given Mr Payne's history, and without imputing any bad motive to him, it is quite believable in our view that he would raise direct and detailed questions about the Claimant's condition, including whether a stoma had been fitted. Thirdly, we do not believe Mrs Hardy would have volunteered this information; she was circumspect for the reasons she gave.

27. Regrettably, the Claimant had to have a further operation because of complications, in early May 2019. On 6 May 2019, Mrs Hardy texted Ms Heanes this news and told her that the Claimant was in intensive care (page 120). On 23 May 2019 Ms Heanes enquired of Mrs Hardy how the Claimant was; the reply was that he was still in hospital (page 122).

28. As noted above, Mrs Hardy dropped off subsequent sick notes at Sheene Road. The Respondent says that it received no complaint from either the Claimant or Mrs Hardy about the contact between them and the Respondent, and says that it needed to keep in touch and up to date with developments in order to make cover arrangements. It is fair to say that all of the text exchanges between Ms Heanes and Mrs Hardy (pages 119 to 127) were warm and respectful on both sides. At one point Mrs Hardy said, "Thank you so much for your support and kindness".

29. The Claimant was paid on a weekly basis. It is accepted that the Respondent did not pay him on 24 May 2019 and that this was because he had not provided a sick note. The Respondent says that a note was needed to enable it to process the payment of statutory sick pay. In an exchange of texts between Mrs Hardy and Ms Heanes, after Mrs Hardy enquired why the Claimant had not been paid, Ms Heanes said, "the company requires a doctor's fit not to be able to continuing (sic) to pay SSP" (page 124). The Respondent did not contact the Claimant before his pay was withheld.

30. Ms Heanes says that, in addition to the text messages just referred to, she took a call from Mrs Hardy in relation to this issue. Ms Heanes explained to the Tribunal that her payroll colleague informed her that because there was no fit note, the Claimant could not be paid; she says she followed that advice by requesting a fit note when she spoke with Mrs Hardy. Mr Payne told us this was the Respondent's policy. Ms Heanes went on to say that she has "no jurisdiction" over payroll, but accepts she had never known a case when someone in hospital had not been paid SSP and also agreed that her colleague responsible for payroll could have checked the government guidance (which we refer to below and which contradicts the Respondent's position) before the decision not to pay the Claimant was made.

31. The Claimant was eventually discharged from hospital on 27 May 2019. He and Mrs Hardy dropped off a further medical note at Sheene Road, where they met Evelina and another manager called Michael who offered the Claimant the opportunity to attend work if he needed a break from being at home while he was recovering.

32. By a letter of 18 July 2019 (page 128), thus nearly two months later, Ms Heanes set up an informal welfare chat for the Claimant with Mr Payne and herself, to take place on 23 July 2019. The Claimant had by this point supplied a fit note covering further absence to 20 August 2019. The Claimant attended the meeting with Mrs Hardy. It took place at the Upper Charnwood Street site, although the Respondent had offered to meet at the Claimant's home if he might find that easier. Ms Heanes agreed in evidence that Mr Payne wanted to attend the meeting, even though the Claimant was unknown to him and he was not the Claimant's manager, partly because he had experienced a similar medical procedure himself. Mr Payne says that although it was unusual for him to attend, he did so at the request of Evelina who was unavailable. We do not think it necessary for us to resolve this conflict of evidence as to the reason for Mr Payne's attendance on this occasion.

33. The meeting lasted for around an hour. Of course, part of the purpose of the meeting was to understand when the Claimant might return to work so that the Respondent could plan workloads. The Claimant thus accepts that it was in order for him to be asked about his health and when he expected to return to work. He says in his statement (paragraph 14) that he indicated he expected to return to work within a few weeks, telling us in oral evidence that he suggested 9 September as a possible date. Either way, it is common ground that the parties agreed that the Claimant would be in touch nearer the time of his return, as it was agreed he would take paid holiday in late August. It was also agreed that he would return initially on a part time basis, i.e., there would be a phased return.

34. That element of the meeting is uncontroversial. There is however another material dispute between the parties about what else was said. The Claimant and Mrs Hardy say that Mr Payne advised them that he had himself had a similar operation 30 years previously, that is having a stoma fitted, and that he encouraged the Claimant to get the operation reversed, as he had, saying that the Claimant would be off work for another 12 months as a result. Mrs Hardy says that it was then that she understood why Mr Payne had been able to ask detailed questions about the Claimant at the meeting in April, namely because he had experienced something similar himself. The Claimant says that what Mr Payne said was very upsetting, given the Claimant had only just been through the stoma operation very recently.

35. Ms Heanes said in her evidence that Mr Payne mentioned the reverse operation as an option for the Claimant but that this took place at the meeting on 5 September 2019 when the Claimant was dismissed (see below), the comment being made because the Claimant and Mrs Hardy both became upset about what the Claimant had been through. In fact, however, Mrs Hardy gave unchallenged evidence that she did not attend the September meeting. We must therefore reject Ms Heanes' account as to timing. She went on to say that Mr Payne "would have said" that when the Claimant had the reversal operation, he would need more time off, though she insisted Mr Payne was only giving general advice that the Claimant should see his doctor and discuss it in that context if that was what he wanted to do.

36. Mr Payne also denies the Claimant's and Mrs Hardy's account. Many years previously he had a stoma fitted himself for 11 months, and was off work for several weeks when he subsequently had the four-stage reversal operation, though he was eager to say to us that everyone's situation is different so that he

would not have been in a position to tell someone how long they would need to take off work or what breaks they would need when working.

37. At paragraph 14 of his statement he says that he was "extremely diplomatic and respectful in suggesting the operation procedure I myself had gone through". He says that using the word "suggesting" in that phrase was an error. He also said at paragraph 4 of his statement, in unchallenged evidence, that he had acted as an unpaid counsellor for the Leicester General during the 1990s for patients in a similar position to the Claimant, to advise them about support groups. At paragraph 5 he said that he never gave personal advice as every patient is different and at paragraph 13, referring to his training as a counsellor, he said that "one rule was to never give my opinion when counselling another person". His account is that because Mrs Hardy was upset, he gave her some telephone numbers where she and the Claimant could get support – though as we have indicated we conclude that he provided this information at the meeting in late April and not in July. Mr Payne says that when he mentioned he had been through a similar procedure, Mrs Hardy asked if he still had a stoma and it was then that he said he had had the operation reversed.

38. This is another conflict of evidence which it is necessary for us to resolve. As will be apparent, there was some confusion in the Respondent's evidence about when the alleged offending comments were made, but we are clear that Mr Payne's recollection is much to be preferred over that of Ms Heanes in this respect, not least given that Mrs Hardy was present in July but not in September, and given that it is more likely that any comments about the medical position were made at a welfare meeting rather than at a redundancy dismissal meeting. We find therefore that any comments about a reverse operation were made in July.

39. As to what was said, although his own account was not entirely consistent, we find on balance that it is unlikely, given Mr Payne's professional training, which would naturally make him reluctant to give advice, and given the emphasis he placed during his evidence on the individual nature of the medical experience, that he went further than saying he had gone through the reversal operation himself and that if this was something the Claimant was interested in, he should see his surgeon. It should also be said that at times both the Claimant and Mrs Hardy blurred the distinction between what was actually said at a meeting and how what was said made them feel. On a couple of occasions, for example, the Tribunal had to clarify whether what the Claimant was recounting in evidence was what had actually been said or what he felt about it and it was clarified that it was the latter. We are inclined to conclude that this was one such occasion. We find that Mr Payne relayed his experience in the way he described to us, and that the Claimant and Mrs Hardy wrongly took this as an encouragement to have the reversal operation. We thus prefer Mr Payne's account of this particular part of the conversation.

40. There is another part of the discussion which is also the subject of some dispute. The Claimant and Mrs Hardy say that Mr Payne made a statement along the lines of, "We need to let you know there will be some redundancies; this won't affect [the Claimant]; he's been through a lot," – in other words assuring the Claimant he would be safe. It is said that Mr Payne then asked the Claimant if he would be willing to return to work at the Upper Charnwood Street site, and that the Claimant agreed to this even though it entailed more travel and working for a different line manager. In oral evidence, the Claimant said he was

also told that work at the Upper Charnwood Street site would be on the day shift, which was less suitable for him given that his condition means he is not so good in the mornings. He went on to say that Ms Heanes told him the Respondent would be able to keep an eye on him at Upper Charnwood Street, and that Mr Payne said he knew parking would be difficult (it is accepted that it is) but was sure the Claimant could manage it.

41. The Claimant described this part of the meeting as "bombshell after bombshell" – the suggestion of relocation, the move to a dayshift, the parking problems, and in addition the fact that heavier lifting would be required at Upper Charnwood Street, which would obviously be a concern for the Claimant given his particular disability. He was shocked that working at Upper Charnwood Street was raised, given that it was meant to be a welfare meeting. His view is that it reflected the Respondent's wish not to have him back, hoping he would leave. He did not raise these concerns with the Respondent, whether at the meeting or thereafter, not even with his managers at Sheene Road whom he respected; he was just hoping everything would be fine, agreeing with whatever was said just to ensure he retained his job.

42. Ms Heanes says it was the Claimant who first mentioned the subject of redundancies (a redundancy round had been implemented in June and earlier in July) and that in response she and Mr Payne confirmed what had already taken place. She says that no assurance was given to the Claimant about his own position however. Mr Payne says in his statement (paragraph 7), "I did not say to the Claimant 'Your job is safe'. There was no need for me to say this because redundancy was not discussed at this meeting". At paragraph 7, he also says "at this point there was no conversation of the Claimant returning to the Upper Charnwood Street site". In his oral evidence however, he said that the Claimant working on the day shift at Upper Charnwood Street was mentioned as an option, out of welfare concern for the Claimant, as there were more managers and more staff there who could provide support. He also said in oral evidence that the relocation was raised as an option for the Claimant because of the varying workload at the different sites, but then said that there was no mention of lack of work at any particular site; he emphasised that the Respondent has a right under contracts of employment to require Quality Inspectors to move to wherever they are needed.

43. Ms Heanes agrees that Upper Charnwood Street was mentioned. She says she does not disbelieve the Claimant's account that she said the Respondent could keep an eye on him there. She suggested what was said was that when he was ready to return, all options could be looked at including working on the day shift at Upper Charnwood Street, where there was more work and where the Respondent's Quality Manager was based. She says that if the day shift was an issue for the Claimant, this could have been discussed on his return.

44. The Claimant's case is that Mr Payne was seeking to discourage him from returning to work, by suggesting the relocation. He believes Mr Payne knew that he would require breaks because of his disability, and would not have wanted to tolerate that. Mr Payne says at paragraph 8 of his statement that he would not have discouraged the Claimant from returning to work as he has been through a similar procedure himself. He described as "ridiculous" Mr Small's suggestion that the Respondent did not want to continue to employ someone with a stoma.

45. On 24 July 2019, Mrs Heanes sent to the Claimant a letter summarising the meeting (page 129). The letter read in part, "We are glad to hear you are making steady progress and we do hope you continue to recuperate. As discussed, you will contact me upon your return from annual leave with a suitable return to work date. We look forward to hearing from you and when suitable, welcoming you back on a phased return to work". We accept Ms Heanes' evidence that the Claimant had raised returning full time but that she had said the initial return would be on a part-time basis. There was no mention in the letter of the Claimant moving to Upper Charnwood Street, and the Claimant did not respond to the letter. There were no minutes of the meeting, or at least none were shown to the Tribunal.

46. We will come to whether the Respondent was discouraging the Claimant from returning to work in our analysis. As to our conclusions about what was said at the meeting, we find the following:

46.1. As to redundancy, it was stated that the Respondent was not envisaging further redundancies at that stage; as we will come to, the catalyst for a second round of redundancies was the loss of a major contract. In the light of that agreed fact, we find it unlikely that Mr Payne and Ms Heanes mentioned further redundancies at that stage and went on to say that the Claimant's job was safe. We find it more likely on balance that it was the Claimant who mentioned redundancies, no doubt having heard about the recent round of departures, and that Mr Payne and/or Ms Heanes confirmed what had happened. It may have been that when the Claimant raised redundancies in this way, the Respondent said something to the effect that the Claimant was not to worry about it, but this was not the same as saying the Claimant's job was safe even if the Claimant read it like that.

46.2. As to what was said about Upper Charnwood Street, this is in fact largely agreed. The notion of the Claimant working there on the day shift on his return to work was clearly mentioned, and it was also said that the Respondent could keep an eye on him there. We will return to what was in Mr Payne's and/or Ms Heane's minds in making these comments in our analysis.

47. According to Ms Heanes, whilst the Claimant was absent, his work was shared amongst other Quality Inspectors, though she could not say which. Mr Payne says that a long-serving employee, Mr Chauhan, provided cover. There were at that time two shifts at Sheene Road, as is the case now. Mr Payne says that there was more than one Quality Inspector per shift, and that certainly appears to have been the case.

48. At pages 130 to 131 is a note of a meeting of the Respondent's General Works Committee on 19 or 20 August 2019. It records that the Respondent had reviewed its work schedule and had concluded that the 4-day week which had been in place for some time was not sustainable. It had therefore made the difficult decision to implement another redundancy round, although it was not able to confirm exact numbers. It was said that individual consultations would commence on 22 August 2019, "following the same redundancy process" – in other words the same process as had been adopted for the June/July redundancies.

49. On 22 August 2019, two days after the Claimant's sick note ended, Ms Heanes sent the Claimant a further letter (page 132) to tell him that he was at risk of redundancy and that he was required to attend a consultation meeting. Mr

Payne says, and we accept, that Ms Heanes wrote similar letters to a number of other employees, some of them almost certainly on the same day. The Claimant was abroad at this point; he was alerted to the letter by his son, and was able to call the Respondent to arrange a meeting for 5 September 2019.

50. The letter stated that the Respondent had announced on 19 August 2019 to its Works Committee that due to a continued downturn in business the Respondent had no alternative but to reduce headcount. It said that the purpose of the consultation meeting was to explain the consultation process, advise the Claimant of any vacancies and give him the opportunity to suggest ways of avoiding redundancy, in other words anything he could suggest for the Respondent to reconsider its position. The Claimant did not ask for any more details before the meeting.

51. What led to the second round of redundancies was that the Respondent had lost a major contract, amounting to around 25% of its customer orders. As noted at the Works Committee meeting, in addition to the earlier round of redundancies in July, staff had also been on a 4-day week. As a result of this second round of redundancies, a small number of employees left at the end of August. Only the Claimant left in September – the Respondent says that this was because he was on holiday at the end of August when the second round was announced. Other employees affected by this round left in October, as the lost customer contract was phased out.

52. Mr Payne says that the Claimant would not have been dismissed if the major customer contract had not been lost. In the first round, more than 20 staff left in total, including two Quality Inspectors, identified to the Tribunal as KA (from Upper Charnwood Street) and RS (from Sheene Road) – see pages 58 and 59. Mr Payne was unable to say why the Claimant was not in the first round; he was the only Quality Inspector to leave in the second round.

53. In the Further Particulars of its Response (page 48) the Respondent stated that in selecting who should leave by reason of redundancy, it applied “last in, first out” (LIFO) and an assessment of skills and training/qualifications. It stated that all members of the Quality Department were placed in a redundancy selection pool across all sites, being ten employees in total. The Claimant had the shortest service and scored lowest on the other criteria. This led to his selection for redundancy. Ms Heanes said in evidence however that the Respondent used LIFO only, which she said was the Respondent’s policy for all redundancies. Indeed, at paragraph 10 of her statement she said that the Respondent had inspectors with many years’ service and decided that the fairest choice if it had to make some employees redundant was to use LIFO. Mr Payne for his part said that he met with the Respondent’s managing director and that they decided LIFO was the best course of action as they could not afford the statutory redundancy payments that would be due to longer-serving staff. Mr Payne says that whilst it was a decision of the senior management team, of which he was a member, that there should be redundancies, it was Evelina who put the Claimant forward for selection. She is no longer employed by the Respondent and was not present to give evidence at this Hearing.

54. At the meeting on 5 September 2019, the Claimant was told that his role was to be made redundant. At paragraph 12 of his statement, Mr Payne refers to this as the “inevitable redundancy”, though he told us it was a mistake to describe it in that way. Ms Heanes says the Claimant was told that the Respondent had

applied LIFO, although Mr Payne could not recall whether that was the case. We conclude that the Claimant did know that the Respondent was saying it had applied LIFO for the reasons we will come to below. He was told he could attend a further consultation meeting to present proposals to the Respondent to reconsider its position. The Claimant felt the decision had been made and declined to attend a further meeting. He was thus informed that he was dismissed, with 1 week's payment in lieu of notice.

55. At paragraph 24 of her statement, Ms Heanes stated that the Claimant "confirmed he was aware of the Respondent's situation and about the previous redundancies". She went on to say at paragraph 32 that although he was offered a further meeting, the Claimant said he saw no point, as he accepted that it was likely he would be chosen. The Claimant insists that the main reason he declined further discussion was that he was told 90 employees were to be made redundant altogether. He says he would have challenged the decision (and thus sought further consultation) if had been told that in fact the numbers were much lower, as he was aware that there were many other employees with shorter service than him, but if 90 employees were going to have to leave then on a LIFO basis, he knew he was bound to be a casualty of the process. Ms Heanes and Mr Payne deny any mention was made of 90 redundancies.

56. It can be seen that much of the factual matrix leading to the Claimant's dismissal is basically agreed. As to whether 90 redundancies were mentioned, again there were no notes of the meeting. The burden is on the Claimant to prove what he alleges; there are two witnesses saying it was not said; and it is a statement which bore no relation to the numbers that were actually made redundant. On balance therefore, we conclude that there was no mention of 90 redundancies. Nevertheless, as the Claimant's own case suggests, we find that it was indicated to him at the meeting that LIFO was the basis for the decision.

57. At pages 63 and 64 there is a form HR1, giving advance notification of redundancies to the Redundancy Payments Service, signed by Ms Heanes in relation to the first round of redundancies. The reason given for the redundancies was lower demand for products and it was said that all of the employees who were to be made redundant had less than 2 years' service. The form then described as the method for selection, "Everyone with less than two years' service who either have high absenteeism and are predominantly unskilled labour". The Respondent accepts that the second round of redundancies was carried out on the same basis as the first, as it told the Works Committee (page 131).

58. Ms Heanes said to us that notwithstanding what was written on the HR1, absence was not taken into consideration in deciding to select for redundancy anyone with less than 2 years' service, because the Respondent "knew it would be contentious" and did not want to prejudice anyone who had been off sick. She told us that live disciplinary warnings were taken into account instead. This is not mentioned anywhere else in the Respondent's evidence. She could not say why absenteeism was mentioned in the HR1. Mr Payne's evidence on the point was somewhat unclear, but amounted to saying that absenteeism was stated on the HR1 but was not used in individual selections. He could not say why it was mentioned on the form, but denied that the Claimant's absence was a factor in the decision to dismiss him.

59. At page 61 there is an undated redundancy matrix listing ten Quality Inspectors, including the Claimant, with an explanation of the redundancy selection criteria at page 62. The Claimant did not see the matrix at the time. Against "Skills/Competencies", worth up to 4 points, with a weighted multiple of 3, it was said that this related to an individual's ability to do the job, reflecting the level of their knowledge and understanding of the job, their range of skills relevant to the job and their potential and value to the Respondent, including the ability to work without supervision. Against this criterion the Claimant scored one point, which meant that he was assessed as having limited skills in his current role and unable to operate without close supervision. Against "Training/qualifications" (qualifications relevant to the individual's present job or future progression) the Claimant scored zero, meaning that he was assessed as having no relevant qualifications and training. There are no scores against the other criteria, including length of service. The Claimant says he has 30 years' inspection experience and so cannot see how he would have scored '1' for skills and competencies. Given that the Respondent could produce no evidence of concerns about his performance, we share the Claimant's conclusions.

60. Ms Heanes could not tell the Tribunal when the matrix was prepared, though she confirmed it was prepared by Evelina. KA was not on list, the Respondent says because he had already been made redundant, but RS was on the list, even though he was made redundant at the same time as KA. Ms Heanes could not explain that either. The Respondent was not able to offer any explanation of how the scoring was arrived at. Ms Heanes said that the matrix only played a part where employees had equal service. When it was pointed out that no-one on the matrix had equal service, Ms Heanes could only say it was prepared in case more redundancies were needed at Upper Charnwood Street. Initially she could not say if the matrix was used in the decision to dismiss the Claimant, though she later insisted that he was dismissed solely on the basis of LIFO. Indeed, neither she nor Mr Payne were aware of the matrix when they went to the meeting on 5 September 2019.

61. Mr Payne said the matrix would only come into play in the second meeting, that is if an employee wanted to challenge their selection, but the starting point was LIFO and so the selection decisions, or certainly that relating to the Claimant, would not have been affected by the matrix. On the basis that he insists selection decisions were made in accordance with LIFO, he conceded that the matrix was not needed and could not answer why it was produced, except that it was for "completeness and continuation". The Tribunal was unable to understand what that means.

62. A letter confirming the Claimant's dismissal was sent by Ms Heanes on 5 September 2019 (page 133). It rehearsed the relevant background, then said the Claimant was invited to a further consultation meeting to present proposals for the Respondent to reconsider his role being at risk but "you acknowledged you clearly understood the situation and declined to attend a further meeting. The Company respects your decision". It then dealt with the formalities and offered a right of appeal, closing by wishing the Claimant luck with his interview.

63. The Claimant did not appeal, believing the decision to have been pre-determined. He says that the dismissal was an act of direct discrimination on the basis that the redundancy was a sham, or he was selected in a discriminatory manner. This is on the basis that he says stereotypical assumptions were made about his ability to work effectively – he relies on Mr Payne's comments at the

meeting on 23 July 2019. He says that a hypothetical comparator, someone with a broken leg, would have been given been given support, time to receive treatment and encouragement to return to work. Alternatively, he believes he was dismissed because of – at least in part – his sickness absence and because the Respondent believed he would be off sick again and was concerned about his future performance and the adjustments required to accommodate him. The Respondent has an equality, inclusion and diversity policy from page 108 onwards. It recognises that discrimination is unacceptable and describes equality of opportunity as a longstanding feature of its employment practices.

64. The Claimant was not replaced. It is accepted the Respondent has to have an inspector on each shift, to pass ISO9001 requirements. The afternoon shift at Sheene Road closed for 6 months from October 2019, though it was not known by Mr Payne and Ms Heanes on 5 September 2019 that this would be the case. Mr Payne does not know who did the Claimant's work after his dismissal, though again he emphasised that Quality Inspectors can be moved around.

65. On time limits, the Claimant says he did not complain about the discrimination which he alleges took place before his dismissal, initially because he was in hospital, and unwell. He also says he did not realise he had a right to complain about his dismissal as he thought this only accrued after 2 years' service. When he went to hospital for an evaluation a month after his dismissal, a nurse told him he still had rights given his health situation. He then contacted ACAS and solicitors. It was when speaking with ACAS that he found out about time limits.

Law

66. Section 39 of the Act provides, so far as relevant:

"*(2) An employer (A) must not discriminate against an employee of A's (B)—* …

(c) by dismissing B;

(d) by subjecting B to any other detriment".

Direct discrimination

67. Section 13 of the Act provides, again so far as relevant:

"*(1) 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*".

The protected characteristic relied upon in this case is disability.

68. Section 23 provides, as far as relevant,

"*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*.

(2) The circumstances relating to a case include a person's abilities if – (a) on a comparison for the purposes of section 13, the protected characteristic is disability".

The relevant circumstances for these purposes are those which the Respondent took into account in deciding to treat the Claimant as it did, except for his disability. As a result of section 23(2), the Claimant and his comparator must have abilities that are materially the same. This means that if the Claimant was treated in a certain way because of something he could not do due to his disability, that is not direct discrimination, though of course it may be discrimination arising from disability – see below.

69. The Tribunal must therefore consider whether one of the sub-paragraphs of section 39(2) is satisfied, whether there has been less favourable treatment than a (in this case, hypothetical) comparator, and whether this was because of the Claimant's disability.

70. In determining whether the Claimant has been subjected to a detriment for the purposes of section 39 (or indeed unfavourable treatment for the purposes of section 15), "one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to [his] detriment? An unjustified sense of grievance cannot amount to 'detriment'" (**Shamoon v Chief Constable of the RUC [2003] UKHL 11**).

71. The fundamental question in a direct discrimination complaint is the reason why the Claimant was treated as he was. As Lord Nicholls said in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Disability being part of the circumstances or context leading up to the alleged act of discrimination is insufficient.

72. What must normally be considered are the mental processes (conscious or otherwise) which led the alleged discriminator to act as they did. Establishing the decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances. In determining why the alleged discriminator acted as they did, the Tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to be significant in the sense of being more than trivial (again, **Nagarajan** and **Wong v Igen Ltd [2005] ICR 931**).

Discrimination arising from disability

73. Decisions including those of the Employment Appeal Tribunal ("EAT") in **Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305** and **Pnaiser v NHS England [2016] IRLR 170** and of the Court of Appeal in **City of York Council v Grosset [2018] ICR 1492** make clear that the Tribunal should ask the following questions in determining complaints under section 15:

73 1. Was the Claimant treated unfavourably?

73.2. What caused the unfavourable treatment? This requires consideration of the mind(s) of alleged discriminator(s) and thus that the reason which is said to arise from disability be more than just the context for the unfavourable treatment. There need only be a loose connection between the unfavourable treatment and the alleged reason for it, and it need not be the sole or main cause of the treatment, though the reason must operate on the alleged discriminators'

conscious or unconscious thought processes to a significant extent (**Charlesworth v Dronsfield Engineering UKEAT/0197/16**). By analogy with **Nagarajan** and **Igen**, "significant" in this context must mean more than trivial.

73.3. Was the reason for the treatment "something arising in consequence of the Claimant's disability"? This could describe a range of causal links and is an objective question, not requiring an examination of the alleged discriminator's thought processes.

74. As to what constitutes "unfavourable treatment", the Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** held that it is first necessary to identify the relevant treatment and it must then be considered whether it was unfavourable to the Claimant. The Court said that little was likely to be gained by differentiating unfavourable treatment from analogous concepts such as "detriment" found elsewhere in the Act, referring to a relatively low threshold of disadvantage needed.

75. If the questions set out above are established in the Claimant's favour, a complaint under section 15 will be defeated if the Respondent can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim - "justification" for convenient shorthand. We draw the following principles from the relevant case law, some of which concerned justification of indirect discrimination though we see no reason for a difference in approach in the context of section 15:

75.1. The burden of establishing this defence is on the Respondent.

75.2. The Tribunal must undertake a fair and detailed assessment of the Respondent's business needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary.

75.3. What the Respondent does must be an appropriate means of achieving the legitimate aims and a reasonably necessary means of doing so. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said, approving Mummery LJ **in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

75.4. In **Hardy & Hansons plc v Lax [2005] ICR 1565** it was said that part of the assessment of justification entails a comparison of the impact upon the affected person as against the importance of the aim to the employer. It is not enough that a reasonable employer might think the treatment justified. The tribunal itself has to weigh the real needs of the Respondent, against the discriminatory effects of the aim. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

75.5. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Naeem v Secretary of State for Justice [2017] ICR 640**.

In summary, the Respondent's aims must reflect a real business need; the Respondent's actions must contribute to achieving it; and this must be assessed objectively, regardless of what the Respondent considered at the time. Proportionality is about considering not whether the Respondent had no alternative course of action, but whether what it did was reasonably necessary to achieving the aim.

Burden of proof

76. Section 136 of the Act provides as follows:

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court* [which includes employment tribunals] *could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision*".

77. Direct evidence of discrimination is rare, is often not in the hands of the claimant and so tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Igen,** updating and modifying the guidance that had been given by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.** The Claimant bears the initial burden of proof. According to the Court of Appeal in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913**, "If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the Respondent's act was a discriminatory one) then the claim will succeed unless the Respondent can discharge the burden placed on it at the second stage".

78. At the first stage, the Tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them**.** As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all and, in a direct discrimination case, evidence related to comparators. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts. That was point of Sir Patrick Elias' comments at paragraph 44 (not 45) of **Efobi v Royal Mail Group [2019] ICR 750** referred to by Mr Small. He was not saying adverse inferences cannot be drawn at the first stage; his point was that a tribunal cannot draw adverse inferences from the absence of an adequate explanation at the first stage.

79. Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

80. In a direct discrimination context, it is important for the Tribunal to bear in mind that it was also said in **Madarassy** that "the bare facts of a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which an employment tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination". The something "more" which **Madarassy** says is needed may not be especially significant, and may emerge for example from the context considered by the Tribunal in making its findings of fact.

81. In relation to section 15 in this case, given in large part that the connection between the reasons for the Claimant's treatment and his disability is conceded, the main question in terms of the burden of proof is whether the Claimant has proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that matters which arose from his disability significantly influenced the Respondent's actions. In other words, the burden is on the Claimant to show that the "something arising in consequence of disability" was the reason for the unfavourable treatment, though this need not be the only inference that could be drawn from the facts in order to shift the burden of proof to the Respondent.

82. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of disability or the matter arising in consequence of disability as the case may be. That would require that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

83. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**. In some cases, it may be appropriate for a tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination.

Time limits

84. Section 123(1) of the Equality Act 2010 provides that proceedings on a complaint under Section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Section 123(3) says that for the purposes of this section conduct extending over a period is to be treated as done at the end of the period, and failure to do something is to be treated as occurring when the person in question decided on it.

85. A continuing effect on an employee is not of itself sufficient to establish a continuing act. In **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96** it was said that the question is whether there is an ongoing situation or continuing state of affairs in which the Claimant was less favourably treated and for which the Respondent is responsible. The Court of Appeal acknowledged

that the burden is on a Claimant to prove a continuing act, and noted that a Claimant may not succeed in proving the alleged incidents actually occurred or that, if they did, that they add up to more than isolated and unconnected acts.

86. The provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability which applies for example in unfair dismissal cases. Nevertheless, there is no presumption that time will be extended – **Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434**. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of the tribunal granting or refusing an extension, and all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

87. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** it was said that Parliament has given tribunals "the widest possible discretion" in deciding whether to extend time in discrimination cases. Notwithstanding **Keeble** there is no list of factors which a tribunal must have regard to, though the length of and reasons for delay, and whether delay prejudices a Respondent for example by preventing or inhibiting it from investigating the claim whilst matters were fresh, will almost always be relevant factors. It was said that there is no reason to read into the statutory language any requirement that the Tribunal must be satisfied that there are good reasons for the delay, let alone that time cannot be extended in the absence of an explanation of delay from the Claimant. At most, whether any explanation or reason is offered and the nature of them are relevant matters to which the Tribunal should have regard

Statutory Sick Pay

88. Mr Small referred to Government Guidance on statutory sick pay. It says:

"*The employee should tell you they're sick within the time limit set by you, or 7 days if you do not have one. You cannot:*

- *insist they tell you in person or on a special form*
- *ask them for proof of their sickness until they have been off for 7 days (including non-working days)*

You do not have to pay Statutory Sick Pay (SSP) for any days the employee was late in telling you (unless there's a good reason for the delay)".

89. That is about notification of absence. What the Guidance says in relation to evidence of sickness is as submitted by Mr Small:

"*You cannot withhold SSP if the employee is late sending you a fit note or isolation note*".

In other words, employers can withhold SSP for late notification of sickness but not for late receipt of medical evidence. If an employer has no reason to doubt an employee's incapacity, SSP can be paid without medical evidence. This Guidance is consistent with the provisions of section 156 of the Social Security Contributions and Benefits Act 1992 and regulation 7 of the Statutory Sick Pay (General) Regulations 1982, which make clear that SSP can be delayed in payment in the absence of notification of incapacity for work but set out no similar entitlement in respect of the late provision of a fit note (or earlier equivalent).

Analysis

90. We take each matter in turn, chronologically.

Contact by the Respondent in April 2019

91. This is a complaint of discrimination arising from disability only.

92. As set out in our findings of fact, when the Claimant was first absent because he had been admitted to hospital, there was a voluntary exchange of information between the Claimant and Mrs Hardy on the one hand and Evelina on the other, though of course the contact on the Claimant's part was a requirement of his contract of employment. No complaint is made about that. At some point after that initial contact, we have accepted, Evelina told the Claimant and Mrs Hardy that she was under pressure to obtain more written information from, or regarding, the Claimant in respect of his absence. That pressure came in all likelihood from either payroll or HR. Specifically, the nature of this complaint on the evidence we have heard is that Evelina was saying the Respondent wanted urgent proof of why the Claimant was still away from work, which amounted to wanting proof that he was in hospital and not just suffering from a bout of gastroenteritis. The latter had been sufficient for the Respondent at the outset; its case is that it needed more evidence of what was going on as the absence became extended.

93. The first question is whether the Respondent requiring proof that the Claimant was in hospital amounted to unfavourable treatment. We conclude that it did not. We accept of course that the Claimant was in a very difficult position after his first operation on 26 April 2019. It is clear from his evidence however that he understands – and, at the time, understood – why the Respondent wanted the proof it sought. He said to us specifically that he understands the Respondent "needed it [that is, proof of what was happening] for [its] paperwork", accepting he had to be contacted in order for that to be provided. His issue with being contacted was very specifically that he expected the Respondent to understand that he could not obtain a fit note and that proof he was in hospital would suffice.

94. Accordingly, based on our findings of fact and notwithstanding the way in which the parties stated the matter in their respective pleadings and in discussing the issues at the start of this Hearing, what the Respondent was seeking was some proof that the Claimant was in hospital. The Claimant's case was not presented on the basis that he and Mrs Hardy were told by Evelina he needed to provide a fit note; the case he put to us was that they were told he needed to provide proof that he was in hospital. With that in mind, given he accepts that this was something the Respondent needed, and presumably therefore was

entitled to request, although proving unfavourable treatment is a relatively low threshold, and without diminishing the considerable difficulties the Claimant – and indeed Mrs Hardy – were experiencing at the time, we conclude that he has not met that threshold. This particular complaint must therefore fail.

95. In any event, even if the Claimant had established unfavourable treatment, whilst the request was clearly because of his absence and the absence clearly arose in consequence of his disability, in our judgment the request would have amounted to a proportionate means of achieving a legitimate aim. The legitimate aim was said by Mr Munro to be meeting the requirements of PAYE. We are doubtful about that. As indicated in our brief summary of the law relating to SSP above, it is clear that employers can request notification of incapacity from employees, though according to regulation 7 of the Statutory Sick Pay (General) Regulations 1982 they cannot specifically require notification of incapacity to be in the form of medical evidence. The way that the Respondent's position ended up being put however, albeit principally by way of the Claimant explaining what was communicated to him and Mrs Hardy by Evelina, seemed to be to the effect that the Respondent wanted evidence that the Claimant was in hospital for broader reasons.

96. It is clearly legitimate for an employer to know what is causing an employee's continued and extended absence, as the Claimant plainly accepted. This might be so that it can be satisfied that the absence is genuine and/or so that it has a sense of how long the employee might be away. It is difficult to know what other means the Respondent could have used to achieve that aim, other than asking the Claimant for evidence that he was in hospital. We would therefore have been prepared to find that the Respondent had adopted proportionate means of achieving a legitimate aim and the complaint would have failed on that basis also.

Meeting on or around 29 April 2019

97. This too was a complaint of discrimination arising from disability only.

98. We have made clear that we find the meeting took place essentially as Mrs Hardy described it, and that she, Ms Heanes and Mr Payne were present as she asserted. Mrs Hardy was clearly upset by what took place, specifically Mr Payne's question as to whether the Claimant had had a stoma fitted. She relayed the conversation to the Claimant who, in his own words, tried to pass it off, but was sufficiently concerned about what he had been told to make different arrangements for future provision of medical notes. Thus, he clearly did not like what had happened. The first question we have to decide however is whether, by what took place at the meeting, the Respondent can be said to have treated him unfavourably, given that he himself was not present to hear what was said directly.

99. In our judgment, unfavourable treatment does not have to be directed at a claimant personally in order to found a complaint under section 15. By way of example, implementing a policy or arrangement could in certain circumstances amount to unfavourable treatment of a disabled employee even if the policy or arrangement is not targeted at them in particular. What is important is that the treatment has a specific adverse effect on the disabled employee, creating a disadvantage for them. As the Equality and Human Rights Commission Code of Practice on Employment (2011) notes at paragraph 5.7, many instances of unfavourable treatment will be clear, but sometimes unfavourable treatment will

be less obvious, and can arise even if an employer thinks it is acting in a disabled employee's best interests.

100. We agree with Mr Small that what took place was very insensitive conduct on the part of Mr Payne. His questions clearly concerned the Claimant and were most certainly aimed at him, even though he was not there, putting Mrs Hardy in a difficult position and resulting in the disclosure of very sensitive information about the Claimant's medical situation which he (and Mrs Hardy) perfectly reasonably did not want revealed, at least not at that point. After all, it took place no more than a day or two after the Claimant's surgery. We do not know what was said on the document provided by Mrs Hardy at the meeting, as the Respondent did not put it in evidence (or if we have overlooked it in the bundle, it was not drawn it to our attention). We therefore view what happened as the intrusion the Claimant took it to be, reasonably so in our judgment. We are satisfied therefore that what transpired at that meeting amounted to unfavourable treatment even though it took place in his absence. An interpretation of section 15 that required the treatment in question to be direct and immediate in order to be unfavourable would in our view improperly diminish the protection which the section is meant to provide.

101. The Claimant's absence seems clearly to have been the reason for Mr Payne's line of enquiry. As Mr Payne denied being present at the meeting, there is no direct evidence – that is, from him – of his thought processes. It is nevertheless obvious that there was a causal link between his questions and the Claimant's absence, in that what he asked was concerned with the cause of the absence and quite possibly with how long it was likely to last. The Claimant has therefore proved facts from which we could conclude, in the absence of an adequate explanation, that the Respondent treated him unfavourably in this regard because of his absence, which it is accepted arose in consequence of his disability. The Respondent has not led any evidence to the effect that the questions asked by Mr Payne were not concerned with the Claimant's absence (and therefore not connected to his disability) not least because, as Mr Small pointed out, its case was that Mr Payne was not there. We conclude therefore that the Claimant's absence, which arose in consequence of his disability, was a more than significant influence on Mr Payne's conduct on this occasion.

102. The remaining question is whether the Respondent has shown that Mr Payne's conduct was a proportionate means of achieving a legitimate aim. Mr Munro articulated the legitimate aim as the Respondent wanting clarification of the Claimant's condition. At some point in the Claimant's absence, perhaps even at this point, it would have been a legitimate aim to want to know how long he was going to be off work, and in due course it would have been legitimate to know what might be needed by way of adjustment to working arrangements on his return. In relation to the Claimant's medical condition however, all the Respondent needed to know at such an early stage after surgery was that he was in hospital. Nothing further was needed. In particular, we can see no reason why the Respondent needed to know whether the Claimant had a stoma. Accordingly, wanting that level of clarification was not a legitimate aim, certainly not at that point. Alternatively, if the aim was simply clarification of the Claimant's condition, going so far as asking about that sensitive issue was not a proportionate means of achieving it, given the time at which the question was asked and the very specific enquiry about the Claimant's treatment.

103. We impute no ill motive to Mr Payne, but as the authorities make clear, motive for the treatment is irrelevant. This complaint therefore succeeds.

Failure to pay the Claimant on or around 24 May 2019

104. This too was only a complaint of discrimination arising from disability.

105. The delay in paying the Claimant was clearly unfavourable treatment, as Mr Munro accepted.

106. As to the reason for it, the person who decided that he could not be paid was not present to give evidence at the Tribunal so that, again, we were not able to enquire directly of them as to their thought processes in making that decision. Quite obviously, their non-attendance at the Hearing cannot of itself defeat the Claimant's complaint. There is in any event sufficient evidence before the Tribunal from which the reason for the decision can be discerned as we will now explain.

107. As noted above, Mr Small indicated at the start of the Hearing that the reason was the Claimant's absence. That is not quite how the case developed, in that the evidence with which we were presented showed that the Respondent's reason for non-payment of the Claimant's wages was that he had not provided the fit note it wanted which, as Ms Heanes and Mr Payne told us, was the Respondent's policy. Another way of stating it is that the Respondent did not pay the Claimant because it wanted a fit note. Whichever way it is analysed, and noting on the authorities that in any event there need only be a loose connection, and certainly no requirement that there be an immediate connection, between the unfavourable treatment and the reason for it, the decision not to pay the Claimant was in our judgment for a reason arising in consequence of his disability. The reason the Claimant had not provided the fit note was because he was in hospital and the reason the Respondent wanted him to provide a fit note was his absence; both his hospitalisation and his absence inarguably arose in consequence of his disability. The burden therefore passes to the Respondent to establish that the decision not to pay the Claimant was not for a reason arising in consequence of his disability in this way. It plainly has not discharged that burden; indeed, it is difficult to see how it could do so on the facts as just summarised. The question therefore becomes whether not paying the Claimant was a proportionate means of achieving a legitimate aim.

108. The legitimate aim relied upon by Mr Munro was the Respondent's policy or rule or understanding that a fit note was needed in order to pay SSP. He explained it at the start of the Hearing as "PAYE requirements".
That is not a legitimate aim given, as the Government Guidance shows, SSP should not be withheld because of failure to provide evidence of incapacity and indeed can be paid without it. In any event, Ms Heanes agreed that the Respondent could have checked the Government Guidance before making the decision not to pay the Claimant's wages, so that even if the Respondent had established a legitimate aim, such as the need to operate what it believed to be PAYE requirements, it is difficult to see how it could have shown that it used proportionate means to achieve it.

109. Accordingly, this complaint also succeeds.

Meeting on 23 July 2019

110. The Claimant's complaint focused on two features of this meeting. The first element was his being questioned about his condition and treatment.

111. The first point to be decided in relation to that is whether the Respondent treated him unfavourably. The Claimant provided very little detail of what he says the unfavourable treatment was in this respect. At paragraph 14 of his statement, he said no more than that he was asked about his current health and when he expected to return to work. This was not developed further in his oral evidence. Indeed, both his statement and his oral evidence about this meeting were focused elsewhere: first, Mr Payne's comments about his own medical experiences and his suggestion to the Claimant that he should have the reversal operation which would lead to further absence; and secondly the references to the Claimant returning to work at Upper Charnwood Street.

112. We will come to those two matters shortly. Dealing specifically with the Respondent's questions about the Claimant's treatment and condition, the Claimant accepts that it was in order for the Respondent to ask about his health on this occasion. We agree – after all, this was a welfare meeting. For that reason and given the limited evidence provided by the Claimant in this regard, we are not satisfied that he has established a prima facie case that the Respondent subjected him to unfavourable treatment.

113. In any event, we accept that at this later stage in the Claimant's absence, well after his discharge from hospital and at what was expressly arranged as a welfare meeting, it would have been in order for the Respondent to ask about the Claimant's condition and treatment, in some detail, provided it was done sensitively (we cannot see how, even at this stage, there would have been a legitimate need to ask if the Claimant had a stoma). Had it been necessary, the Respondent would therefore have been able to establish the legitimate aim of seeking to clarify the Claimant's situation and condition in advance of his return to work. The evidence goes nowhere near establishing that the questioning was insensitive. There is therefore nothing to suggest that the questions asked were not proportionate to that end.

114. This complaint accordingly fails.

115. The second complaint arising from the meeting on 23 July is that the Respondent discouraged the Claimant from returning to work. This was put as a complaint of direct discrimination and alternatively discrimination arising from disability.

116. Dealing first with direct discrimination, the complaint was put specifically by Mr Small in his submissions on the basis of Mr Payne having encouraged the Claimant to undergo the reversal operation, which would lead to further substantial sickness absence. Mr Small submitted that it was self-evident Mr Payne would not have made those comments to the hypothetical comparator with a broken leg. Whilst we accept that submission, our findings of fact make clear that Mr Payne did not encourage the Claimant to undergo the reversal operation. This complaint therefore fails on the basis that the Claimant has not established that the Respondent subjected him to the alleged detriment.

117. As to discrimination arising from disability, discounting as we do that there was any encouragement to the Claimant to undergo the reversal operation, the alleged discouragement was that the Respondent mentioned the Claimant returning to work on the day shift at Upper Charnwood Street, so that it could keep an eye on him. Was that unfavourable treatment?

118. On balance, we conclude that in one respect it was, though not that relied upon by the Claimant. There appears to have been no discussion of the implications of the day shift for the Claimant's wellbeing, nor any discussion of the fact that working at Upper Charnwood Street would entail further travel for him. Being told that this would be considered as an option for him on his return to work from serious illness, without those issues being properly explored, could reasonably be considered detrimental. This element of the discussions obviously created concern for the Claimant, even though he acceded to it because he was understandably keen to do whatever was reasonably necessary to keep his job.

119. We are not satisfied however that the Claimant has established the unfavourable treatment (or detriment) he relies upon, namely that he was discouraged from returning to work. We note the letter sent by Ms Heanes following the meeting. Doubtless it was a standard letter used for these purposes, but it spoke very clearly of anticipating the Claimant's return to work. Standard form as it was, we do not think that this was mere window-dressing on the part of Ms Heanes; the Respondent anticipated the Claimant would return and explicitly invited him to get in contact to that end in due course. This plainly reflected what had been discussed at the meeting itself, as our findings of fact make clear. We also accept on balance the Respondent's case that the Claimant would not have been dismissed at all had it not lost the major customer contract – we will say more about that in dealing with his dismissal. In short, the discussion of the day shift at Upper Charnwood Street was not as carefully managed as it could have been, but the Claimant was not discouraged from returning to work. His complaint would fail on that basis.

120. For completeness, we considered the reasons given by the Respondent's witnesses for embarking on the discussion about Upper Charnwood Street. Although not entirely consistent, these were the essentially unchallenged combination of there being more work on that site and welfare concern for the Claimant in that there would be more support for him there. In giving oral reasons we stated that accordingly we were not satisfied that the Claimant had proven facts from which we could conclude that the factors he relied on featured in Mr Payne's or Ms Heanes' thought processes when raising the possibility of work at Upper Charnwood Street. The welfare concerns for the Claimant were of course connected to his absence; these were arrangements being considered for his return from that absence. Nevertheless, had it been necessary to do consider the point, we would have found that the mention of the day shift at Upper Charnwood Street as one possibility for the Claimant's return to work would have been a proportionate means of achieving the legitimate aim of looking after his interests. That is plainly what was meant by "keeping an eye" on him.

121. For the reasons given above, this complaint also fails. We would wish to add that we emphatically do not accept the submission that Mr Payne did not want to employ someone with a stoma. Whilst we accept that it is not necessarily the case that someone who has been through the same experience would not discriminate in this way, we note the strength of Mr Payne's evidence on this

point and find it highly improbable indeed that this was part of his thought processes.

Dismissal

122. This too was put as a complaint of direct discrimination, alternatively discrimination arising from disability. We deal with direct discrimination first.

123. Mr Munro stated in submissions that the Respondent accepted that the Claimant had been treated less favourably than his hypothetical comparator. We would of course usually consider ourselves bound by a concession, particularly when made by a legally qualified representative. In this instance however we concluded that we had no alternative but to take the unusual step of deciding that we should not be bound by the concession and that the complaint of direct discrimination should fail.

124. For reasons we will come to in dealing with the section 15 complaint, we are not satisfied that the Claimant has established facts from which a reasonable tribunal could properly conclude that his comparator would have been treated any differently. Section 23(2) of the Act requires us to consider how the Respondent would have treated a person who had been absent in the same way as the Claimant. It would also require us to consider, if they were factors in the decision, how the Respondent would have treated someone who it anticipated would have the same further absence as the Claimant, in relation to whom the Respondent had concerns about reduced performance, and in relation to whom it had concerns about the specific arrangements it might need to make to accommodate him on his return to work. Having roundly rejected the case that there was something specific about the Claimant's condition, namely the fact that he had a stoma, which led the Respondent not to want him at work, it is abundantly clear that the Respondent would have treated the hypothetical comparator in the same way. This will become clearer as we deal with the complaint of discrimination arising from disability. That is the difficulty with most direct disability discrimination complaints, and for that reason it fails.

125. We therefore turn to discrimination arising from disability. We were very conscious that this was not an unfair dismissal complaint and therefore whilst, as we will make clear, the procedure followed by the Respondent in dismissing the Claimant was not wholly irrelevant, it does not as such come under the same scrutiny as it might in the unfair dismissal context. We would nevertheless make clear that had this been an unfair dismissal case, that is if the Claimant had been dismissed after 2 years' service, his case would have succeeded, again for reasons that will become clear.

126. There was a single issue for us to decide. There was clearly unfavourable treatment (whether put as dismissal or selection for redundancy), the Respondent put forward no justification or knowledge defence, and accepted that the Claimant's absence, past and future, and any reduced performance, were all matters that arose in consequence of the Claimant's disability, though it did not accept that in relation to the need for the Respondent to make adjustments. Obviously, in order to succeed in his complaint, it was only necessary for the Claimant to prove that one of the reasons he relies on was a reason for his dismissal, assuming that it was a reason that was either agreed to be or proven to be something which arose in consequence of his disability. He did not need to prove all of the reasons he relied upon.

127. The only issue for us to determine therefore was whether any of the factors the Claimant relied upon were a reason for his dismissal or, put another way, a reason for his selection for redundancy – either would satisfy the requirements of section 15. The burden was on the Claimant to prove facts from which we could reasonably conclude, in the absence of an adequate explanation, that it was.

128. We were not at all persuaded by Mr Small's narrative that this was a scenario whereby the Respondent tried to force the Claimant out of the business and by convenient timing put him at risk when his sick note ran out. We accept that the Respondent had a genuine need for redundancies, and it is clear things have continued to be difficult for the Respondent even since the Claimant's dismissal, for example necessitating closure of the afternoon shift at Sheene Road in October 2019. As we will come to, we were also satisfied that the timing of the Claimant's dismissal was related to the loss of the major contract. Our focus was instead on Mr Small's alternative case, namely that the Claimant's absence record was a reason for his dismissal or redundancy selection.

129. What did the Claimant establish on the evidence before us? At this first stage, we excluded from our considerations any explanation put forward by the Respondent; we were to come to that if a prima facie case was made out. The following was clear:

129.1. As already intimated, we do not think the timing of the at-risk letter of 22 August 2019 could properly lead to any adverse inference against the Respondent. It plainly followed the meeting of the Works Committee and it seems clear that a number of similar letters were sent out at around the same time, given that the Committee was told that individual consultation would commence on 22 August, the date of the letter.

129.2. The Claimant has however established beyond dispute that the Respondent adopted the same process for the redundancy selections in which he was caught up in August as it adopted in the June/July round. The Respondent told the Works Committee that this was the case and did not seek to persuade us otherwise.

129.3. Connected to that, and crucially, the Claimant has also established – it is inarguable – that the Form HR1 for the June/July redundancy round expressly included a statement by the Respondent to the Redundancy Payments Service that absenteeism was to be a factor in the selection of those to be dismissed, specifically for those with less than 2 years' service.

129.4. We might have considered whether the statement in the HR1 was meant to refer to people with sporadic attendance, as opposed to those with longer absences like the Claimant, but that case was not put to us by the Respondent. Its witnesses did not say that it meant something other than absence record. In fact, Ms Heanes' evidence was to the effect that absence was not used as a criterion for selection, specifically because it was thought to be controversial and the Respondent did not want to penalise those who had been off sick. It would seem to follow therefore that the Respondent was telling the Redundancy Payments Service that absence record in its plain and broadest sense was going to be used to select for redundancy in that first round – and, as just stated, the second round was to be conducted on the same basis.

129.5. In addition, the Respondent denies using absence as a factor in redundancy selections, but to say the least, its case as to how selections were carried out was confusing. In the Further Particulars of its Response, it referred to LIFO and in addition set out a detailed explanation of why the Claimant scored so poorly against additional criteria. Both Mr Payne and Ms Heanes insisted in their oral evidence however that the Respondent used LIFO only.

130. All of the above was enough, in our judgment, to pass the burden of proof to the Respondent. Again, we note that the person who is said to have selected the Claimant for redundancy, namely Evelina, was not present at the Hearing so that what was in her mind could be assessed directly. Again, that cannot mean in principle that the relevant facts could not be established. Given what was said to a government agency, given the clear commitment to staff to carry out selections on the same basis on both occasions, and given the Respondent's inability to provide a clear explanation of how the Claimant was selected, we conclude that whether in the mind of Evelina who put him forward for selection, or in the minds of Mr Payne and Ms Heanes, it matters not: the Claimant has proved facts from which we could conclude in the absence of an adequate explanation that his absence, arising in consequence of his disability, was a reason for the unfavourable treatment of his selection for redundancy, and thus his dismissal.

131. It was unnecessary for us to go on to consider the other reasons he relied upon as having influenced the Respondent's decision, though there is little to suggest that future absence, concerns about future performance or concerns about workplace adjustments were a part of the mental processes, conscious or otherwise, of any of those involved in the termination of his employment.

132. We then turned to whether the Respondent had discharged the burden to provide cogent evidence that the Claimant's absence was not a significant factor in his dismissal. In short, it did not:

132.1. First, Ms Heanes approved the HR1, as she confirmed; her name was on it.

132.2. Secondly, neither of the Respondent's witnesses could offer any explanation at all of why absence was mentioned on the HR1 if it was not a factor in the redundancy selections in the first round, and thus, as the evidence showed, in the second round.

132.3. Thirdly, the Respondent's witnesses were unable to explain satisfactorily the basis on which the Claimant was selected in the light of the totality of the evidence as we have assessed it.

132.4. Fourthly, related to that, they were unable to say why the redundancy selection matrix was produced at all. The Tribunal cannot say whether the matrix was used or not, because the Respondent itself cannot say.

132.5. Fifthly, whilst unreasonable conduct of itself is not necessarily evidence of discrimination, if anything further were needed, the unfairness of the dismissal process would have provided it – in particular its speed, the lack of time for meaningful consultation, and the wholly unexplained and unjustified scoring of the Claimant.

133. The Respondent has therefore failed to discharge the burden of demonstrating that the Claimant's absence played no part in the decision to select him for redundancy and dismiss him. This complaint succeeds.

Time limits

134. We turn finally to time limits. The three complaints in which the Claimant has succeeded concern events on 29 April 2019, 24 May 2019 and 5 September 2019. The complaint about dismissal was presented in time. The question for us therefore was whether the three complaints, or any of them, can be said to have constituted conduct extending over a period ending with the dismissal.

135. We concluded that the three matters taken together can properly be said to have been conduct extending over that period. All of the conduct related to the Claimant's absence, which was therefore a common theme closely linking them together, even though there was no common decision-maker. In addition, the length of time between the three events was not significant.

136. Even if this was not the case, as the authorities we have referred to make clear, tribunals have a wide discretion to extend time if the complaints were presented within such further period after the expiry of the normal time limit as the Tribunal thinks just and equitable. In this instance, the Claimant was very unwell and indeed in hospital at the time of the events in April and May and was then recovering after he was discharged. Putting his time in hospital, and a reasonable convalescence period thereafter, out of account takes us to late June or early July. The usual time limit, plus ACAS Early Conciliation leads to somewhere around late October or early November. A delay of approximately two months beyond that is not insignificant, even if the Claimant was unaware of how discrimination claims (and related time limits) work, though we are satisfied that he took action to progress matters as soon as it came to his attention that he might have a basis for complaint.

137. In any event, on the crucial issue of the balance of prejudice, we were satisfied that there was none to the Respondent in our allowing the complaints to proceed. Nothing was said by Mr Munro to this effect, beyond the simple fact of the Respondent having to defend them. Specifically, we were not told of any different case the Respondent would have, or would have been able to, put forward if it had known about the Claimant's complaints relating to the 29 April meeting and his 24 May pay at an earlier date. By contrast, there would be evident prejudice to the Claimant at this late stage if those earlier matters were put out of account. On this basis, we would have extended time to allow them to proceed had it been necessary to do so.

138. This matter PROCEEDED to a remedy hearing on a date that WAS agreed with the parties.

Note: This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

Employment Judge Faulkner

Date: 18 MARCH 2021

Note

All judgments and written reasons for the judgments (if provided) are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties in a case.