EMPLOYMENT TRIBUNALS

Claimant: **Mr Adam Tinsley**

Respondent: **DNA Vetcare LTD**

Heard at: **London South Employment Tribunal (by CV)**

On: **9 August 2021**

Before: Employment Judge Dyal sitting with Raja Singh and Janet Jerram

Representation:

Claimant: in person

Respondent: Mr Peter Collyer, Tribunal Consultant

RESERVED JUDGMENT

1. The Claimant was constructively dismissed and the dismissal was unfair.
2. The Claimant was wrongfully dismissed and is entitled to one further week of notice pay.
3. Unlawful deductions were made from the Claimant's wages in the sum of £4,088.67.
4. The complaints of sexual orientation discrimination and harassment fail.

REASONS

Introduction

1. This case came before the tribunal for its final hearing.

The issues

2. Unfortunately no list of issues was prepared or agreed in this case in advance of the final hearing. We therefore spent most of the first morning discussing and ultimately agreeing the list of issues below.

Constructive unfair dismissal

1. Was the Claimant dismissed?

1.1 Was the Respondent in repudiatory breach of the Claimant's contract of employment? The Claimant relies upon the implied term of trust and confidence. The particulars of the breach the Claimant relies upon (individually or cumulatively) are:

1.2 Being set an unrealistic target, namely, from November 2016 a financial target of c.£13,000 p/w.

1.3 There was only one vet (himself) available/fully available instead of two: the other vet was pregnant and thus unable to fulfil some of her veterinary duties between March 2018 to July 2018; the other vet was on maternity leave from July 2018 – end of C employment.

1.4 There was short staffing of admin and nursing staff including on the following dates:

1.4.1. 3 April 2018;
1.4.2. 30 May 2018;
1.4.3. 26 July 2018;
1.4.4. 25 September 2018;
1.4.5. 24 October 2018 (there was a new member of team, a junior nurse, but no one to help her so the Claimant had to supervise and assist her);
1.4.6. 26 October 2018.

1.5 A colleague assisting the Claimant being called to the main hospital to find there was no work for them whereas the Claimant was very busy on 3 October 2018

1.6 The requirement to be in a house call and at the clinic at the same time on around 22 October 2018. The Claimant had to cancel the house call to return to the clinic, the client complained about the cancellation and was then criticised for it by the Respondent.

1.7 review on or around 22 or 25 October 2018, which was subjective, biased, unfair and included remarks related to sexual orientation (see below).

1.8 Did the Claimant resign at least in part in response to the breach?

1.9 If so, did he do so without delay, affirmation or waiver?

1.10 If the Claimant delayed, affirmed or waived the breach is he nonetheless able to claim constructive dismissal by reason of a final straw?

2. If so what was the reason for the dismissal and was it a potentially fair one?

3. If there was a potentially fair reason was the dismissal fair in all the circumstances in accordance with s.98 Employment Rights Act 1996?

4. If the Claimant was unfairly dismissed, should a *Polkey* reduction be made? [In the event we decided it would be better to defer this issue to the remedy hearing]

Direct sexual orientation discrimination

5. The Claimant is homosexual.

6. Was the Claimant subjected to less favourable treatment than a hypothetical heterosexual comparator would have been? He alleges the following:

    6.1 In January 2018, Ms Baker made a comments to the effect that management was watching the Claimant for being gay and having party lifestyle;
    6.2 In the review meeting on or around 22 or 25 October 2018, Ms Baker saying words to the effect that, the Claimant's sick leave was associated with his lifestyle of being gay and therefore out all weekend and taking drugs;
    6.3 Constructive dismissal.

Harassment related to sexual orientation

7. Was the Claimant subjected to the following conduct: [as per allegations of less favourable treatment].

8. Was the conduct unwanted?

9. Did the conduct have the purpose or effect of:

    9.1 violating the Claimant's dignity;
    9.2 creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? (In considering whether the conduct had 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.)

Unauthorised deduction from wages:

10. Did the Respondent make unauthorised deductions from the Claimant's wages for the period 1 October 2018 – 2 November 2018. The Claimant was paid nil.

Notice pay

11. Is the Claimant entitled to notice pay?

12. If so how long is the notice period?

3. The claim form also refers to victimisation. However, the term appears to be used in the lay sense of being treated badly, rather than the technical s.27 Equality Act 2010 sense of being subjected to a detriment because of a protected act. In the discussion of the issues, the tribunal explained to the Claimant the technical meaning of victimisation. He agreed that was not the sense in which the word was used or intended in the claim form. We explored whether there was any matter which the Claimant wished to pursue as an act of victimisation. There was one and only one such matter. However, it was a matter that was not referred to in the claim form.

4. The Claimant wanted to complain that, by reason of a protected act, being a complaint to Mr Walker on 7 November 2018, Mr Walker had made a complaint about him to the Royal Society of Veterinary Surgeons. The Claimant was unsure of the date of the referral. He was notified of it, and of the outcome (the referral would not be further pursued) on 21st of April 2020. The Claimant applied to include this complaint by amendment. The application was opposed. The tribunal refused the application for reasons given at the time.

The hearing

5. *Documents before the tribunal*. The presentation of the documentation was on the chaotic side, principally because of poor preparation on the Respondent's side.

5.1. From the Respondent:

5.1.1. Bundle A: this bundle was produced by the Respondents previously representatives;
5.1.2. Bundle B: this bundle was produced by the Respondent's current representatives and includes the documents in bundle A and further documents;
5.1.3. The Respondent's witness statements:
5.1.3.1. First and second statement of Claire Baker, Operations Director
5.1.3.2. First and second statement of Dane Walkers
5.1.3.3. Statement of Lauren Emmett
5.1.3.4. Statement Robert O'Reiley
5.1.3.5. Statement of Sian Skipsey
5.1.3.6. Statement of Helen Wood in the form of an email dated 12 August 2021 (adduced in the course of the hearing and admitted by consent)

5.1.4. A bundle of the Claimant's documents which included the Claimant's statement and a statement from Mica Bartley. It was agreed that this could be discarded because it replicated the Claimant's bundle;

5.1.5. In the course of the hearing further documents were adduced by consent:

5.1.5.1. A one page document indicating who was on shift on certain dates;

5.1.5.2. A one page document containing sales figures;

5.1.5.3. A second payslip for October 2018;

5.1.5.4. A six page document showing surgery rotas;

5.1.5.5. Video footage of part of the Claimant's review meeting on 22 October 2018.

5.2. From the Claimant:

5.2.1. Claimant's bundle of documents including his witness statement a statement of Mica Bartley (formerly employed by the Respondent as a nurse).

5.2.2. Two documents sent by Claimant to the employment tribunal on 9 August 2021 at 16:55. Firstly, a document showing that the Claimant was nominated for young vet of the year in August 2020; secondly, a letter dated 21 April 2020 from the Royal College of veterinary surgeons.

5.2.3. Respondent's original witness statements (i.e., the Respondent's statements save for the second statement of Claire Baker in the second statement of Dane Walkers). It was agreed that this could be discarded as its content was all contained in the Respondent's bundle of its witness statements.

6. The Claimant objected to the Respondent relying on bundle B and objected to the Respondent relying on the second witness statements of Ms Baker and Mr Walker. For reasons given at the time we decided to allow the Respondent to rely on that bundle and those statements. We also indicated that the Claimant could himself give further evidence, whether orally or in writing (and if in writing so long as provided by 9:30 AM on 11 August 2021) in response to the said second witness statements. At the outset of his evidence he did so at significant length.

7. *Witnesses the tribunal heard from*: all of the witnesses listed above save for Ms Bartley, Ms Emmett and Ms Skipsey who were not called.

8. *Submissions:* the parties made oral closing submissions on day 3 which the tribunal considered carefully.

Findings of fact

9. The tribunal made the following finds of fact on the balance of probabilities.

10. The Respondent is a large veterinary practice with 12 sites in London and Kent. It is a medium-sized employer with approximately 170 staff including about 44 veterinary surgeons.

11. The Claimant's employment with the Respondent commenced on 4 April 2016. He was employed as Lead Surgeon, based at the Respondent's Mayow branch in Sydenham.

12. The Claimant is gay. He was open about his sexuality at work and it was known by all people relevant to this claim that he was gay.

Targets

13. Each of the Respondent's veterinary practices has a sales target. The target is set for the practice as a whole rather than any particular member of staff.

14. At the Mayow practice at all relevant times the target was £13,000 per week in invoiced sales. This was set on the basis that this was a two vet practice.

15. The target had a good deal of significance:

    15.1. It was an important metric of performance. For management it was one of the key indictors for how the practice was doing. Vets are the key players in each practice and the target is a key benchmark for how the vets are performing.
    15.2. The target was frequently referred to by management both informally (in email correspondence, telephone calls and discussions) and more formally in review meetings. If the target was met there would be praise and small incentives like paid dinners. If it was not met inquiries would be made as to why not. Sometimes there would be implied criticism and at other times actual criticism.
    15.3. The target had an impact on a vets' pay. It could have an influence on considerations of pay-rises and was one of the factors that would be taken into account when awarding bonuses. Bonuses however formed no more than about 5% of a vet's remuneration and the frequency with which the target was hit was only one of multiple factors taken into account.
    15.4. Overall, we have no doubt that employees, particularly the Claimant, felt significant pressure to meet the target.

16. In practice, in the course of the Claimant's employment, the Mayow clinic met the target around half the time.

Staffing and working hours

17. A central theme of the Claimant's case is that the Mayow clinic was frequently understaffed and that this made his working life very difficult. When the clinic was understaffed he had to work long hours to get through the workload and without breaks. We broadly accept that for reasons we will come to. First however some background is needed.

18. On weekdays, when fully staffed the clinic would have two vets, two receptionists and a minimum of two nurses (but ideally four). At the weekend, the staffing

levels were halved. This was the Claimant's evidence, it was no contradicted and we accept it.

19. In broad terms, the Claimant's working day was divided into morning consultations, followed by surgery, followed by afternoon consultations.

20. The nature of sector is such that there were inevitably peaks and troughs in work. These are caused by among other things:

    20.1. whether or not, and if so how many, pet emergencies there were on a given day and the nature of the emergencies that arise;
    20.2. the usual vagaries of running a business where custom ebbs and flows not only in response to the quality of the service provided but other factors such as local trends in pet ownership, the prevalence of particular illnesses in pet populations and many more;
    20.3. the availability of staff of all descriptions (veterinary, nursing and administration).

21. We accept the Respondent's evidence that recruitment and staffing are difficult in this sector. In addition to the staffing problems businesses generally face:

    21.1. it is hard to recruit sufficient vets and there is a trend of high turnover, particularly as many of the vets are from abroad and work in the UK for limited periods. For this reason the Respondent constantly seeks to recruit vets e.g. by permanently advertising;
    21.2. there is a national shortage of qualified nursing staff.

22. In his evidence to the tribunal, Mr Walker was very dismissive of the Claimant's complaint that there had been significant staffing problems at the Mayow clinic that had made the Claimant's working life difficult. Mr Walker considered that the Mayow clinic to be as well resourced as any of the Respondent's practices. However, his evidence was highly general and it did not appear that he was aware of the fine detail. Ms Baker's evidence was more balanced on this matter. We consider the contemporaneous evidence to be the best guide to the reality of the situation.

23. The contemporaneous evidence shows that the Claimant consistently raised heartfelt concerns about staffing levels and the hours that he was working. The contemporaneous management reaction to those concerns we think shows that the concerns he raised were reasonable ones and that there were real staffing problems at the Mayow clinic. Altogether we think it shows that at times the Claimant was working hours outside of those considered acceptable within the organisation.

24. The following messages are revealing:

    24.1. On 25 November 2016 the Claimant messaged Martha (surname unknown), who was his manager at the time. He stated "*I am working 60 to 70 hours per week due to a lack of staffing and I am burnt out*". The

response was "…I *will [try] correct this, but I'm only doing what I've been shown*".

24.2. On 25 June 2017, Victoria (a nurse at Mayow) wrote in a message to the Claimant: *"Dane came in today and was a bit of a knob. He was being really patronising and got the trigene (cleaning chemical) and some paper towel and saying why haven't I got on my hands and knees and scrubbed the floors clean. Explained we've been busy and finishing late and not having lunch etc…but wasn't good enough… it was like an interrogation. He (Dane) genuinely said "you can't use busy as an excuse as I'm the busiest person in the company".*

24.3. On 6 December 2017, Claimant sent Ms Baker a text raising a concern that he was working too many hours, was exhausted, coming home and going straight to bed and relying on the weekends to catch up. She responded that she would call him back when she had a spare hand to use the phone. She did not do so – she herself was very busy.

24.4. On 3 April 2018, the Claimant contacted Ms Baker and stated: *"it is not ideal to have one member of staff to do both reception and nursing on the day after a public holiday long weekend. We seem to keep having similar days to today where the vets have no support staff or people answering phones".* Ms Baker responded that two new members of staff would be starting over the next two weeks and there would be better times – the new members of staff did not materialise.

24.5. On 1 and 2 May 2018, the Claimant raised concerns his then manager Bri (surname unknown). He said that standards had declined and it may be because a particular member of staff was leaving or because Steph (the other vet at the practice at the time) was pregnant and not there much. He complained about the state of the surgery and stock levels. He also complained that he was overworked because the other vet could not do dental work/x-ray. Bri indicated she would attend on 2 May 2018 to assist with the issue, but did not do so. She said that a new member of staff would be starting on 16th and hoped that would help and that she would speak to the member of staff who was leaving.

24.6. On 5 June 2018, the Claimant complained to Bri that four members of staff had been absent. He complained that he had been on his own the previous day for half a day and would be the following day too. She did not respond.

24.7. On 10 June 2018, the Claimant texted Ms Baker and stated, *"has been busy, busy the past 2 days. Literally just finished up surgery and straight into consults (same as yesterday). It is back to back with one vet on. I am exhausted and have a stack of call backs to get done"*.

24.8. On 26 July 2018, the Claimant messaged Ms Baker and said: *"this week at Mayow has been hectic, even I was chasing my tail, and I am quick… The pay increase as I said from the beginning was only a small part of*

many issues for me, but mostly it was the rota, and the number of hours we work / spend in the clinic. Yesterday was 11.5 hours with zero break!! It was the same the week before on a few occasions."

24.9. On 15 August 2018, the Claimant texted Ms Baker at 8.30pm and said: *"this week at Mayow has been hectic, even I was chasing my tail, and I am quick… the pay increase as I said from the beginning was only a small part of many issues for me, but mostly it was the rota, and the number of hours we work / spend in the clinic. Yesterday was 11.5 hours with zero break!! It was the same the week before on a few occasions."* Ms Baker responded, "*You should only consult 2 hours in the morning, and then 2 hours in the evening if you are alone! Giving you 2.5 hours for ops then so you get a few hours to recover. We need to look at this!... Hopefully the new nurses will be bloody organised for you."* (We pause to note that the Claimant routinely worked far more than this and that the support did not materialise.) The Claimant added: *"…I don't mind being busy, but it's too many days where not a single 5 minute break , so I don't get to eat, I get skinny (first world problems in the gay circle ha), I am too tired to go to the gym, the dogs get neglected [a reference to the Claimant's pets], mon-fri I don't do anything social and my week just becomes all about work and it's a spiral where I get burnt out like I was several months a go…"* Ms Baker responded, "*Lets get the diary sort out for you and ensure you don't get like this! They seem to think you're invincible!!".*

24.10. On 5 September 2018, the Claimant told Ms Baker in a text that he had "*lost the will to live with the practice*". Ms Baker responded that more vets would be coming so the Claimant would not need to do sole practice. She comments it *"can't come soon enough".*

24.11. On 25 September 2018, the Claimant texted Ms Baker and said that there had only been 1 receptionist in the evening, in the morning only 1 receptionist and 1 new nurse that needed support and guidance. He said the clinic could not function like this and that it had happened one day after being told in a meeting they needed to work harder.

25. In her oral evidence, Ms Baker indicated that 9/10 times there would be more than one vet assigned to the Mayow practice. We think that was a significant underestimate. In the course of the hearing the Respondent disclosed a handful of rotas. These showed the number of vets assigned to the Mayow practice on the dates the rotas covered. In particular:

25.1. In July 2018 there were 7 on which there was only 1 vet weekdays [it was normal to have only one vet at the weekend];
25.2. In August 2018, there were 6 weekdays on which there was only 1 vet;
25.3. In September 2018, there 5 weekdays on which there was only 1 vet.
25.4. Between 1 October 2018 and the Claimant's resignation on 26 October 2018, there were no weekdays on which there was only 1 vet.

26. Turning directly to the matters raised in the list of issues:

25.1 We accept that between March 2018 and July 2018, the other vet at the practice was not performing her full duties because she was pregnant. She was also absent frequently for pregnancy related reasons. This increased the Claimant's workload.

25.2 We accept that, between July 2018 and the end of the Claimant's employment the other vet normally assigned to the practice was on maternity leave. Some cover was provided but there were a large number of occasions on which there was only one vet.

25.3 The surgery was short staffed (in the sense of not having at least two receptionists and/or two nurses) on: 3 April 2018; 30 May 2018; 26 July 2018; 25 September 2018; 24 October 2018; 26 October 2018.

Chronological narrative

27. The Claimant was offered employment in an email from Ms Baker on 18 February 2016. She indicated that his basic salary would be £55,000, there would be a quarterly bonus according to performance, and that he would be supported in obtaining a certificate (which was a reference to a particular surgical qualification) with "50% funding". Following negotiations the salary was increased to £57,000.

28. Undertaking the certificate was entirely a matter for the Claimant rather than a requirement from the Respondent's side. As Ms Baker said in her email of 24 February 2016: "*When you decide you want to pursue a certificate, we will also fund 50% of this"*.

29. On 10 March 2016, Ms Baker emailed the Claimant and attached a contract of employment asking him to sign and return it before his start date on 29 March. The Claimant responded on the same day stating "*thanks for the contract I will fill it in and return it once back in the UK. I land this Saturday.*" He asked two questions, one relating to his start date and the other requesting leave in late June and early July. Miss Baker responded on 11 March 2016 indicating that the Claimant's proposed start date of 4 March was acceptable and that he could take the leave requested. The contract attached to the email is the one appears at B89-96.

30. We reject the evidence in the Claimant's witness statement that he was never provided with a contract of employment. He was as above (and indeed as below).

31. In early 2017, the Claimant told the Respondent that he wanted to enrol on the *Improve International Surgery Certificate Course*. He sent the Respondent the course details including the course fees which were in excess of £10,000.

32. It was agreed that the Respondent would pay the cost of the course fees upfront, and that the Claimant would repay them 50% of the course fees. It was left open exactly how, when and over what period the Claimant would repay the money. Nothing was put in writing. However, we find as a fact, based on the correspondence we have seen, that the mutual understanding was that the money would be repaid over an extensive period of time in instalments:

32.1. In an email from Ms Baker to Mr Graham Franks (then Financial Controller) on 17 February 2017, Ms Baker asked whether it would be possible for the Respondent to pay for the course and then deduct the Claimant's half of the fees monthly over two years, alternatively deduct his parts through salary sacrifice. She asked Mr Franks to contact the Claimant if necessary to set something up. Ms Baker sent a chaser email in respect of this on 24th of February 2017. It is unclear whether Mr Franks responded to Ms Baker, but we find neither he nor anyone else contacted the Claimant.

32.2. On 23 October 2018, Ms Baker emailed the Claimant noting that (by then) there had been an oversight in not making deductions from the Claimant's salary. She ultimately told the Claimant that deductions would be made from his salary at the rate of £495.87 per month, unless the amount of the course fees could be negotiated downwards with the course provider. The Claimant did essentially agree that he was liable for 50% of the overall course fees, though he did not think they should be charged or charged in full as he had not completed the course. However, he did not indicate any agreement to the deduction from his wages Ms Baker said would be made.

33. On 27 December 2017, the Claimant attended work in an unfit state. His speech was slurred and his eyes were rolling to the back of his head. Mr Walker urgently attended the surgery to sort the situation out. He spoke to the Claimant who put the matter down to a reaction to prescription drugs and produced a data sheet for the drugs which indicated that was a possibility. Mr Walker sent the Claimant home.

34. Mr Walker did not know one way or the other what the reason for the Claimant's ill-health was. He and Ms Baker with whom he briefly spoke about the matter, considered it a possibility that the Claimant's condition was the result of recreational drugs. It is unnecessary for us to decide what the cause of the Claimant's ill-health that day and we do not do so.

35. On 2 January 2018, after a work party, the Claimant and Ms Baker had an unguarded conversation. They were on good terms at this stage. The Claimant alleges that Ms Baker attributed his sickness absence on 27 December 2017 to him being gay and thus having a party lifestyle. He says that she told him that management were for that reason watching him. Ms Baker denies this and she says that she simply asked if the Claimant was ok following the events of 27 December 2017.

36. For reasons that we explain below, we find that the truth of the matter is somewhere in between. Ms Baker did inquire whether the sickness of 27 December 2017 was the result of a partying lifestyle and implied that it might be. She did not however link this expressly or impliedly to the Claimant's sexual orientation nor did she reference that. The reason she did this was not nothing to do with the Claimant being gay, but (a) because he was known to have a partying lifestyle [the tribunal intends no criticism of the Claimant for this] and (b) because of his presentation on 27 December 2017 which was consistent with intoxication with recreational drugs (though that was not the only possible explanation for the presentation by any means).

37. On 30 April 2018, Ms Baker and Mr Walker came to the Mayow Clinic for review with the Claimant. They arrived late. The Claimant expressed irritation with this very directly. Mr Walker was unable to get the data off he needed of his computer and Ms Baker had no notes. Mr Walker and Ms Baker left stating they would come back another time as they were too busy with 11 clinics. Mr Walker was brusque and unapologetic for arriving late and, in the event, wasting the Claimant's time. This, unsurprisingly, irritated the Claimant.

38. This is an appropriate moment for us to say that we do accept that the Claimant could be brusque and confrontational too at times. He was an employee who divided opinion. Some colleagues loved working with him but others, particularly vets, found him difficult.

39. On 1 May 2018, the Claimant emailed Ms Baker resigning from his employment giving four week's notice. Ms Baker came and spoke with him to discuss his resignation. In the meeting the Claimant raised numerous issues with Ms Baker to explain his resignation. Pay was one of them, but he also trenchantly expressed his view that the Mayow clinic was understaffed and that he was having to work to many hours as a result. Ms Baker convinced the Claimant to rescind his resignation by increasing his salary by £8,000 per annum.

40. At the beginning of May 2018, the Claimant chose to return his company vehicle because he found he was not using it. When he returned it, it was left on the driveway of the Mayow clinic for about a month. There was no handover of the vehicle as such and no inspection of its condition.

41. In mid-June 2018, Ms Baker emailed the Claimant and the admin team at the Mayow surgery, asking the Claimant to explain some damage to the vehicle that had been discovered. The Claimant did not respond.

42. The Claimant's evidence to the tribunal is that he has no idea how, when or by whom the vehicle was damaged. Although we are unimpressed by the Claimant's failure to respond to Ms Baker's email about the vehicle we ultimately accept the Claimant's evidence about the vehicle.

43. On 3 October 2018, the Mayow clinic was left understaffed when a nurse was sent to the Respondent's main hospital in Streatham. Once there she found herself underoccupied. We reject the suggestion this was done deliberately to make the Claimant's life difficult. It was done because it was anticipated that she would be needed at the Streatham hospital because it was anticipated it would be very busy. Further, she was experienced and one of the doctors at the hospital was not and it was thought her experience would help him. In the event the hospital turned out not to be as busy as anticipated.

44. On 18 October 2018, Ms Baker arranged a review meeting with the Claimant to take place on 22 October 2018. She asked the Claimant to complete his part of the review questionnaire in advance of the meeting. He did not do so and this we find unimpressive. This meeting was the long deferred meeting first attempted in April 2018.

45. At the meeting the Claimant was presented with an assessment of his performance. He was given a score of 5/10 for client service. This was a very low mark, particularly given that client service was hitherto one of the Claimant's accepted strengths. The Respondent largely refused to discuss the scores it gave the Claimant. He was simply told this related to client complaints. The Respondent has failed to explain in its evidence what complaints this related to. The only complaint discussed at the meeting was along the following lines:

    45.1. A client with a parrot needed a house call for the Claimant to trim the bird's nails. This was a two person job. Days before attending the job the Claimant notified the Respondent that there was a staffing difficulty. If he attended, the surgery would be without a vet. He was told to attend.
    45.2. On route to the parrot (during his lunch break), the surgery called the Claimant to tell him that there was a medical emergency with a pet at the surgery. There was no vet there to deal with it. Since the parrot's nails were not an emergency, he cancelled the house call and rushed back to the surgery.
    45.3. The parrot's owner complained.

46. It plain that the Claimant did nothing wrong here. however, he was impugned for the customer complaint and it was the only reason given to him for scoring 5/10.

47. At around this time there was another customer complaint issue relating to the Claimant in respect of an alleged misdiagnosis of the cat. The evidence is less than clear whether this was taken into account at the review meeting and on balance we find it was not. IF it had been that would have been unfair since there had been no concluded findings one way or the other as to whether the Claimant was at fault.

48. The Claimant was scored 4/10 for "Team work and flexibility". The Claimant was not given an explanation for his score though he asked for one. This was not explained in the Respondent's witness evidence either (we acknowledge that the Respondent referred in, usually vague terms, to a number of conduct concerns about the Claimant. However, it did not identify whether any of those concerns and if so which ones had a bearing on this mark).

49. At the meeting there was a discussion of the Claimant's level of sickness absence. The Claimant says that Ms Baker again linked this to his sexual orientation. Ms Baker denies this. We must now tackle this dispute head on. It is a very difficult one to resolve and there are undoubtedly powerful factor pointing in either direction.

50. The height of the Claimant's case is Respondent's evidence in relation to the CCTV footage of this review meeting.

51. The meeting took place in the Claimant's consultation room which is covered by CCTV (with both visual and audio recording) that is routinely turned on. No CCTV footage was disclosed prior to the commencement of the hearing, though the Claimant had asked for it contemporaneously and asked for it to be preserved.

52. The Respondent's position (of more accurately positions) in respect of the CCTV footage is (are) remarkable:

    52.1. The issue first arose when, in an email of 7 November 2018 in support of his grievance (see below), the Claimant told Mr Van Heerden, Director, that the review meeting was on CCTV and alleged a discriminatory remark had been made at the meeting.

    52.2. On 9 November 2018 there was an investigation meeting in which Mr Van Heerden interviewed Ms Baker. The notes of the meeting record Mr Van Heerden asking Ms Baker: "*Can you please find the CCTV footage referred to in his email of 7thNovember where he advises he was accused of being out partying/ being gay".* Ms Baker responds *"I have this saved and will send over to you. There is nothing in this footage."* In her oral evidence to the tribunal, Ms Baker confirmed that these notes were an accurate account of the exchange between her and Mr Van Heerden. Plainly, Ms Baker is representing that the footage exists, has been saved, that she has seen it and that it is innocent.

    52.3. However, in the grievance outcome letter, Mr Van Heerden says this *"Claire denies making any comment regarding your 'partying' lifestyle. I have found no evidence of this on CCTV and because I do not know when it occurred have been unable to narrow it down to seek the footage."* This is hard to reconcile with Ms Baker's remarks at the grievance investigation meeting.

    52.4. In cross-examination, Ms Baker was asked to explain how it is that Mr Van Heerden could not find the footage when she had told him what she had at the investigation meeting. She gave evidence on Day 2. Her explanation was that in the meeting with Mr Van Heerden, she had assumed that the footage existed and knew that it did not support the Claimant's case. She had gone too far in what she told Mr Van Heerden. At some point after speaking to him she tried to get the footage but it did not exist. She went to the Mayow clinic and discovered that the cable for the CCTV camera in the consultation room was not connected to the recording box under the stairs in the clinic. There was thus in fact never any footage. Even that explanation is not really consistent with what Mr Van Heerden says. However, it gets much worse.

    52.5. It was obvious that Ms Baker clearly struggled in cross-examination on day 2 in respect of the CCTV. On Day 3, the Respondent adduced new witness evidence from Ms Helen Wood. She produced a short statement explaining that she had viewed the footage of the review meeting in a response to a request from Mr Van Heerden in early November 2018. She said that it showed the Claimant being aggressive at the meeting and no comment relating to his sexual orientation. She also said that she had notified Mr Van Heerden of this in early November 2018.

    52.6. In light of this, the question was asked whether the footage still existed. The answer was that it did, in part, and a video clip running to about 6.5 minutes was disclosed on the morning of day 3 for the very first time. It was admitted in evidence and the tribunal was able to view it. The meeting does not begin immediately and thus only about three minutes of the meeting is captured. That which is captured sheds no light on the centrally disputed issues, save that contrary to the Respondent's case,

the Claimant is not aggressive and does not have his feet on the table.

52.7. In her oral evidence, Ms Wood said she was *sure* that she had either sent Mr Van Heerden the footage or given him an account of it in November 2018.

52.8. The review meeting lasted about half an hour. Ms Wood's evidence was that the only part of the footage that remained in existence now i.e., the clip that had been disclosed. The clip that was disclosed was made by Ms Wood using her mobile telephone in November 2018. She had played the footage on the Respondent's CCTV system and using her mobile recorded what was shown on the screen. That was because it was hard to move footage around directly from the CCTV system. Her work around was to record the footage on her mobile phone in several tranches. She said that the reason why only part of the footage remained was because she had upgraded her telephone various times since November 2018 and in the process of that the other videos that she took of the footage had been lost.

53. In our view the Respondent's various positions are self-evidently deeply inconsistent. The overall position is incoherent and deeply suspicious. We ask ourselves why that might be so. We are driven to the conclusion that there is something on the CCTV footage that the Respondent did not wish the Claimant to see and so it suppressed the footage. It is unclear whether the footage still exists even now but we are inclined to believe Ms Wood that the only footage she now has is the fragment she disclosed. It does not *necessarily* follow, however, that what is being covered up is a discriminatory remark – though that is plainly a real possibility.

54. We further note that it would be very odd for the Claimant to request this CCTV footage on 7 November 2018 and allege that it recorded a discriminatory remark if it did not.

55. However, we have, on balance, nonetheless come to the conclusion that Ms Baker did not make a remark about Claimant's sexual orientation for the following reasons.

56. On 26 October 2018, the Claimant resigned giving one week's notice. On 2 November 2018 he then raised a grievance complaining of many things including constructive dismissal. The features of the letter are important:

56.1. It was very detailed. It ran to 8 typed pages;

56.2. It is fair to say that the terms and tone of the letter did not pull punches. The Claimant directly impugned Ms Baker (by name) in numerous respects and did so in strident terms;

56.3. The letter did raise an allegation of sexual orientation discrimination. The issue it raised was as follows: "*the situation you have put me in today's caused me a great deal of stress and anxiety as well as flaring up other conditions I suffer with which the company are aware of, which could amount to disability and sexual orientation discrimination claim due to the medication I take to avoid contracting a particular life changing virus*". The tribunal appreciates that it can be difficult to raise an allegation of

discrimination. However, this shows that the Claimant was prepared to do so. But, the allegation of sexual orientation discrimination he raised then has nothing to do with the allegations of sexual orientation discrimination/harassment he has raised in these proceedings.

56.4. Later in the letter, he said this: *"you, Claire, have accused me before not being actually sick when I was so poorly I shouldn't even have come to work that day but you accuse me of being out all weekend; why did you do that? I have always felt you treat me differently and always question why."* This is especially significant because the Claimant in fact raises the issue that is the subject of the complaints in the tribunal proceedings of sexual orientation discrimination/harassment. However, when raising it in this letter he makes no suggestion that Ms Baker said anything about his sexual orientation when discussing his sickness/being out all weekend. Moreover, he indicates that he was left wondering why she treated him differently: he would not have been left wondering if Ms Baker had referred to his sexual orientation in the way now alleged. In our view, this is all a very powerful indication that Ms Baker had not referred to the Claimant's sexual orientation when speaking to him about his sickness/being out all weekend. If she had, the Claimant would surely have said so here, given that this was a letter in which he was elsewhere complaining of sexual orientation discrimination and constructive dismissal.

57. It is also notable that the Claimant had text message exchanges with three colleagues following the review meeting. They were candid, unguarded exchanges in which the parties to the messages liberally criticised the Respondent. The focus of the Claimant's fire was entirely on the score he received for client service (5/10). He and others considered this ridiculous. There was no reference to the sexual orientation matters now in issue. Again we think there would have been had the Claimant's sexual orientation been raised in the review meeting.

58. It is right to acknowledge that the Claimant later made the relevant allegations of sexual orientation discrimination/harassment on 7 November 2018 and thus relatively contemporaneously in an email to Mr van Heerden. That is a factor that operates in his favour, but nonetheless we hold to our view. We think that what has happened here is as follows:

58.1. In both January 2018 and October 2018, Ms Baker linked the Claimant's sickness absence to him being out all weekend / having a partying lifestyle.

58.2. Once the Claimant got seriously into dispute with the Respondent he ruminated on this. As the dispute progressed, he started to see the Respondent and Ms Baker in particular in the worst possible light (and likewise the Respondent began to see him in the worst possible light).

58.3. This influenced the Claimant's recollection of the incidents of January 2018 and October 2018, which once in dispute with Ms Baker he put down to sexual orientation.

58.4. We have asked ourselves whether we think the Claimant has deliberately made up the allegations of sexual orientation discrimination. We do not think he has – we think it a case of genuine mis-recollection on his part. His recollection of the incidents with Ms Baker darkened as his relationship with

the Respondent soured into entrenched dispute. Importantly, it is unlikely that he would have asked for the CCTV footage unless he genuinely believed it would support his allegations.

59. In our view, the CCTV footage was suppressed by the Respondent because it showed that the review had been conducted in an unfair way with no proper explanation given for the low scores received. It also showed that Ms Baker did make a remark linking sickness absence to the Claimant being out partying all weekend and it was considered that this lent credence to the Claimant's allegations about January 2018.

60. Returning to the narrative, as has been alluded to in the course of making findings about the meeting of 22 October 2018 above, the Claimant resigned on a week's notice on 26 October 2018. There were mixed reasons for this but they included the matters he relies upon in the constructive dismissal claim as significant factors.

61. On 31 October 2018, Ms Baker accepted the Claimant's resignation. She also indicated that he would be paid nil for October 2018 and the two days of November 2018. There were a number of reasons for this to which we return. The Claimant was sent a payslip showing various deductions and nil net pay.

62. The Claimant, raised his grievance on 2 November 2018. Mr van Heerden dealt with it, including by interviewing Ms Baker. He largely rejected the grievance in an outcome letter dated 4 December 2018. He accepted that there had been mistakes with some of the deductions but nonetheless that the Claimant's entitlement was nil.

Deductions

63. We find that for the period 1 October 2018 – 2 November 2018 the Claimant's gross entitlement to pay prior to any deductions was as follows:

    63.1. £5,416.67 (salary for October);
    63.2. £500 (salary for 1 – 2 November);
    63.3. £47.00 commission;
    63.4. Total: £5,963.67.

64. The Respondent made numerous deductions:

    64.1. Certificate course fees: initially it deducted the entire sum of the course fees which following negotiations with the course provider had been reduced to £4231.91 plus VAT of £846.38 = £5078.30. Mr van Heerden considered that the Respondent was only entitled to deduct 50% so in his outcome letter he said the sum deducted would be £2,500. However, the amended payslip shows that £2,633.80 was deducted. We find that this was done to ensure that the Claimant's pay was nil, rather than for any principled reason.
    64.2. £1,875.00 was deducted because the Claimant had taken 7.5 days of holiday in excess of his accrued entitlement. Based on Ms Baker's oral evidence to the tribunal, we find that the Claimant had taken 24.5 days leave.

He had accrued just over 16.5 days. So he had taken just under 8 days more than he had accrued.

64.3. £325 for "unpaid leave hours already received". The Respondent's explanation for this was incoherent. At times it was suggested that this had something to with the Claimant being paid normal pay when he should have been paid nil because on sick leave. At times it was suggested that it related to an advance the Claimant had been given. In her oral evidence Ms Baker was unable to explain this deduction. Mr Collyer was unable to explain it in closing submissions. Our finding of fact is that reason for the deduction is simply unexplained.

64.4. £240 for damages to the van.

Law

Constructive unfair dismissal

65. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed. That includes a right not be unfairly constructively dismissed (s. 95(1)(c) ERA).

66. The essential elements of constructive dismissal were identified in ***Western Excavating v Sharp*** [1978] IRLR 27 as follows:

> *"There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".*

67. It is an implied term of the contract of employment that: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (***Malik v BCCI*** [1997] IRLR 462).

68. It is for the tribunal to decide whether or not a breach of contract is sufficiently serious to amount to a repudiatory breach. However, a breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances: ***Morrow v Safeway Stores*** [2002] IRLR 9.

69. In ***Gogay v Hertfordshire County Council*** [2000] IRLR 703 upon the analysis of Hale LJ (as she was)**:**

69.1. The test for a breach of the implied term is a severe one [55].

69.2. Even if the employer acts in a way that is calculated or likely to undermine trust and confidence there is no breach of the implied term if the employer has reasonable and proper cause for what is done [53].

70. The implied term can be breached by a single act by the employer or by the combination of two or more acts: ***Lewis v Motorworld Garages Ltd*** [1985] IRLR 465.

71. Breach of the implied term must be judged objectively not subjectively. The question is not whether, from either party's subjective point of view, trust and confidence has been destroyed or seriously undermined, but whether objectively it has been. See e.g. ***Leeds Dental Team v Rose*** [2014] IRLR [25] and the authorities cited therein.

72. In ***Amnesty International v Ahmed*** [2009] IRLR 884, Underhill J gave importance guidance on the relationship between discrimination and constructive dismissal:

> *…The provisions of the various anti-discrimination statutes and regulations constitute self-contained regimes, and in our view it is wrong in principle to treat the question whether an employer has acted in breach of those provisions as determinative of the different question of whether he has committed a repudiatory breach of contract. Of course in many if not most cases conduct which is proscribed under the anti-discrimination legislation will be of such a character that it will also give rise to a breach of the trust and confidence term; but it will not automatically be so. The question which the tribunal must assess in each case is whether the actual conduct in question, irrespective of whether it constitutes unlawful discrimination, is a breach of the term defined in* Malik*. Our view on this point is consistent with that expressed in two recent decisions of this tribunal which consider whether an employee is entitled to claim constructive dismissal in response to breaches by the employer of his duty under the Disability Discrimination Act 1995: see* Chief Constable of Avon & Somerset Constabulary v Dolan *(UKEAT/0522/07) [2008] All ER (D) 309 (Apr), per Judge Clark at paragraph 41, and* Shaw v CCL Ltd *[2008] IRLR 284, per Judge McMullen QC at paragraph 18.*

73. The employee must resign in response to the breach. Where there are multiple reasons for the resignation the breach must play a part in the resignation. It is not necessary for it to be 'the effective cause'. See e.g. ***Wright v North Ayrshire Council*** [2014] ICR 77 [18].

74. In a constructive dismissal case, the reason for dismissal in such a case is the reason that the employer did whatever it did that repudiated the contract and entitled the employee to resign. See ***Beriman v Delabole*** [1985] IRLR 305 [12 – 13].

75. There is a limited range of fair reasons for dismissal, see s.98 Employment Rights Act 1996. Where there is a potentially fair reason for dismissal fairness must be decided by applying the test at s.98(4), which the tribunal reminds itself of. When applying that test, the tribunal must not substitute its own judgment for that of the employer but ask whether the employer's decision to dismiss was within the band of reasonable responses.

Equality Act 2010 complaints

- Direct discrimination

76. Section 13 EqA provides: *"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."* Sexual orientation is protected characteristic.

77. Section 23 EqA provides as follows:

> *(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 each person's abilities if – on a comparison for the purposes of section 13, the protected characteristic is disability…*

78. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

79. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

> *'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*
>
> *The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'*

80. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

> *'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'*

- Harassment

81. Section 26 EQA 2010 provides:

> (1) A *person (A) harasses another (B) if –*
> *(a) A engages in unwanted conduct related to a relevant 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 [for short we will refer to this as a "proscribed environment"].*
> *…*
> *(4) In deciding whether conduct has the purpose or 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."

82. ***In Weeks v Newham College of Further Education*** UKEAT/0630/11/ZT, Langstaff J said this at [21]:

> *"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 office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."*

83. In ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336 (at ¶15), Underhill J (as he was) said:

> 15…*A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard….Whether it was reasonable for a Claimant to have felt her dignity to be 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. One question that may be material is whether it should reasonably have been apparent*

whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."

22…We accept that not every racially slanted 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. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"

84. A finding that it is not objectively reasonable to regard the conduct as harassing is fatal to a complaint of harassment. That point may not be crystal clear on the face of s.26 Equality Act 2010 but see the *obita dicta* of Underhill LJ in ***Pemberton v Inwood*** [2018] IRLR 557 at [88] and the ratio of ***Ahmed v The Cardinal Hume Academies***, unreported EAT Appeal No. UKEAT/0196/18/RN in which Choudhury J held that ***Pemberton*** indeed correctly stated the law [39].

85. In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic of disability, the Tribunal has to ask itself whether, objectively, the remark relates to the Claimant's disability. The knowledge or perception by the person said to have made the remark of the alleged victim's disability is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The Tribunal should look at the evidence in the round (per HHJ Richardson in ***Hartley v Foreign and Commonwealth Office Services*** UKEAT/0033/15/LA at [24-2].)

86. In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (***Unite the Union v Nailard*** [2018] IRLR 730 at [80]).

87. In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 HHJ Auerbach gave further guidance:

[21] Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.

> *[24] However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.*
>
> *[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.*

Burden of proof and inferences

88. ***Igen v Wong*** [2005] IRLR 258 and ***Madarassy v Nomura International PLC*** [2007] ICR 867 are the leading cases on the burden of proof. These cases, the tribunal accepts and directs itself, authoritatively explain how the burden of proof operates. The tribunal considered in particular the annexe to the judgment in ***Igen*** which spells the matter out and was endorsed by the Court of Appeal again in ***Madarassy***. In ***Madarassy*** the Court of Appeal emphasised that a difference of treatment and a difference of protected characteristic status is not enough to shift burden of proof of itself. It gives rise to a mere possibility of discrimination.

89. In ***Deman v Commission for Equality and Human Rights Commission & others*** [2010] EWCA Civ 1279, Sedley LJ (giving the judgment of the court) said this:

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

90. Thus where there is a difference of treatment and a difference of status it does not take much more to shift the burden of proof.

91. In a complaint of failure to make reasonable adjustments the Claimant has the burden of proving that the PCP, physical feature or failure to provide auxiliary aid, would put him at a substantial disadvantage compared to others who are

not disabled. The burden does not shift unless there is evidence of some apparently reasonable adjustment which could have been made. This does not necessarily mean providing the detailed adjustment but at the least requires the broad nature of the adjustment to be clear enough for the Respondent to understand and engage with it. See ***Project Management Institute v Latif*** [2007] IRLR 579.

92. However, discrimination cases do not always turn on the burden of proof provisions. In ***Hewage v Grampian*** [2012] IRLR 870, Lord Hope said this:

> "*It is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other*".

93. The tribunal reminds itself that direct evidence of discrimination is rare and that discrimination is often sub-conscious. For this and other reasons establishing discrimination is usually difficult and tribunals should be prepared, where appropriate, to draw inferences of discrimination from the surrounding circumstances or any other appropriate matter. These points are made, in among other places, ***Amnesty International v Ahmed*** [2009] ICR 1450.

94. In ***Anya v University of Oxford*** [2001] ICR 847 the Court of Appeal emphasised that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts. The Tribunal should consider indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by unlawful factors.

Unauthorised deduction from wages

95. By s.13 Employment Right Act 1996, the employer may not make deductions from the wages properly payable to the employee save in accordance with a statutory provision, in accordance with the terms of the employee's contract or in accordance with a written agreement/consent made in advance of the deduction.

96. Certain deductions are excepted from the foregoing, including the overpayments of wages (see s.14).

Discussion and conclusions

97. As a matter of background, we start by recording our view that there is no significance to the fact that the Claimant did not sign either contract of employment he was sent. He agreed to the terms of the first and then second

contract by receiving the documents, raising no objection to their terms and continuing in the Respondent's employment thereafter.

Constructive dismissal

98. In our view the Respondent was indeed in breach of the implied term of trust and confident.

99. The breach arose through the cumulative effect of the following matters:

99.1. The target of £13,000 was in some respects unrealistic. When the surgery was fully staffed it was realistic and indeed it was designed with that level of staffing in mind. When the surgery was not fully staffed the target was not always realistic. It would depend on how short staffed the surgery was. The target was never amended to reflect staffing difficulties and there was always pressure to meet the target. The Claimant felt this pressure and it was objectively reasonable for him to feel it:

99.1.1. Management set a lot of store by the target and it was constantly monitored.
99.1.2. It had some impact on pay.
99.1.3. It had some impact on standing within the business.

99.2. The desire to meet the target drove the Claimant to work very hard at times, including long days with no breaks at all. His messages to Ms Baker on 15 August 2018 encapsulate how this affected him. If the target was not met there would be a demand for an explanation as to why and with it, at the least, implied criticism for not meeting the target.

99.3. We have found that between March 2018 and July 2018, the burden of work fell significantly more heavily on the Claimant because his colleague was pregnant and unable to fulfil all of her duties (x-rays and dental work). This added materially to the Claimant's workload.

99.4. We have also found that the clinic was short staffed on the dates identified on the list of issues. This added to the Claimant's workload considerably and made it much more difficult for him to get through his work.

99.5. On 3 October 2018, a colleague assisting the Claimant was sent to the Streatham hospital. There proved to be no work for her there. The Claimant was left short staffed at the Mayow clinic. However, as set out in the findings of fact there were good reasons for this. It was anticipated that the greater need for this colleague was at Streatham. In the event, Streatham was less busy than anticipated. It is not possible to always predict how busy a clinic will be. Best guesses need to be made and that is what happened here.

99.6. On 22 October 2018, the Claimant was in effect required to be on a house call and in clinic at the same time. He was then criticised for cancelling the house call (non-emergency, a parrot that needed its nails cut) to attend

an emergency admission at the clinic. Not only was he criticised verbally, but it was also the only reason given for a low score (see below).

99.7. The review meeting of 22 October 2018 was unfair. The Claimant was given a very low score, 5/10, for customer service which was until then regarded as one of his greatest assets. He prided himself on providing good client service and it was part of his identity as a vet (which was his vocation as much as his job) to do so. In so far as the score was explained at all, it was an irrational explanation. It was given because the parrot's owner complained that the home visit was cancelled. The owner had a legitimate basis for the complaint, but in the circumstances it could not possibly rationally reflect poor customer service *on the Claimant's* part. He was also given a score of 4/10 for flexibility and team work. This was not explained. Further, it was suggested to him that his sick leave related to having a party lifestyle (though no reference to his sexual orientation was made or implied). This was unfair.

100. In our view taken all together these matters were sufficiently serious, objectively, to seriously damage and undermine the relationship of trust and confidence.

101. The staffing issues protracted over a significant period of time and Ms Baker's assurances that they would be resolved largely did not materialise. These matters had a deep impact upon the Claimant's life which he repeatedly explained to Ms Baker and other managers in text messages set out above.

102. That is important context for what then happened on 22 October 2018. The review meeting was extremely unsympathetic and the Claimant was given two very low scores with almost no explanation, and, such explanation as there was, was totally unfair and irrational. He asked for the scores he was given to be further explained but this was stonewalled and the scores simply asserted. Mr Walker was dismissive in this meeting and did not consider that the Claimant had the right to an explanation for, or to challenge, his scores. On the contrary, he regarded the Claimant's inquiries about that as the Claimant being inappropriately confrontational.

103. It was also offensive to suggest that the Claimant was the author of his misfortune in respect of his sick-leave.

104. We have asked ourselves whether the Respondent had reasonable and proper cause for the conduct that undermined trust and confidence. We consider that it did not:

104.1. We are sympathetic to the fact of staffing problems and accept that some staffing problems inevitably arise especially in this sector. However, the staffing problems are nonetheless very important in the analysis of reasonable and proper cause – because it is management's duty to effectively manage them. This did not happen.

104.2. It is notable that the financial target was never amended at all during the Claimant's employment. It did not respond or move according to staffing

levels and this meant the pressure to meet it was always there including in periods when it became an unrealistic target because of short staffing. If there was a good explanation as to why the target could not move in response to the situation on the ground that would be one thing; but there has been no explanation. Absent an explanation in our view it was unfair (without reasonable and proper cause) to impose the self-same target on the Claimant regardless of staffing levels (vets/receptionists/nurses). Not even simple steps, such as assuring the Claimant that the target need not be met when the practice was significantly short staffed, were taken.

104.3. Nothing was done beyond lip-service and the very occasional ad hoc action, to moderate the diary during periods of short staffing. Importantly, there was no system in place to prevent the diary being overly busy when short-staffed despite the problem protracting and being raised many times. Good intentions were stated on a few occasions, but no system was put in place to ensure that in practice the diary was not overbooked when the clinic was short staffed. Instead, it routinely got booked up as if the Claimant was "invincible". The working hours Ms Baker indicated were proper ones (2 hours consulting in the morning, 2.5 hours for surgery and 2 hours consulting in the afternoon) were 'pie in the sky' – they were simply unachievable. In short, much more could have reasonably and properly been done to manage the diary in response to staffing issues;

104.4. There was no reasonable and proper cause for criticising the Claimant in respect of the cancelled house visit to the parrot. The emergency at the surgery was clearly the priority. The Claimant had flagged the problem of leaving the surgery without a vet if he did the house visit but was told nonetheless to do it. It was remarkable that he was later criticised for providing poor customer service when the problem he had anticipated occurred;

104.5. There was no reasonable and proper cause for failing to give the Claimant an explanation for the scores of 4/10 and 5/10 in the review meeting nor to dismiss his concerns about the lack explanation for the same. Nor was there reasonable and proper cause to imply that he was the author of his own sick leave through his lifestyle.

105. The Claimant affirmed his contract in May 2018 when he accepted a pay-rise and withdrew his resignation. However, the staffing problems continued thereafter and the review meeting of 22 October 2018 was an apt final straw (contributing as it did, to the breach).

106. We find that the Claimant did resign in response to the breach and did so shortly after the final straw with no delay, affirmation or waiver after the final straw. He was therefore (constructively) dismissed.

107. The Respondent has not pleaded any reason for the dismissal and we find on that basis that there was no potentially fair reason for the dismissal. If we were wrong to do that we would find that the reason or the principal reason for the dismissal was conduct. The Respondent considered that the Claimant had developed a poor attitude, had been inflexible and provided poor client service.

108. The dismissal on any view was unfair. There was no sufficient basis to dismiss the Claimant by reason of conduct (or any reason) and no procedure that could begin to be described as fair (within the band of reasonable responses) was followed.

Discrimination/harassment

109. We have found as a fact that Ms Baker did not make the comments that she is alleged to have made linking the Claimant's sick-leave to his sexual orientation.

110. In our view the comments that Ms Baker did make about the Claimant's lifestyle not only did not expressly refer to his sexual orientation, they also did not implicitly do so either.

111. The Claimant's sexual orientation was a matter of complete irrelevance to what Ms Baker said and she was not influenced consciously or sub-consciously by the Claimant's sexual orientation. She simply did not associate the Claimant going out all weekend or partying with his sexual orientation at all.

112. We reach the above conclusion having stood back from all of the evidence and acknowledged that discrimination is usually hidden and/or subconscious. We so no basis for inferring discrimination or any relation between the comments that were made and sexual orientation.

113. All though not of itself decisive, we note that Ms Baker's relationship with the Claimant was very good and even friendly save at the bitter end. She was well aware that he was gay and for her this was simply an unremarkable fact about the Claimant that was of no relevance at all to his sick-leave.

Notice pay

114. The Claimant was constructively dismissed. He was entitled under his contract to two week's notice (clause 35), of which he was only paid for one. He is entitled to a further payment of a week's notice.

Deductions from wages

115. The Respondent's position in respect of course fees developed over the trial. It's final position was that it was entitled to deduct 50% of the final invoice for the fees excluding VAT (since the VAT could be retained). On any view, then, there was an unlawful deduction in respect of course fees.

116. It is clear that the Claimant is liable for 50% of the course fees (and he accepted that in his closing submissions). However, that does not of itself mean that the Respondent was entitled to deduct the course fees from the Claimant's wages or do so in one hit. It could only do so if this were provided by the Claimant's contract or otherwise he had agreed/consented to the *deduction* in writing in advance of it being made.

117. In this case, if the Respondent was entitled to make the deduction that would have to be because of the terms of the contract rather than any other written agreement/consent because there is no other potential agreement/consent in writing.

118. In closing submissions, the tribunal asked Mr Collyer of the basis on which the Respondent submitted it was entitled to make the deduction. He referred to this, the second paragraph of clause 31 of the Claimant's contract:

"Whilst in employment at the Surgery, with the agreement of the Management, the Surgery will support you with a 50% contribution towards a certificate qualification".

119. We pointed out that this indicated that the Claimant would be responsible for 50% of the fees, but not that a deduction could be made from his wages to recover it.

120. The tribunal then asked Mr Collyer whether the Respondent relied on the preceding paragraph of clause 31, which reads as follows:

> *The company supports CPD as required by your relevant governing body. Course details and fees are subject to the prior approval of the company. It is an absolute requirement that you obtain authorisation from your line manager before booking any training and/or courses. You are allowed up to 5 days per calendar year to enable you to fulfil relevant training. Should your employment be terminated by either party, then any current or future appointments to the CPD will cease with immediate effect. For training courses which have already been paid for prior to notice being given by either party, the company reserves the right to seek reimbursement from final salary. [emphasis added]*

121. He indicated that it did not.

122. The tribunal then took Mr Collyer to clause 23 and asked if he relied upon it. Initially he said he did not. However, after some discussion he indicated that on reflection he did. It provides as follows:

> *23. TRAINING AND TRAINING COURSES*
>
> *The company is committed to training all employees and as such regular in-house training will take place. From time to time you may be required to undergo training courses at the company's expense and you will be expected to attend such courses when required to do so. It is a condition of your employment that you will be required to refund the company with the full costs of this training (including the costs of the training course, administration and / or registration fees, training material or other associated costs of training) in any of the following situations:*
>
> - *Withdraw from the training within 12 months of commencing the training*
> - *Fail to attend the training within 12 months of commencing the training*
> - *Fail to complete the training*

- *Cease to be employed by the company (howsoever caused, including your resignation or your dismissal by the company) within 12 months of completion or the commencement of the training*

The company reserves the right to deduct any monies owed by you from either your salary or final salary.

123. In our view the Respondent was not entitled to rely on either clause 23 or clause 31.

124. Clause 23 deals with mandatory training that the Respondent requires the employee to attend. This Certificate was not such a course. It was a course which was entirely voluntary it being a matter entirely for the Claimant whether he undertook it or not. This is not a mere technicality. It is significant because this course, whose full fees exceeded £10,000, was completely outside the normal range. It was not the type of course that the Respondent would make mandatory for employees and not the type of course that objectively speaking, the parties had in contemplation when agreeing clause 23.

125. In our view, essentially the same point applies in respect of clause 31. The first paragraph of that clause is not, objectively speaking, contemplating or referring to the Certificate qualification. It is referring to ordinary CPD activities which are of a totally different order to the Certificate qualification. This is a real distinction because, again, ordinary CPD activities do not cost anything like £10,000. Usually the cost is modest.

126. In our view, when the contract of employment was entered, all that was agreed in relation to the certificate was that the Respondent would pay for half of it. At that point there was no agreement that the Respondent would pay the Claimant's share in advance. Nor any agreement that any of the cost of the course could be deducted from the Claimant's wages. This therefore left the full terms to be worked out later.

127. In 2017, the Respondent decided to pay the Claimant's share of the fees upfront. It was clear that the Claimant would have to pay this back, however it is also clear that:

127.1. the agreement was that this would happen over an extended period of time in instalments;
127.2. there was no agreement, written or otherwise, that any part of the fees could be deducted from the Claimant's wages.

128. Thus, while we accept that the Claimant is liable for 50% of the course fees, we do not accept that the Respondent was entitled to deduct that sum from his wages.

129. Turning to the deduction in respect of damages to the Claimant's vehicle. This was unlawful. The Claimant's contract provided, at clause 15:

15. DEDUCTIONS FROM WAGES
The company may deduct monies from your wages in respect of: […]

Any cost of repairing damage to, or loss of property. fines or charges imposed upon, or any other loss sustained by the company (or any third party), caused by your breach of contract, breach of the company's rules, or as a result of negligence or dishonesty on your part.

130. There is no evidence that the Claimant's vehicle was damaged by any breach of contract, company rules, negligence or dishonestly. There is no evidence in fact about how, when or by whom it was damaged, nor what the damage was.

131. The sum of £325 was deducted for reasons that are unexplained. That was unlawful.

132. The deduction of £1,875 on account of holiday taken in excess of entitlement were lawful. They were in accordance with clause 17 which provided: *Should holiday taken already exceed your accrued entitlement, you will be required to refund an amount equivalent to the number of days' holiday by which you have exceeded your entitlement. This sum may be deducted from your final salary.*

133. In conclusion, then, whereas the Claimant was paid nil, he ought to have been paid the gross sum of £5,963.67 (see findings of fact for basis of this figure) minus £1,875 = £4,088.67. His wages were unlawfully deducted in that sum.

Conclusion

134. The matter will now be listed for a remedy hearing.

_____

Employment Judge Dyal

_____

Date 13.08.2021