RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant:	Mr S McLean
Respondents:	1) Premier Mist 2) Peter Duval 3) Ashley Williams
Heard at:	Leeds Employment Tribunal
Before:	Employment Judge Deeley, Mrs Mather-Arshad, Mr Childs
On:	29 and 30 June and 1 July 2021 and 2 July 2021 (in chambers)
Representation	
Claimant:	Mr Beever (Counsel)
Respondent:	Mr Cameron (consultant)

JUDGMENT

1. The claimant's claims for unauthorised deductions from wages succeeds and is upheld. The Tribunal declares that the claimant has been under-paid four days' holiday. The parties agreed that the correct award for this deduction is £388.68 (gross).
2. The claimant's claim for failure to provide a written statement of employment particulars succeeds and is upheld. The Tribunal awards the claimant £1050 (i.e. two weeks' capped pay) in respect of this failure.
3. The claimant's complaints of disability discrimination under the Equality Act 2010 ("**EQA**") for:

   3.1 Failure to make reasonable adjustments; and

   3.2 Discrimination arising from disability;

   fail and are dismissed.

4. The claimant's fifth complaint of harassment (relating to the second respondent's comment to the claimant on 18 October 2019) against the first and second respondents under the EQA succeeds is upheld. A separate remedies hearing will be held in relation to any compensation to be awarded in relation to this complaint.
5. The claimant's remaining four complaints of harassment fail and are dismissed.

INTRODUCTION

Tribunal proceedings

1. This claim was case managed by Employment Judge Brain at a Preliminary Hearing on 2 April 2020.
2. We considered the following evidence during the hearing:
   2.1 a joint file of documents and the additional documents referred to below;
   2.2 witness statements and oral evidence from:
      2.2.1 the claimant; and
      2.2.2 the respondents' witnesses:

Name	Role at the relevant time
1) Mr Peter Duval	Managing Director
2) Mr Ashley Williams	Design Manager
3) Mr Cameron Smith	Senior Design Engineer

3. The claimant provided additional disclosure documents at the start of the hearing. The respondents did not object and we included the additional documents in the hearing file.
4. We also considered the written and oral submissions from the claimant's representative and the oral submissions from the respondents' representative.

Adjustments

5. We asked the parties if they wished us to consider any adjustments to these proceedings. No specific adjustments were requested.
6. We reminded the parties that both they and their witnesses could request additional breaks at any time.

CLAIMS AND ISSUES

7. The Tribunal provided a draft list of issues to the parties, based on Employment Judge Brain's case management summary. The list was discussed with the parties in detail at the start of the hearing. The revised list of issues that the Tribunal considered in reaching its conclusions on this claim is set out below.

8. The claimant brought the following complaints of disability discrimination the Equality Act 2010 ("**EQA**"):

   8.1 Failure to make reasonable adjustments

   8.2 Discrimination arising from disability; and

   8.3 Harassment.

   (The claimant's claim for direct discrimination was dismissed on withdrawal at the Preliminary Hearing).

9. The claimant has also brought claims for:

   9.1 under-payment of holiday pay on termination of employment (relating to 4 days' holiday leave that the claimant states he carried over from the 2018 holiday year); and

   9.2 failure to provide a written statement of particulars of employment.

ISSUES

10. We provided a draft list of issues to the parties at the start of the hearing, which we discussed and agreed with the representatives.

11. The respondent accepted that the claimant's condition of lymphoma is a disability for the purposes of s6 Equality Act 2010 and that they had knowledge of the claimant's disability since 12 November 2018.

12. The respondent conceded during closing submissions that they had underpaid the claimant in relation to his holiday pay on termination and that they had failed to provide him with a written statement of employment particulars.

13. The provision, criterion or practice relating to the claimant's claim for reasonable adjustments was amended by agreement with both representatives during closing submissions.

14. The list of issues for the Tribunal to consider is set out below.

LIST OF ISSUES

1. **Discrimination arising from disability (Equality Act 2010 section 15)**

   1.1 Did the things set out in the Table happen?

   1.2 If so, was that unfavourable treatment?

   1.3 Did the following things arise in consequence of the claimant's disability:

1.4 Was the unfavourable treatment because of any of those things?

1.5 Was the treatment a proportionate means of achieving a legitimate aim? *Premier Mist says that its aims were the efficient running of its business.*

1.6 The Tribunal will decide in particular:

1.6.1 was the treatment an appropriate and reasonably necessary way to achieve that aim;

1.6.2 could something less discriminatory have been done instead;

1.6.3 how should the needs of the claimant and the respondent be balanced?

2. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

2.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

2.2 A "PCP" is a provision, criterion or practice. Did the respondent(s) have the PCPs set out in the Table?

2.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

2.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

2.5 What steps could have been taken to avoid the disadvantage? The claimant suggests the steps set out in the Table.

2.6 Was it reasonable for the respondent to have to take those steps and when?

2.7 Did the respondent fail to take those steps?

3. **Time limits – reasonable adjustments claim only**

3.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 12 September 2019 may not have been brought in time.

3.2 Were the harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

3.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
3.2.2 If not, was there conduct extending over a period?
3.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
3.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
3.2.4.1 Why were the complaints not made to the Tribunal in time?
3.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

4. **Harassment related to disability (Equality Act 2010 section 26)**

4.1 Did the respondent(s) do the things set out in the Table? *Premier Mist accepts vicarious liability for any harassment acts that the Tribunal finds were undertaken by Mr Duval and/or by Mr Williams.*

4.2 If so, was that unwanted conduct?

4.3 Did it relate to disability?

4.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. **Remedy for discrimination [ACAS Code issues only, remaining issues to be dealt with at remedies hearing]**

5.1 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.2 Did the respondent or the claimant unreasonably fail to comply with it?

6. Statement of employment particulars (s38 Employment Act 2002)

6.1 *The respondent concedes that it failed to provide the claimant with a written statement of employment particulars.* Is it just and equitable in all the circumstances to increase the minimum award to four weeks' capped pay (rather than two weeks' capped pay)?

Table of factual allegations

Failure to make reasonable adjustments (Premier Mist only)				
Dates	**PCP alleged**	**Disadvantage alleged**	**Adjustments suggested by claimant**	**PH summary paras**
18 September 2019 and 15 October 2019	Requirement to complete two sets of CAD drawings (relating to sprinkler design) to a reasonable standard and in a reasonable timeframe	Claimant was unable to complete the tasks within the timeframe without training, due to his sickness absence from 12 November 2018 to 28 May 2019 and phased return to work from 28 May 2019 to 22 July 2019, leading to the claimant's dismissal.	a) Providing the claimant with adequate training (see paragraph 28 of Particulars of Claim (p64/65) on sprinkler design; b) Providing the claimant with one to one assistance; and c) Giving the claimant an extension of time to complete the drawings.	6, 7 *(as amended by agreement during closing submissions)*

Discrimination arising from disability (Premier Mist only)				
Dates	**Treatment alleged**	**Disadvantage alleged**	**Legitimate aim pleaded**	**PH summary paras**
a) After the end of the claimant's phased return to work was	a) Failure to provide the claimant with adequate training on sprinkler design (which was the	Respondents failed to provide the claimant with adequate training because he had a significant period	Efficient running of the business	8, 9, 10

completed in late July 2019 b) 18 October 2019	subject of the CAD drawings); and b) Dismissing the claimant. *The respondents deny that the claimant was dismissed and aver that he resigned (cf paragraphs 22 and 38, Amended Grounds of Resistance)).*	of absence from work and he informed them on 4 October 2019 that he would need to take a further significant period of time off work due to his disability		

Harassment (Peter Duval and Ashley Williams)		
Dates	**Treatment alleged**	**PH summary paras**
1. 4 October 2019	Following a three monthly follow up appointment with his doctor, the claimant disclosed to the respondents that the doctor had advised that a further scan was needed. In response, Peter Duval said to the claimant that he *"should get it cut out and stop messing about with all these scans".*	14.1
2. From 4 October 2019 onwards	Peter Duval ostracised the claimant in that he was reserved with the claimant.	14.2
3. From 4 October 2019 onwards	Ashley Williams ostracised the claimant in that he: a) stopped conversing with the claimant; and b) passed work to a junior employee which would normally have been undertaken by the claimant.	14.2
4. 15 and 16 October 2019	Ashley Williams ignored the claimant's enquiries about a sprinkler design.	14.3
5. 18 October 2019	Peter Duval said to the claimant: *"I have had your f***ing back for months and you know it".*	14.4

RELEVANT LAW

15. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' submissions.

Disability discrimination claims

Discrimination arising from disability (s15 EQA)

16. The right not to suffer discrimination arising from disability is set out at s15 of the EQA:

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if –

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

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

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

Something arising from disability

17. The EAT in *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090 (paragraph 96) held that s15 requires the Tribunal to consider "two distinct causative issues" when considering whether the 'something' alleged arose in consequence of B's disability. The EAT set out the issues as follows:

> *"(i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability?*
>
> *The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."*

Proportionate means of achieving a legitimate aim

18. The Tribunal must apply an objective test when considering whether there was a proportionate means of achieving a legitimate aim, having regard to the respondent's workplace practices and organisation needs (see, for example, the EAT's decision in *City of York Council v Grosset* (UKEAT/0015/16), as approved by the Court of Appeal ([2018] EWCA Civ 1105).

19. We note that the Tribunal must make its own assessment as to whether 'proportionate means' have been used to achieve a legitimate aim.

Failure to make reasonable adjustments (s20 and 21 EQA)

20. The legislation relating to a claim for failure to make reasonable adjustments is set out at sections 20 and 21 of the EQA:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

…

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

…

21. We also note that 'substantial' in the context of 'substantial disadvantage' is defined at s212(1) of the EQA as: *"more than minor or trivial"*.

22. The Tribunal must assess whether the Respondent applied a provision, criterion or practice which placed the Claimant at a substantial disadvantage in comparison to those employees not sharing his disability. If so, the duty to make reasonable adjustments is engaged.

23. The Tribunal must then consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

24. The burden of proof is on the claimant to establish the existence of the provision, criterion or practice and to show that it placed her at a substantial disadvantage (*Project Management Institute v Latif* [2007] IRLR 579). The claimant must also identify the potential reasonable adjustments sufficiently to enable them to be considered as part of the evidence during the hearing. These are not limited to any adjustments that the claimant brought to the respondent's attention at the relevant time. The respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved. It is not necessary, at the time, for the Claimant to have brought the proposed adjustment to the Respondent's attention.

25. The reasonableness of the steps to be taken to avoid the disadvantage is to be determined on an objective basis (*Griffiths v Secretary of State for Work and*

Pensions [2017] ICR 160). In order for an adjustment to be "reasonable", it does not have to be shown that the success of the proposed step was guaranteed or certain. It is sufficient that there was a chance that it would be effective. Guidance as to the considerations that are relevant in assessing reasonableness is provided in paragraph 6.28 of the Employment Statutory Code of Practice.

26. The public policy behind the reasonable adjustments legislation is to enable employees to remain in employment, or to have access to employment. The Tribunal has to carry out an objective assessment to consider whether any proposed adjustment would avoid the 'substantial disadvantage' to the employee caused by the PCP (*Royal Bank of Scotland v Ashton* [2011] ICR 632).

27. In *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10, the EAT held that if there is a real prospect of an adjustment removing a disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one.

28. In addition, the Tribunal needs to consider the implications of any proposed adjustments on a respondent's wider operation (*Lincolnshire Police v Weaver* [2008] AER 291, decided under the former Disability Discrimination Act 1995).

Harassment

29. The provisions relating to harassment are set out at s26 of the EQA:

> **26 Harassment**
> (1) A person (A) harasses another (B) if –
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of –
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> …
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are – …disability;
> …

30. There are three elements to the definition of harassment:

30.1 unwanted conduct;

30.2 the specified purpose or effect (as set out in s26 EQA); and

30.3 that the conduct is related to a relevant protected characteristic: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, as updated by reference to the EQA provisions in *Reverend Canon Pemberton v Right Reverend Inwood* [2018] EWCA Civ 564.

31. A single act can constitute harassment, if it is sufficiently 'serious' (cf paragraph 7.8 of the EHRC Code).

32. The burden of proof provisions apply (see below). When a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of a protected characteristic (such as disability), it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of that characteristic. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of that characteristic. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed: see *Nazir v Asim & Nottinghamshire Black Partnership* [2010] IRLR 336 EAT.

33. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant.

34. In *Dhaliwal*, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

> *"while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."*

35. The EAT in *Dhaliwal* also stated that:

> *"Not every…adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended".*

36. The EAT in *Weeks v Newham College of Further Education* (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that:

> *"…although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding….An 'environment' is a state of affairs. It may be created by an incident, but the effects*

are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace."

Burden of proof

37. The burden of proof is set out at s136 EQA for all provisions of the EQA, as follows:

> **136 Burden of proof**
> …
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
> …
> (6) A reference to the court includes a reference to -
> (a) an employment tribunal;
> …

38. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

Time limits

39. The provisions on time limits under the EQA are set out at s123 EQA:

> **123 Time limits**
>
> (1)… proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Failure to provide written particulars of employment (s38 Employment Act 2002)

40. The provisions of s38 EA apply if the claimant succeeds in a claim under the jurisdictions listed at Schedule 5 of the EA. The first respondent conceded that they have under-paid the claimant in respect of his holiday pay, which is an unauthorised deduction from wages claim. This falls within the jurisdiction listed at Schedule 5.

41. The minimum award under this section is two weeks' capped pay (under s227 Employment Rights Act 1996) in respect of any failure under s38 EA, subject to the Tribunal's discretion to either:

    41.1 award a higher amount of four weeks' capped pay if it is just and equitable in all the circumstances (s38(3) and s38(2) EA); or

    41.2 not make an award if there are exceptional circumstances which would make such award or increase unjust or inequitable (s38(5) EA).

FINDINGS OF FACT

Context

42. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

43. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case:

    "Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

44. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

45. Premier Mist UK Limited ("**Premier Mist**") provides water mist and sprinkler systems to clients' businesses. Premier Mist employed over 70 staff during 2019, consisting of office based staff and engineers (who carry out pipe fitting duties at client sites). Premier Mist does not have any internal human resources, but uses a third party company to assist with any human resources issues.

46. Premier Mist's staff during the period relevant to the claimant's claim included:

Name	Role at the relevant time
1) Mr Peter Duval	Managing Director
2) Mr Ashley Williams	Design Manager and the claimant's line manager
3) Mr Cameron Smith	Senior Design Engineer
4) Mr James Barr	Design Engineer
5) Mr Quinlan Aspden	Design Engineer
6) Mr Peter Ling	Finance Manager

47. The claimant was employed from 22 October 2018 until his employment terminated (with notice) with effect from 15 November 2019. The parties dispute whether the claimant resigned or was dismissed at the meeting on 18 October 2019 (please refer to our findings in relation to that meeting).

48. The claimant had a very good relationship with his colleagues. For example, he said that his relationship with Mr Duval was really good and that they 'got on famously'. For example, Mr Duval took him to a private box at Leeds United. Mr Duval agreed and described the claimant as 'very sociable'.

49. The claimant also said that when he returned to work after his nine months' sickness absence in May 2019, everyone 'made me feel welcome'. He described his relationship with Mr Williams as 'fine, really good'. Mr Smith said that of the claimant that he 'valued his company'.

Claimant's interview and offer of employment

50. The claimant was interviewed for a role as Design Engineer by Mr Duval and Mr Williams. The claimant was offered the role by email on 1 October 2018. The claimant was provided with an offer letter which stated:

    50.1 his provisional start date of 29 October 2018;

    50.2 his salary of £32,5000, to be reviewed on completion of a 3 month 'trial period'; and

    50.3 his working hours of 37.5 hours per week and breaks.

51. The offer letter did not provide any other information regarding the claimant's employment terms.

52. The claimant was not provided with a contract of employment. The respondent said that they 'forgot' to provide him with a contract because the claimant went on sick leave shortly after starting work.

53. The claimant contacted Peter Ling during his sickness absence and asked for his contract of employment. Mr Ling responded on 21 January 2019, stating:

"P.S. I've not forgotten about your contract. I'll sit down with Peter as soon as I can to get his signature."

54. The claimant did not receive his contract of employment during his sickness absence. After the claimant had returned to work form his absence, he mentioned to his colleagues that he had still not received a contract and they said that it had taken some time to receive their own contracts.

55. The claimant was not provided with a contract of employment before his employment terminated.

Claimant's induction training

56. The claimant had over thirty years' experience of working as a CAD technician, using AutoCAD and REVIT systems. His CV stated that he had previously worked as an AutoCAD Technician and Training Development Manager role including:

"- Plans, Design, BIM Management, Detailing, Rendering and Project estimating

- Architectural, Engineering, Electrical, Concept Design, 2D, 3D and Animation"

57. However, the claimant had not previously worked with mist or sprinkler systems and requested the British Standards for sprinklers before he started working for Premier Mist. Mr Williams emailed a copy of the standards to the claimant on 12 October 2018.

58. The claimant's first day of work was Monday 22 October 2018. His induction training took place during his first week at work. However, there is a dispute as to the length of that training and the topics covered. Mr Williams produced a list of the matters covered during the training that he ran through with new joiners in the design team after these proceedings started. The claimant agreed that the majority of the topics in that list had been discussed as part of his training, including:

58.1 Mr Williams chose an old project that Premier Mist had previously completed;

58.2 He sat with the claimant and went through the design of a project on a step by step basis, starting with the drawings received from the client. The claimant said that Mr Williams did not go through the full hydraulic calculations with him;

58.3 Mr Williams explained the tasks that Premier Mist had quoted for, including whether the project was residential or commercial;

58.4 Mr Williams showed the claimant the "groundworks" and demonstrated how to do a floor level, i.e. tidying up the drawings to remove any additional

parts of the drawing that were not required (and would make it difficult to see the key parts of the drawing required for the mist or sprinkler systems);

58.5 Mr Williams then showed to the claimant how to place different parts of the drawing on PM layers and demonstrated how to do a floor level. For example, Mr Williams changed the building to light grey, lighting and over services to pink, and room names to blue. He then 'locked' the layers so that they could not delete anything needed by mistake;

58.6 Mr Williams then showed the claimant how to 'hatch out' any areas which were not part of the quotation;

58.7 at this point the drawing was ready to commence design works. Mr Williams showed the claimant how to position nozzles on the drawing, using the correct nozzle spacing listed on the datasheets;

58.8 the claimant finished off positioning nozzles on the floor level. Mr Williams then reviewed the drawings and advised on any areas that need to be changed;

58.9 Mr Williams then added pipework to a few rooms and a corridor, showing how pipework must be drawn to avoid other services, explaining what fittings could and could not be used and also the riser location with the correct valve arrangement that to be installed on each floor level;

58.10 the claimant then finished off the rest of the pipework on that floor level. Mr Williams checked the pipework and advised on a better route or if areas have been missed etc. The claimant then corrected any mistakes and completed the process with the remaining floor levels;

59. The claimant said that he had not received any training from Mr Williams on:

59.1 the British Standards for sprinklers;

59.2 how to carry out full hydraulic calculations;

59.3 how to complete plant arrangement drawings; and

59.4 how to complete drawing sheets (which contained information such as drawing revision numbers, project title, floor level, nozzle numbers, plant details etc.), although he later asked Mr Barr for help in completing these.

60. The claimant said that this exercise took around an hour. We have concluded that talking through the matters set out above and demonstrating those points would take significantly more than an hour. However, we do not accept Mr Williams' evidence that the training would take around a week.

61. We have concluded that the training lasted around two to three days in total, including any periods when the claimant was sat by himself completing tasks. In reaching this conclusion, we have considered:

61.1 the claimant's previous experience in working with CAD design;

61.2 the drawing times provided by the claimant relating to the projects set out in his work diary, which were not challenged by the respondent (please see our findings of fact regarding the projects that the claimant undertook between August and September 2019).

Claimant's sickness absence

62. The claimant was diagnosed with lymphoma in early November 2018 and informed Mr Duval of his diagnosis on Monday 12 November 2018. The claimant said that Mr Duval was very supportive of the claimant's diagnosis, said that he would keep the claimant's job open and that Mr Duval gave him a hug.

63. The claimant was absent from work from November 2018 to 24 May 2019. During the claimant's sickness absence, there were days on which he felt well enough to do some work. He offered to update Premier Mist's website and he started work on the website. The claimant did not receive any additional pay for this work.

Claimant's phased return to work

64. The respondent arranged for the claimant to return on a 10 week phased return to work, working reduced hours from 28 May 2019. The claimant did not carry out any design work during his phased return to work. He instead completed the updated website for Premier Mist, worked on search engine optimisation and on Premier Mist's social media accounts. The claimant was paid for the hours that he worked during this period.

Events during August 2019

65. The claimant's phased return to work ended after 8 weeks in late July 2019 because the claimant felt well enough to return to work full time. The claimant also wished to be paid for full time hours, rather than part time hours.

66. Mr Williams decided that the claimant should be given the Station Road drawings as a training exercise when his phased return to work ended. He carried out a similar training exercise with the claimant to the one that he carried out during the claimant's original induction training. The claimant's evidence was that he did not realise that this was an old project and thought that it was a standard project. However, we note in the claimant's work diary that he did not provide any detailed comments on his progress on this job, stating only 'comments amended'. This contrasts with the claimant's more detailed comments in his work diary on the four other projects which the claimant worked on from August to October 2019. In addition, the claimant did not include the Station Road project in his summary of his work diary which suggests he did not regard this as a standard project. We therefore concluded that the Station Road drawings completed by the claimant were completed as training.

67. The claimant also stated that he received 30 minutes' assistance from Mr Smith as part of his work on the Howard Gardens project in August 2019, which the claimant perceived to be additional training.

68. In addition, the claimant also sought assistance from colleagues, particularly Mr Barr and Mr Smith from day to day on any projects that he was working on. The claimant

said during his oral evidence that he sat next to Mr Barr and that he would frequently ask Mr Barr questions if there was anything of which he was unsure.

69. We asked the claimant during his oral evidence about any additional training needs that he thought he had when he returned from his sick leave. He said that he had additional difficulties in filling in the bottom end of the sheet (known as 'sheeting up') because he had had a lot of time off and so had not had chance for this to become 'second nature'. The claimant did not suggest that he had any additional difficulties in completing the drawings themselves.

70. The claimant also said that he needed supervision and that Mr Barr must have been 'fed up' with the number of questions that the claimant asked him. However, we note that both Mr Williams (and Mr Smith when deputising for Mr Williams) did supervise the claimant. For example, they provided him with work to complete and checked his drawings.

Claimant's work diary

71. The claimant produced an excel spreadsheet which he referred to his work diary. This document noted the timings set out in the table for four projects. The claimant stated that he completed this spreadsheet at the time he carried out work on the projects referred to in that spreadsheet. The claimant later produced a summary of that spreadsheet for the purposes of these proceedings.

72. We accept that the respondents were not aware of the existence of the claimant's work diary during his employment. However, the respondents did not provide any specific evidence as to the tasks undertaken or timings of the tasks for the projects that the claimant worked on during this period to suggest that the claimant's work

73. We therefore accept that the claimant's work diary was a contemporaneous record of the claimant's notes on the tasks that he undertook for the projects set out in the table below.

Project	**Dates claimant worked on the project**	**Claimant's total drawing time**
Howard Gardens	14/8/19 – 25/9/19	2 days
Fordlands Care Homes	28/8/19 - 25/9/19	4.5 days
Sweet Street	18/9/19 – 14/10/19	5.25 days
Ousegate	15/10/19 – 17/10/19	1.5 days

Sweet Street project – 18 September 2019 to 14 October 2019

74. The claimant emailed Mr Williams at 3.45pm on Thursday 12 September 2019 to inform him that he was due to go for a scan on 25 September 2019. Mr Williams did not respond to that email.

75. Mr Williams was on holiday during the week of 16 September 2019. In his absence, he asked Mr Smith to deal with the Sweet Street project. Mr Smith asked the claimant to start work on the drawings for Sweet Street on Wednesday 18 September 2019.

76. Mr Smith contacted the client contact at Sweet Street at 12.43pm on 18 September to ask for the electrical drawings:

"Do you have the M&E dwg's, ie. lighting and ventilation in order for us to co-ordinate with these services?"

77. The client replied 2 hours later, stating:

"We are working these up as we speak we doing typical flat types however for now I have attached the Vent Layouts and the Mech Typical Layouts we have done for now.

PLEASE NOTE THESE ARE NOT FINAL"

78. The client did not provide the final electrical drawings at any time whilst the claimant was working on the Sweet Street project.

79. The claimant noted in his work diary for 18 September 2019:

"CS: Given drawing, Sprinkler System, Residential

CS: Hold up! No lights on dwgs"

80. He noted in his work diary for 23 September 2019:

"AW said to start putting the heads in before the electrics. Printed off A3 room layouts for checking by AW – Note: AW just told CS that it is his fault that the dwg wasn't done!"

81. We find that the claimant misunderstood his discussions with Mr Smith and thought that he should stop working on the drawing after Mr Smith mentioned that they had not received the electrical drawings from the client. The reason why the claimant thought that he should stop work was because around two weeks earlier he had had to re-do the drawings for Fordlands Care Homes because the lights were missed from the original drawings.

82. Mr Williams returned from holiday on Monday 23 September 2019. He was unhappy to learn that the Sweet Street drawings had not been completed. Mr Williams asked Mr Smith why the drawings were incomplete and Mr Smith said it was the claimant's fault.

83. The claimant suggested that Mr Williams blamed him for the late drawings because he had told Mr Williams that he was due to attend a scan. We do not accept this suggestion. Mr Williams was unhappy that the drawings had not been completed and agreed with Mr Smith that it was the claimant's fault. However, this was not linked to the claimant's email on 12 September 2019 regarding his scan.

4 October 2019 onward – claimant and Mr Duval

84. The claimant attended his scan on 25 September 2019, as part of further tests to check whether his cancer was in remission. The claimant went to see his consultant on 3 October 2019. He stated at paragraph 39 of his witness statement that:

> *"On 3 October 2019 I had asked my Consultant if all the cancer had gone now and was told that the scans showed that it had (p259). I asked if it could return and was told that it could and a further scan could be called for at some point in the future".*

85. The claimant's consultant also wrote to him by letter dated 3 October 2019. We accept the claimant's evidence that he did not receive this letter until 19 October 2019, i.e. after his employment had terminated. The letter stated:

> *"Appointment Date: 03/10/2019*
>
> *…*
>
> *I am extremely pleased to inform you that the results at your MRI scan show that your lymphoma is still in complete remission.*
>
> *We will review you again in clinic as planned."*

86. We accept that the claimant had a brief conversation with Mr Duval on 4 October 2019. Premier Mist's business ran form a small office and both the claimant and Mr Duval would often speak to each other in passing. This conversation was not witnessed by anyone else.

87. We find that Mr Duval asked the claimant how he was as they walked out of the men's toilets. The claimant said that his cancer had gone, but that it might come back and he may need a scan in the future. The claimant said that Mr Duval replied: *"you should get it cut out and stop messing about with all of these scans"*. Mr Duval said during cross-examination that he did not recall making that comment.

88. Paragraph 40 of the claimant's witness statement referred to Mr Duval making this comment. The claimant went on to state at paragraph 41 of his statement that he noticed a material change in Mr Duval and Mr Williams' attitudes to him, which he alleges amounts to both of them ostracising him from 4 October 2019 onwards. The claimant stated at paragraph 42 of his witness statement: *"I felt like my cancer wasn't being taken seriously at this point and that I was becoming a problem to the First Respondent."*

89. The claimant said of Mr Duval in oral evidence: *"It was very unlike Mr Duval to say that, to be honest"* and explained that this was why he remembered the comment. However, the claimant did not provide any other evidence as to the effect of that specific comment on himself.

90. We find that Mr Duval did make that comment. We note that the comment was made in the context of a brief conversation in passing. It is perhaps not surprising that Mr Duval did not recall the conversation because the evidence of both Mr Duval and the claimant was that up to this point in time, they often chatted when they saw each other in the office. By way of contrast, the claimant had just attended his appointment with Dr Kane and gave consistent evidence regarding Mr Duval's comment.

91. The claimant said during cross-examination that Mr Duval's comment was not consistent with his previously supportive behaviour. We note that a close family member of Mr Duval's was suffering from cancer at that time and was also undergoing treatment. We find that Mr Duval made that comment without considering the possible impact of his words on the claimant. Premier Mist had previously permitted the claimant to take time off to attend scans without question and there was nothing to suggest that their approach would change if the claimant needed to attend any future scans.

92. We find that Mr Duval did not ostracise the claimant because he had said he may need another scan. Mr Duval had previously been supportive of the claimant during his treatment and there was nothing to suggest that a potential future scan would change the way in which he acted towards the claimant.

93. The claimant was unable to provide any specific examples of incidents when Mr Duval ostracised him. The claimant said during cross-examination that he noticed a 'big change' during the two weeks from 4 October until his employment terminated on 18 October 2019. For example, he said that Mr Duval no longer came into the boardroom first thing in the morning and have a chat. He also said that Mr Duval spoke to other designers in the design room, but not to him. We note that the design room was open plan and that Mr Duval's office was on the gantry over-looking the design room. Both the claimant and Mr Duval agreed that Mr Duval would frequently speak to the designers from the gantry as he was leaving or entering his office.

94. We find that Mr Duval's behaviour towards the claimant started to change from early October onwards because Mr Williams made him aware of the claimant's potential performance issues (see findings relating to the meeting on 18 October 2019). However, we find that this was not due to the claimant's conversation with Mr Duval on 4 October 2019.

95. In terms of the impact of Mr Duval's comment on the claimant, we find that the comment in and of itself did not upset the claimant. In particular:

    95.1 Mr Duval had previously supported the claimant from his diagnosis in November 2018, during his phased return to work and the claimant had been permitted to take time off work to attend any medical appointments;

    95.2 the claimant was 'surprised' by Mr Duval's comment because it appeared to be inconsistent with Mr Duval's previous support for the claimant;

    95.3 there was no suggestion that the claimant would not be permitted to attend any future medical appointments, whether for scans or otherwise;

    95.4 the claimant did not complain to Mr Duval about the comment at that time, in their meeting on 18 October 2019 or in his emails in the month following the termination of his employment (the details of which are set out in our findings below). We note that in those emails, the claimant stated that he was raising a grievance regarding matters relating to pay but not regarding Mr Duval's comment to him on 4 October 2019.

96. We have concluded that it was the claimant's perception that Mr Duval ostracised him after 4 October 2019 that distressed the claimant, rather than Mr Duval's comment on 4 October 2019 in and of itself. However, as stated above, the claimant was unable to provide specific examples of any relationship change. In addition, we found that any change in their relationship was due to Mr Duval's concerns regarding the claimant's performance, not due to their conversation on 4 October 2019.

4 October 2019 onwards – claimant and Mr Williams

97. The claimant has also alleged as part of his harassment complaints that from 4 October 2019 onwards, Mr Williams ostracised him in that he:

    97.1 stopped conversing with him; and

    97.2 passed work to a junior employee which would normally have been undertaken by the claimant.

98. During cross-examination, the claimant said that Mr Williams still spoke to him in a work context but that he did not have any social conversations with him during the two week period from 4 to 18 October 2019. The claimant also confirmed that the junior employee that he was referring to was Mr Quinlan.

99. We find that Mr Williams' attitude to the claimant did change on a gradual basis due to his perception that the claimant was unable to perform his job. We note that by the time of the meeting at 18 October 2019, Mr Duval described Mr Williams as being *"at the end of his tether"* with the claimant.

100. We note that Mr Williams stated during cross-examination that work was divided equally between the designers. However, he also stated that he would take into account how busy the designers were with existing projects. Given the differing timescales and requirements for each project, we have concluded that it would not have been possible to divide the work in a completely equal manner between the designers.

101. We find that Mr Williams was unhappy with the claimant's performance following his return to work after his holidays on 23 September 2019. We find that Mr Williams did start to give more work to Mr Quinlan because the claimant was working on the Sweet Street drawings and because he perceived Mr Quinlan to be more capable than the claimant.

Ousegate project – 15 to 17 October 2019

102. At 11.35am on 15 October 2019 and 11.35am, Mr Williams emailed the claimant regarding the Ousegate project:

> *"Please see attached drawing, please can you do a pipe and head layout for this floor the client wants to see our proposed drawing before they place an official order.*
>
> *Please can you do this ASAP*
>
> *It is sprinklers*
>
> *Thanks"*

103. The claimant said that he asked Mr Williams about sprinkler design on 15 and 16 October 2019 and that Mr Williams ignored him. We find that the claimant did not ask Mr Williams about sprinkler design on 15 October 2019 because he did not note this issue in his work diary and instead noted that he had requested

104. We note that the claimant records that he emailed Mr Williams at 8.30am on 16 October 2019 and that Mr Williams did not respond by email. However, the claimant also records that he asked Mr Smith to check his drawing at 11am on that day. We note that Mr Smith frequently deputised for Mr Williams in the latter's absence. We find that the lack of response from Mr Williams between 8.30am and 11am did not amount to Mr Williams ignoring him.

105. The claimant then emailed Mr Smith at 2.20pm on 16th October stating:

"Hi Cameron

Please find Ouse Gate .pdf attached for checking…

Stew"

106. Mr Smith was checked the drawing and was concerned about the errors that the claimant had made. Mr Smith provided feedback on the drawing to the claimant and then forwarded the Ousegate drawing to Mr Williams at 10.34am on 17 October 2019.

107. The claimant then emailed Mr Smith regarding his revised drawing for Ousegate at 12.52pm on 17 October 2019 stating:

"NEW ONE?"

108. Then at 1.27pm on 17 October 2019 at 1.27pm, the claimant emailed Mr Williams with his proposed drawing.

109. The claimant and Mr Smith dispute as to whether Mr Smith approved the second version of the claimant's Ousegate drawing. We found that Mr Smith did not approve the second version of the claimant's Ousegate drawing on 17 October 2019 for the following key reasons:

109.1 Mr Smith had that morning emailed Mr Williams to highlight his concerns regarding the claimant's errors in the first version of the drawing. In those circumstances, we find it likely that Mr Smith would have checked any revised version carefully before approving it; and

109.2 Mr Smith was unlikely to have time to properly check the drawing in the half hour at lunchtime between the claimant sending him the revised drawing and the claimant emailing that drawing to Mr Williams.

Meeting at 4pm on 18 October 2019 – comments during meeting

110. In the month leading up to 18 October 2019, Mr Williams had raised performance concerns regarding the claimant with Mr Duval. Mr Duval told Mr Williams that he should give the claimant more time and the matter was not discussed with the claimant. However, Mr Williams raised further concerns with Mr Duval regarding the

claimant's Ousegate drawings on 18 October 2019, after he had received them from Mr Smith.

111. Mr Williams asked the claimant to join him and Mr Duval for a 'chat' on the afternoon of Friday 18 October. The claimant did not know what they were due to discuss and he was not given the opportunity to bring a representative. The meeting started at around 4pm and lasted for around 40-45 minutes.

112. Mr Williams' view before the meeting started was that Mr Duval should terminate the claimant's employment. Mr Williams stated in his witness statement: *"At that point I was strongly in favour of terminating Mc McLean's employment."* Mr Duval also described Mr Williams as being *"at the end of his tether"* with the claimant. However, we accept that it was ultimately Mr Duval's decision whether or not to terminate the claimant's employment.

113. The claimant, Mr Duval and Mr Williams agreed that:

113.1 the meeting started with Mr Duval saying that he had heard from Mr Williams that the claimant was struggling with his work, to which the claimant responded stating that he was not struggling;

113.2 Mr Williams showed the claimant a copy of the original Ousegate drawing (which the claimant had sent to Mr Smith for checking);

113.3 the claimant accepted that the Ousegate drawing contained several errors including (as set out in the claimant's handwritten notes of the meeting and during his oral evidence):

113.3.1 pipes had not been placed correctly;

113.3.2 there was one room where the sprinkler head was too far away from a wall;

113.3.3 the name of the floor was wrong;

113.3.4 the head spacings between nozzles exceeding the maximum distance permitted;

113.3.5 the claimant had used the wrong zone flow arrangement symbol;

113.3.6 the claimant had written text on top of a wall so that the wall beneath it was not visible;

113.3.7 the claimant had referred to the drawing as being 'for approval' which suggested it was not the correct version to be sent to the client – the claimant said that this was because it was a layout drawing, awaiting a quote;

113.3.8 referring to water mist (and the design standards for water mist systems) rather than sprinklers (and the design standards for sprinkler systems) in the legend and the label;

113.4 Mr Williams described these as 'schoolboy errors, to which the claimant said *"isn't that what checking is for"*;

113.5 Mr Williams said that the claimant took too long to prepare the Sweet Street drawings and that he had sent the wrong version of the drawings to the client;

113.6 Mr Williams and the claimant proceeded to have a heated discussion:

113.6.1 the claimant's own notes record that he firmly disagreed with Mr Williams' comments, that he rolled his eyes and he was 'fighting my corner';

113.6.2 Mr Williams and Mr Duval became frustrated by what they perceived to be the claimant's failure to accept criticism and his defensiveness.

114. We asked the claimant if any of the errors referred to in the paragraph above could have been remedied by additional training. The claimant only referred to the zone flow arrangement, saying he was never taught that. He did not say that the other errors were matters that additional training would have solved.

115. The claimant did refer during his evidence to difficulties that he experienced with Ousegate, due to the irregular shaped rooms involved in that project. However, we accept Mr Smith's evidence that there are CAD design tools that can assist with finding the centre of irregular shaped rooms and that the claimant should have been aware of these tools given his length of experience in using CAD. In addition, we note that the claimant's work diary shows that he spent a disproportionate amount of time on the Ousegate drawings compared to the Sweet Street drawings, in that the claimant spent:

115.1 1.5 days completing the Ousegate drawings (which involved one floor and around 30 heads); and

115.2 2.25 days completing the initial Sweet Street drawings (which involved 13 floors and around 1000 heads).

116. The claimant alleges that Mr Duval was ranting, swearing and shouting during the meeting. We do not accept that Mr Duval behaved in that manner for a prolonged period during the meeting because it is unlikely that the parties would have continued to have a discussion regarding website work and the claimant's notice period (see our findings below regarding termination of employment).

117. However, we find that Mr Duval did become very frustrated with the claimant and snapped: *"I have had your f***g back for months and you know it".* The key reasons for this finding are:

117.1 Mr Duval's oral evidence and demeanour during cross-examination demonstrated the level of frustration that he felt about the claimant's conduct during this meeting. For example, Mr Duval stated during his oral evidence:

117.1.1 *"He couldn't do the job, he simply couldn't do the job…"*;

117.1.2 *"He didn't like taking orders from people younger than him…"*;

117.1.3 *"Mr McLean was very abrupt and he didn't like criticism of any kind…He was not prepared to listen to people he thought was beneath him"*;

117.1.4 *"He did nothing but roll his eyes from start to finish – he was completely adversarial at every point"*;

117.1.5 *"He clearly couldn't do the design work"* ;

117.1.6 *"His position as a design engineer had to come to an end – if that's what you were referring to as instantly dismissed, he was. He couldn't do the work*";

117.1.7 "*It was pointless carrying on – he simply couldn't do the design work".*

117.2 Mr Duval's email of 26 November 2019 (which responded to the claimant's complaints regarding his final pay and holiday pay) echoed the sentiments of the comment alleged at the meeting on 18 October 2019:

"You have a very short memory.

My conduct towards you has been exemplary and I take great exception to your comments.

You will recall, that you were introduced to Premier Mist via a recruitment consultant, within a short period you left work due to ill health – Nonetheless, I supported you and kept you in employment and my only concern was for your wellbeing. I paid the recruiter their fee and you was effectively off-work for a prolonged period. You returned to work on a part-time basis before resuming full-time status and initially you worked on improving our web-site, when eventually concluded you were tasked to do the work that you had been employed to do. It became clear within a matter of weeks that you were not capable of undertaking the works to anywhere near the level of quality or progression required and you were relieved of your position.

It is not my responsibility to keep you in employment…"

Meeting on 18 October 2019 continued - termination of claimant's employment

118. The claimant, Mr Duval and Mr Williams all agreed that the claimant's employment ended as a result of the meeting on 18 October 2019. However, there is a dispute between the parties to that meeting as to whether the claimant was dismissed or resigned from his employment with Premier Mist.

119. We find that Premier Mist dismissed the claimant during the meeting on 18 October 2019. We find that:

119.1 Mr Duval told the claimant that he could not do the design work, but offered that he could do some work on Premier Mist's website and social media account instead;

119.2 the claimant asked more than once whether he was dismissed and he was told that he could not continue as a Designer;

119.3 they discussed whether the claimant would work his notice period;

119.4 the claimant then said *"Well, that's it"* and walked out of the meeting.

120. We also note that:

120.1 the claimant's emails after 18 October 2019 with Mr Ling and Mr Duval refer to his 'instant dismissal' and no attempt is made to correct this reference on behalf of Premier Mist (see findings relating to correspondence after 18 October 2019 below);

120.2 Mr Duval's email of 26 November 2019 states that the claimant was *"relieved of his position"*.

121. We find that the reasons why Mr Duval dismissed the claimant were due to:

121.1 his view that the claimant was not capable of carry out design work due to the number and nature of the errors that the claimant made on the Ousegate drawings, which both Mr Duval and Mr Williams described as 'schoolboy errors'; and

121.2 his perception that the claimant was unable to take on board criticism of his work, which suggested to him that the claimant's performance would not improve.

122. After the meeting ended, the claimant returned to his desk and started packing up his things. He also downloaded some software from his PC. Mr Williams had followed the claimant out of the meeting and stood next to the claimant whilst he did this.

123. The claimant then left the building and went to his car, which was parked in the office car park within view of the office. We find that the claimant jotted down some brief notes before setting out in his car. We have concluded that the claimant did not write all of his four page handwritten notes of the first part of the meeting whilst in the car because it would have taken at least 10 minutes to write these down and it is unlikely that the claimant would have remained in the car park for that length of time. However, we have concluded that the remainder of the handwritten notes were written down later that day. In reaching that conclusion, we have taken into account the fact that:

123.1 the claimant appears to give a relatively balanced account of the first part of the meeting (for example, referring to the fact that he 'reacted' to Mr Williams' comments and 'rolled his eyes);

123.2 the respondent acknowledges that several parts of the notes are accurate; and

123.3 all parties accept that the notes do not refer everything that happened in the meeting (e.g. the offer of website work).

124. The claimant did not receive any letter relating to the termination of his employment and was not provided with any right of appeal against his dismissal.

Correspondence after meeting on 18 October 2019

125. The claimant emailed Gareth Jones (IT manager) on the evening of Saturday 19 October 2019 to ask him to delete his personal emails from the respondent's system. The claimant stated:

"I'm sure you've heard by now that I've been dismissed and know that I'm not coming back".

126. Mr Jones responded on Monday 21 October 2019, copying in Mr Duval and stated:

"Peter has requested that as you are still in notice period that you could please return for the office for a couple of hours to go through a handover with myself with regards to the website/domains etc." [sic]

127. Mr Duval sent a follow up email regarding handover to the claimant on 28 October 2019. He did not state in that email that the claimant had resigned (and had not been dismissed).

128. The claimant emailed Mr Duval on 28 October 2019, stating:

"The last time we spoke, when I was instantly dismissed, I specifically asked you if you wanted me to work my notice and you said you didn't want me to…

…Given the lack of a written contract during my time of employment, I'm not aware my having any notice period. Please could you confirm what you understand my notice period to be for my own reference and understanding?

Further, I've now taken advice due to my wages not being paid in full on Friday 25 October. As a result, I understand that I am entitled to wages outstanding, payment for my notice period, and for any holiday days accrued during my employment which I have not yet taken. I also understand that I may be due pay for any work done during my six months off, during which I received sick pay only. I consider this highly relevant, given this is the work that you are asking me to hand over.

Please could you therefore confirm:

1. What my contractual notice period is;

2. That you will include payment for my accrued holiday days in my final payment; and

3. That you will consider what payment I am due for work done while receiving sick pay only."

129. Mr Duval again did not contradict the claimant and state that the claimant resigned (and had not been dismissed).

130. The claimant attended Premier Mist's office on 1 November 2019 and handed over website info to Mr Jones – he did not speak to anyone else on that day.

131. The claimant exchanged further emails with Mr Ling and then emailed Mr Duval on 18 November 2019 regarding a grievance, stating (with our underlining):

"Subject: Grievance

Dear Peter

I have to raise issues with various statements in your reply (dated 04 November 2019) to my email (dated 1st of November 2019). Those statements being; Holiday accrual, Contract dates and Final payment date. In doing so I am attaching a formal letter as a matter of grievance. I would send this in accordance with the company's grievance procedure, but having never had any knowledge as to the company's 'grievance procedure' policy I must raise my grievance in this manner."

132. We were not provided with any attachment to that email by either party during this hearing. Mr Duval responded by email on 26 November 2019 (set out above) and did not treat the claimant's email as a grievance.

133. We find that the claimant's grievance related to his outstanding holiday pay and notice pay, rather than to his dismissal (or any events leading up to the dismissal) because of the wording underlined in his email above.

APPLICATION OF THE LAW TO THE FACTS

134. We will now apply the law to our findings of fact.

Holiday pay

135. The respondent conceded that it had not paid the claimant in lieu of four days' accrued holiday pay on termination and agreed that this amounted to £366.68 gross. We therefore declare that the claimant has suffered an unauthorised deduction from his wages and award him £366.68 gross.

Written statement of employment particulars

136. We have concluded that the claimant should be awarded two weeks' pay (capped at £525 per week for dismissals that took place between 6 April 2019 and 5 April 2020) totalling £1050 in relation to Premier Mist's failure to provide him with a contract of employment.

137. We have considered whether it would be just and equitable to increase this award to four weeks' (capped) pay, but have concluded that this would not be appropriate because:

137.1 Premier Mist is a relatively small business within no internal HR resources;

137.2 the claimant's request for a contract of employment appears to have been forgotten, rather than completely ignored. For example, in January 2019 Mr Ling told the claimant that he was going to speak to Mr Duval to obtain his signature;

137.3 Mr Ling responded to the claimant's enquiries about his notice period and final pay after his employment ended and clarified his terms. There was a dispute about the amount of holiday pay due to the claimant, but this arose out of Premier Mist's misunderstanding of the requirements around holiday accrual during sick leave rather than the terms of the contract itself.

Harassment allegations

Allegation 1 – Mr Duval (4 October 2019)

138. We found that when the claimant said that a further scan may be needed, Mr Duval said he: *"should get it cut out and stop messing about with all these scans"*.

139. We have concluded that the comment constituted unwanted conduct and that it was related to the claimant's disability. In reaching this conclusion, we have borne in mind the guidance set out in *Dhaliwal* set out in the section of this judgment headed 'Relevant Law'.

140. We have found that it did not have the purpose of violating the claimant's dignity or creating the proscribed environment because that was not Mr Duval's intention.

141. We then need to consider whether:

141.1 the comment had the effect of violating the claimant's dignity and/or creating the proscribed environment; and

141.2 whether it was reasonable for the comment to have that effect on the claimant.

142. We have concluded that the comment did not have the effect of violating the claimant's dignity and/or creating the proscribed environment. We have considered our findings of fact set out above in detail in reaching this conclusion, including those which we have summarised below:

142.1 the context was that the claimant was understandably concerned about the possibility of his cancer recurring, despite Dr Kane informing him that his cancer was currently in remission;

142.2 Mr Duval had been very supportive of the claimant since his diagnosis in November 2019, despite the claimant's short length of service with Premier Mist before his diagnosis;

142.3 Premier Mist had previously permitted the claimant to take time off to attend scans without question and there was nothing to suggest that their approach would change if the claimant needed to attend any future scans;

142.4 the claimant was aware that a close family member of Mr Duval's was undergoing treatment for cancer;

142.5 Mr Duval made the comment during a brief conversation as he and the claimant walked out of the men's toilets. This conversation was not witnessed by anyone else;

142.6 the claimant said that Mr Duval's comment surprised him, given Mr Duval's previous support for him. The claimant said of Mr Duval in oral evidence: *"It was very unlike Mr Duval to say that, to be honest"*;

142.7 the claimant did not complain about the comment to Mr Duval at the time, at the meeting on 18 October 2019 or in his emails following the termination of employment (despite one of those emails raising a grievance regarding pay matters);

142.8 we found that the comment itself did not upset the claimant. We found that the claimant was 'surprised' by Mr Duval's comment. We concluded that it was the claimant's perception that Mr Duval ostracised him after 4 October 2019 that caused distress to the claimant (please refer to our findings of fact and our conclusions on Allegation 2).

Allegation 2 – Mr Duval (4 October 2019 onwards)

143. We found that the relationship between the claimant and Mr Duval changed gradually from 4 October 2019 onwards as Mr Duval became aware of performance concerns related to the claimant and the claimant regarded this as 'unwanted conduct'.

144. However, we have concluded that this change in relationship is not sufficient to meet the test of violating dignity or creating the proscribed environment. In particular, we concluded that:

144.1 Mr Duval did not intend any change in his relationship to violate the claimant's dignity or create the proscribed environment. We note in particular, that the claimant was unable to point to any specific examples of where he said that Mr Duval had 'ostracised' him despite referring to a 'big change' in their relationship during the two weeks leading up to the termination of his employment; and

144.2 whilst the claimant may have considered that the gradual change in his relationship with Mr Duval had the effect of violating his dignity or creating the proscribed environment, it is not reasonable for that gradual change to have that effect when taking into account the context of these allegations set out in our findings of fact. In reaching this conclusion, we have borne in mind the guidance set out in *Dhaliwal* and *Weeks* discussed in the section of this judgment headed 'Relevant Law'.

145. We have also concluded that any change in the relationship between Mr Duval and the claimant was related to the claimant's performance of his design work, not his disability. Even if the claimant were able to demonstrate that his dignity had been violated or the proscribed environment had been created, this allegation of harassment would fail.

Allegation 3 – Mr Williams (4 October 2019 onwards)

146. We found that the relationship between the claimant and Mr Williams also changed gradually since Mr Williams returned from holiday on 23 September 2019 (when

he discovered that the Sweet Street drawings had not been completed) and the claimant regarded this as 'unwanted conduct'. We also concluded that during this period, Mr Williams tended to provide more work to Mr Quinlan than the claimant because he regarded Mr Quinlan as more capable than the claimant.

147. We concluded that Mr Williams' conduct was not intended to violate the claimant's dignity or create a hostile environment for the claimant. The gradual change in Mr Williams' conduct was a reflection of the frustration he felt regarding the claimant's performance.

148. We have also concluded that the gradual change in Mr Williams and the claimant's relationship did not have the effect of violating the claimant's dignity or creating the proscribed environment. In particular, we concluded that:

    148.1 the claimant said that Mr Williams still spoke to him regarding work-related matters. The only specific example that the claimant provided of Mr Williams ignoring him related to the email at Allegation 4 (see our conclusions below);

    148.2 Mr Williams still allocated work to the claimant, for example the Ousegate project, and it was not possible to allocate work in a completely equal manner between the four designers due to the variety of project demands and length. Work allocation would also depend on other factors, include how busy designers were with other projects at any given time; and

    148.3 whilst the claimant may have considered that the gradual change in his relationship with Mr Williams had the effect of violating his dignity or creating the proscribed environment, it is not reasonable for that gradual change to have that effect when taking into account the context of these allegations set out in our findings of fact. In reaching this conclusion, we have borne in mind the guidance set out in *Dhaliwal* and *Weeks* discussed in the section of this judgment headed 'Relevant Law'.

149. We also concluded that even if the change in the claimant and Mr Williams' relationship did amount to harassment, it was related to the claimant's performance in his role as Design Engineer rather than his disability. Even if the claimant were able to demonstrate that his dignity had been violated or the proscribed environment had been created, this allegation of harassment would therefore fail.

Allegation 4 – Mr Williams (15 and 16 October 2019)

150. We found that the claimant did not ask Mr Williams about sprinkler design on 15 October 2019, for the reasons set out in our findings of fact.

151. We found that Mr Williams did not respond to the claimant's email of 8.30am on 16 October 2019, but that Mr Smith checked the claimant's drawings at 11am and that the claimant sent the updated drawings to Mr Williams at lunchtime. We have concluded that Mr Williams did not "ignore" the claimant's enquiries about a sprinkler design, but that these were not dealt with due to the short time period. We have therefore concluded that there was no 'unwanted conduct' and we do not need to consider the issues of purpose or effect.

152. In any event, even if Mr Williams had ignored the claimant during this short time period, there was no evidence to suggest that Mr Williams had ignored the claimant due to his disability.

153. This allegation of harassment therefore fails.

Allegation 5 – Mr Duval (18 October 2019)

154. We found that Mr Duval did say to the claimant during the meeting on 18 October 2019: *"I have had your f***g back for months and you know it"* for the reasons set out in our findings of fact. We have concluded that this comment did amount to unwanted conduct. It was clearly not appropriate for such a comment to be made in the context of a performance discussion.

155. We concluded that Mr Duval did not intend to violate the claimant's dignity and/or create the proscribed environment; rather he wanted to remind the claimant of the steps that Premier Mist had taken to support the claimant in the past.

156. We have considered whether the comment and the circumstances surrounding this comment were sufficient:

    156.1 to violate the claimant's dignity and/or create the proscribed environment; and

    156.2 whether it was reasonable for that comment to do so.

157. We concluded that the comment did violate the claimant's dignity and/or create the proscribed environment for the following key reasons:

    157.1 this comment was made during a meeting to discuss the claimant's performance. That meeting was arranged without prior warning and the claimant was not given the opportunity to be represented;

    157.2 a heated discussion took place during the meeting regarding the claimant's performance that ultimately led to his dismissal;

    157.3 Mr Duval intended the comment as a reminder to the claimant of the steps that Premier Mist had taken to support him in the past, as reflected in his later email to the claimant. However, the choice of language used and the anger and frustration expressed went far beyond those sentiments; and

    157.4 Mr Duval was the Managing Director of Premier Mist and therefore more senior than the claimant. He made those comments in front of the claimant's line manager, Mr Williams.

158. We have also concluded that the comment was related to the claimant's disability, because it related to the steps that Premier Mist had taken to support the claimant since his cancer diagnosis.

159. This allegation of harassment is therefore upheld.

Failure to make reasonable adjustments

160. It was agreed during closing submissions that the provision, criterion or practice ("**PCP**") that the claimant complained of was a requirement to complete the

drawings for the Sweet Street and Ousegate projects to a reasonable standard and in a reasonable timeframe.

161. The substantial disadvantage that the claimant identified was that he had become "de-skilled" because of his lengthy absence due to his cancer treatment and that he needed additional training in order to be able to meet this PCP after his phased return to work ended.

162. We accept that the claimant's absence would have led to a decrease in the skills required to complete CAD drawings, due to the fact that he had not had the chance to practice those skills during his absence and during his phased return to work.

163. However, we do not accept that the PCP would put the claimant at a substantial disadvantage compared to someone without his disability. The reason for this conclusion is that a non-disabled employee who had been absent from work and returned on a phased basis (without doing any drawing work) for the same amount of time that the claimant would also have become 'de-skilled'. We note that the claimant did not allege (and no evidence was provided on this point) that the nature of his illness had a particular impact on his ability to carry out his duties and relied solely on his absence as the reason that he became 'de-skilled'.

164. Having reached this decision, we do not need to consider the remaining issues under our list of issues relating to the reasonable adjustments claim. However, for the avoidance of doubt we found that additional training would not have removed the disadvantage that the claimant suffered for the reasons set out below.

165. We found that the claimant received the following training and assistance during his employment:

    165.1 two to three days' training with Mr Williams, working on an old project, at the start of his employment;

    165.2 additional training with Mr Williams relating to the Station Road project (which was another old project) in or around 6 August 2019;

    165.3 additional assistance from Mr Smith on 16 August 2019 for around 30 minutes, in addition to Mr Smith and Mr Williams checking the claimant's drawings and feeding back on them for each project on which the claimant worked from August 2019 onwards; and

    165.4 day to day assistance from Mr Williams, Mr Smith and Mr Barr regarding any queries that the claimant may have.

166. We have concluded that additional training would not have enabled the claimant to complete the drawings for the Sweet Street and Ousegate projects to a reasonable standard and in a reasonable time frame for the reasons set out below.

167. In relation to Sweet Street, we found that the delay in producing the initial drawings was caused by the claimant's misunderstanding with Mr Smith around whether he should put his work on hold and await the electrical drawings. We note that the claimant refers to a further 5 days whilst the drawings were due to be checked by Mr Williams. However, the dates provided by the claimant include two weekends.

In addition, the claimant sent the wrong version of the drawings to the client by mistake. We have concluded that additional training would not have resolved these issues .

168. In relation to Ousegate, the errors that the claimant made on the drawings appeared to be largely due to:

    168.1 the claimant's lack of attention to detail as set out in our findings of fact (e.g. pipes not being placed correctly, placing sprinkler heads in the wrong place, writing text on top of a wall and referring to water mist rather than sprinkler systems); and

    168.2 the claimant's belief that any errors would be picked up by the 'checking process' and that it was the responsibility of the person checking the drawings to pick up his mistakes.

169. Also in relation to Ousegate, the claimant did not say that he needed further time to complete the drawings. He had sufficient time to prepare two versions of the drawing and to send one version to Mr Smith for checking. In addition, the claimant complained that work was being diverted to Mr Quinlan during the same period, rather than given to him.

170. We have therefore concluded that additional training would not have removed the disadvantage that the claimant has stated he suffered. The claimant's claim for failure to make reasonable adjustments therefore fails.

Discrimination arising from disability

Allegation 1 - failure to provide adequate training

171. We have concluded that the claimant was provided with adequate training both at the start of his employment and at the end of his phased return to work (please refer to the summary of our factual findings at paragraph 164 to 169 in relation to the reasonable adjustments claim above). We note in particular that the claimant appeared to take the view that 'on the job' training did not amount to training. For example, the claimant stated that he had only had an hour's training at the start of his employment but we found that it would have taken around two to three days for the tasks that the claimant agreed were involved in his training to have been completed.

172. We have therefore concluded that the claimant was not subject to unfavourable treatment and his complaint for discrimination arising from disability relating to this allegation fails.

Allegation 2 – claimant's dismissal

173. We found that the claimant was dismissed and that this could of course be regarded as unfavourable treatment.

174. However, we concluded that the disadvantages alleged were not made out:

    174.1 the claimant did receive adequate training (see our conclusions in relation to Allegation 1 above); and

174.2 the claimant did not in fact inform Premier Mist on 4 October 2019 that he would need to take a further significant period of time off work due to his disability. Instead, the claimant's evidence was that he told Mr Duval that he may need an additional scan after his appointment with his consultant on 3 October 2019. The claimant had previously taken time off for scans without any issues being raised.

175. The claimant's representative stated during his closing submissions that the 'reading between the lines', the claimant's cancer might affect his ability to work going forwards. However, the Case Management Summary prepared by Employment Judge Brain referred to the claimant informing the respondent that 'he would need a further significant period of time off work' and this was reflected in the list of issues that we agreed with the parties at the start of this hearing. We also note that the claimant has been represented throughout these proceedings (including at the Preliminary Hearing) by his current solicitors. If the claimant wished to comment on the Case Management Summary then he has had ample opportunity to do so.

176. Even if the claimant were subject to the disadvantages alleged, we found that the vast majority of the errors identified during the meeting on 18 October 2019 were not errors that any additional training would have corrected, as set out in detail in our findings of fact (as summarised at paragraphs 164 to 169 in relation to the reasonable adjustments claim above). The claimant's dismissal was therefore not due to a lack of adequate training. We found that the key reasons for the claimant's dismissal were:

176.1 the errors that he made in the Ousegate drawing, the majority of which arose from a lack of attention to detail; and

176.2 the claimant's failure to accept responsibility for those errors, instead stating that they were matters that should have been picked up as part of a checking process.

177. The claimant's complaint of discrimination arising from disability therefore fails.

Time limits

178. Given our conclusions set out above, we do not need to reach any conclusions on time limit issues.

CONCLUSIONS

179. The parties agreed that the claimant has been under-paid four days' holiday and that the respondent will pay him the sum of £388.68 (gross).

180. The claimant's claim for failure to provide a written statement of employment particulars succeeds and is upheld. The Tribunal awards the claimant £1050 (i.e. two weeks' capped pay) in respect of this failure.

181. We have concluded that Harassment Allegation 5 (relating to Mr Duval's comment during the meeting on 18 October 2019) succeeds and is upheld. All other disability discrimination complaints fail and are dismissed.

182. A separate remedies hearing has been listed for 22 September 2021. Case Management Orders in relation to that hearing will be issued separately.

EMPLOYMENT JUDGE DEELEY

28 JULY 2021