EMPLOYMENT TRIBUNALS

Claimant Mr G Grover

Respondent **v** Garden Care Services (Dunstable) Ltd t/a The Secret Sanctuary

Heard at: Watford in person **On:** 13 to 15 July 2021

Before: Employment Judge Quill
Members: Ms L Thompson
Mr D Wharton

Appearances:
For the Claimant: Mr T Goodwin, counsel
For the respondent: Mr M Dance, friend of directors

JUDGMENT dated 19 July 2021 (having been given orally on 15 July 2021) was sent to the parties on 18 August 2021 and reasons having been requested, on 31 August 2021, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims

1. The Claimant brought the following claims

    a. Unfair dismissal.

    b. Direct discrimination.

    c. Discrimination arising from a disability.

    d. Failure to make reasonable adjustments.

    e. Harassment related to disability.

    f. Failure to pay accrued holiday on termination.

    g. Unauthorised deductions from wages.

    h. Breach of contract / wrongful dismissal (notice pay).

    i. Failure to provide a compliant statement of terms and conditions.

Issues

2. We had to decide the start and end date of the Claimant's employment. In particular, we had to decide whether (as alleged by the Claimant), he

commenced employment in April 2017, being paid in cash, or whether (as alleged by the Respondent) he had no period of continuous employment prior to May 2018. (The Respondent's argument being that prior to May 2018, the Claimant's involvement was informal and voluntary, helping out from time to time, on an ad hoc basis, as a friend of the family and because he enjoyed being around the animals.). We had to decide if the Claimant had 2 years' continuous service by the effective date of termination.

3. The detailed list of issues was paragraphs 5.1 to 5.30 at pages 2 to 8 of hearing bundle (7 being a duplication of 6) having been agreed at a preliminary hearing on 1 October 2020. We went though this list with the parties at the outset of the hearing and it was still correct.

Hearing and Evidence

4. This was a 3 day in person hearing.

5. The bundle was slightly more than 400 pages, and we also took into account some additional documents, being copies of extracts from the Claimant's bank statements.

6. The bundle prepared by the parties incorrectly identified which document(s) had been submitted as the Respondent's initial and amended response. For the reasons which we gave at the time, and based on the contents of the tribunal file, we informed the parties of which documents contained the actual response to the claim and declined to allow a further amendment.

7. For the reasons which we gave at the time, we declined the Claimant's application (made at the outset of the hearing) that we refuse to hear the oral testimony of some of the Respondent's witnesses on the grounds of alleged lack of relevance (amongst other things).

8. For the reasons which we gave at the time, we declined the Claimant's application (made at the outset of the time set aside for oral submissions from the parties) that we refuse to take into account parts of Mr Dance's (the Respondent's lay representative) written submissions.

9. We heard from the following witnesses for the Claimant:

    a. Ms Nicole Walton

    b. The Claimant

    c. Mr Graham Grover (the Claimant's brother)

    d. Mr Marc Darton

    e. Mr Kevin Holden

    f. Ms Elizabeth Braiden

10. We heard from the following witnesses for the Respondent:

    a. Ms Nichola Clark

b. Ms Jacqueline Jones

c. Mr Imran Khan

d. Mr Mike Dance (who also acted as representative during the hearing)

11. In addition, we took into account the further document which were described as witness statements which were provided, giving them such weight as we saw fit in all the circumstances, including the format.

Facts

12. The directors of the respondent company are a married couple, Mr Kevin Claridge and Ms Michelle Claridge. Neither of them gave evidence at the hearing. Ms Claridge attended each day (and, with the tribunal's permission, spoke to the panel to clarify matters where the representative, Mr Dance, was unsure) and Mr Claridge did not attend.

13. The Claimant's evidence on several relevant points was therefore not contradicted by the only other person or persons (Mr Claridge or Ms Claridge or both) who was present for the event or conversation in question.

14. Ms Walton and Ms Braiden give their opinions about the Claimant and whether he has an impairment that affects him (and since when). The Claimant's brother does likewise, and also reports some information which he says his brother supplied to him.

15. Mr Langdon's evidence (a witness called by the Claimant) and the answers he gave to questions, including from panel, was relevant in relation to whether the Claimant was working as an employee for the Respondent between May 2017 and May 2018. During that period, the Claimant was employed by Mr Holden's business and worked on a rota doing shifts which could be either starting 7.30am and finishing 2pm, or else starting 2pm to and finishing 7.30pm. The pattern was 12 days on 2 days off, with the days off being alternate weekends.

16. Marc Darton owns a business which sells animals. From 2017 onwards, Mr Darton had some dealings with the Claimant buying items on behalf of the Respondent. From that date onwards, Mr Darton saw the Claimant wearing the uniform of Secret Sanctuary and using the company credit card when buying items. On some occasions the Claimant was by himself, and on others, the Claimant was with Mr Claridge.

17. Ms Clark (a former work colleague of the Claimant's for another employer, not the Respondent) and Ms Jones (Ms Claridge's sister) and Mr Khan (a customer of the Respondent's) gave their opinions about the Claimant and his work based on their interactions with him. Their evidence was not relevant to the issues that we had to decide.

18. Mr Dance gave evidence that he is a close neighbour of the Claridges and their business and (a) that he is sure that he would have been aware every time (or almost every time) that the Claimant attended and (b) he is sure that the Claimant did not attend often, and did not spend long on each visit, prior to May 2018. He bases his certainty on (i) the fact that he has alarms which

alert him to movement near to his house (and on the only route in or out of the Respondent's premises) and cameras covering that route which he checks every time the alarm sounds, and also that he believes that the Claimant, when visiting, would park his vehicle where Mr Dance could see it.

19. We will discuss our findings of fact, and the reasons for accepting or rejecting the Claimant's evidence, as we go through our analysis.

Law

Definitions of "employee" and "worker"

20. Section 230(1) of the Employment Rights Act 1996 ("ERA") states: "employee means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contact of employment". A contract of employment is defined at s.230(2) as "a contract of service or apprenticeship, whether express or implied (and if it is express) whether oral or in writing".

21. If there is no contract at all between the parties, then the claimant cannot be an employee. For a contract to be formed, there has to be offer, acceptance, an intention to create legal obligations, and certainty. The contract does not necessarily have to be in writing in order to be binding. If there is a contract, the tribunal has to decide if it is a contract of employment or not.

22. A number of different tests have been over the years in order to determine whether an individual is employed under a contract of service and is thus an employee, or whether they have been engaged under some other type of contract. The decision in a given involves weighing all these factors – some might point towards the contract being one of employment, and some might not. However, what was called the "irreducible minimum of obligation" for an employment contract to exist (see (**Nethermere (St Neots) Ltd v Gardiner [1984] I.C.R. 612**) is that there be sufficient control by the Respondent, a mutuality of obligation, and an agreement by the Claimant to do the work personally.

    a. The necessary degree of control to be exercised by the employer for a contract of employment to be found is discussed in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 Q.B. 497**;

    b. The factors relevant to the decision about whether mutuality of obligation exists between the parties include whether the employer is obliged to provide work and the individual is obliged to accept it (**Carmichael v National Power Plc [1999] 1 W.L.R. 2042**)

    c. An individual is required to perform the contract personally if no right of substitution exists to allow the individual to send someone else in their place. If there is a clause in a written document which purports to give a right of substitution, there might still be a finding that the employee had agreed to do the work personally if, in reality, the parties never intended that there would be substitution.

Definition of Disability

23. The statutory provisions are to be found in the Equality Act 2010 ("EqA"). Section 6 provides the statutory definition of disability. In part, it states:

> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> (2) A reference to a disabled person is a reference to a person who has a disability.

24. Schedule 1 contains supplementary provisions relating to the determination of disability. Sub-paragraphs 2(1) and 2(2) of the Schedule provide:

> (1) The effect of an impairment is long-term if—
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c)it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

25. Sub-paragraphs 5(1) and 5(2) of Schedule 1 provide:

> (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
>
> (a) measures are being taken to treat or correct it, and
>
> (b) but for that, it would be likely to have that effect.
>
> (2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

26. In summary, there are 4 matters which the tribunal must consider:

    a. Whether the Claimant has a physical or mental impairment;

    b. Whether the impairment affects the person's ability to carry out normal day-to-day activities.

    c. The effect on such activities must be 'substantial' which means more than trivial

    d. The effects must be 'long term'

27. The third and fourth of these matters - long-term and substantial – can be analysed separately but it is also important to bear in mind that they are inter-connected. The substantial effects must also be long-term.

28. In **Walker v Sita Information Networking Computing Ltd** [2013] the EAT, emphasised that when considering whether or not an individual is disabled the ET must concentrate on the question whether he or she has a physical or mental impairment; the *cause* of the impairment, or absence of apparent cause, is not of zero significance, but its significance is evidential rather than legal. In other words, a cause identified by a medical expert might corroborate that the impairment exists, and the lack of such a proven cause might lead the tribunal o conclude that the Claimant does not genuinely suffer from the impairment. However, if satisfied of the genuineness of the symptoms then lack of a specific diagnosis of the cause does not mean that the Claimant had failed to prove "impairment".

29. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Activities which are not performed by the majority of the population might still be day to day activities, and activities which are usually performed only in connection with work – such as attending an interview, or maintaining a shift pattern – can potentially be considered day to day activities.

Time Limits for Equality Act complaints

30. Section 123 of EA 2010 states (in part)

> (1) Subject to sections 140A and 140B 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.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.

31. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in **Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686**; [2003] ICR 530); **Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548**. Applying that guidance, the Court of Appeal has noted that in considering whether separate

incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: **Aziz v FDA 2010 EWCA Civ 304**. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed

32. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion. The factors that may helpfully be considered include, but are not limited to:
    a. the length of, and the reasons for, the delay on the part of the claimant;
    b. the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;
    c. the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

Burden of Proof for Equality Act complaints

33. Section 136 of the Equality Act deals with burden of proof and is applicable to all the Equality Act claims in this action. Section 136 of EA 2010 states (in part):

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (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.

34. Section 136 requires a two stage approach:

    a. At the first stage the tribunal considers whether facts have been proven (on the balance of probabilities) from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the contravention has occurred. At this stage it would not be sufficient for the Claimant to simply prove that what he alleges happened did, in fact, happen. There has to be some evidential basis upon which the tribunal could reasonably infer that the proven facts did amount to a contravention. That being said, the

tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate.

b. If the Claimant succeeds at that first stage, then that means that the burden of proof has shifted to the respondent and that the claim must be upheld unless the respondent proves that the contravention did not occur.

35. Section 136 does not require the Respondent to prove that alleged incidents did not happen. The tribunal makes its findings in the usual way (including based on the testimony and documents provided by the Respondent's side).

Harassment

36. Section 26 of the Equality Act defines harassment. It states (in part):

> (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.

37. Disability is a relevant characteristic for the purposes of section 26. The facts needs to establish - on the balance of probabilities - that the Claimant has been subjected to "unwanted conduct" which has the "the prohibited effect". To succeed, in a claim of harassment, it is not sufficient for a claimant to prove that the conduct was unwanted or that it has the purpose or effect described in Section 26(1)(b) Equality Act 2010. The conduct also has to be related to the particular protected characteristic (in this case disability). However, because of section 136, the claimant does not necessarily need to prove - on the balance of probabilities - that the conduct was related to the protected characteristic. To shift the burden of proof, we would need to find facts from which we can infer that the conduct could be so related.

38. In **HM Land Registry v Grant 2011 ICR 1390**, the court of appeal stated that – when considering the effect of the conduct, and taking into account section 26(4) – it was important not to "cheapen" the words used in section 26(1). It

said.

> *Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. … to describe this incident as the Tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.*

39. When assessing the effects of any one incident which is one of several incidents, it is not sufficient to consider each incident by itself in isolation. The impact of separate incidents can accumulate and the effect on the work environment may exceed the sum of the individual episodes. In **Qureshi v Victoria University of Manchester**, the EAT warned against taking too piecemeal an approach to the analysis of a set of incidents which were each said to amount to harassment or discrimination. Taking the allegations as a whole (as well as considering each individually) is necessary not just when assessing the effect of the Respondent's conduct on the claimant, but also when deciding whether to draw inferences that the unwanted conduct (or any of it) was related to race.

Direct Discrimination

40. In relation to direct discrimination s.13 of the Equality Act states that a person A discriminates against another B if it is because of a protected characteristic A treats B less favourably than A treats or would treat others.

41. The characteristics of which are protected under s.13 include disability and include sex and include race. So, the definition in s.13(1) incorporates two elements; whether A has treated B less favourably than others ("the less favourable treatment question") and whether A has done so because of the protected characteristic ("the reason why question"). So, for the first of these, the less favourable treatment question, the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about the circumstances of a hypothetical comparator (taking into account the requirements of section 23 of the Equality Act 2010). However, the two questions are intertwined, sometimes the Tribunal will approach the reason why question first. If the Tribunal decide the protected characteristic was not the reason, even in part for the treatment complained of then it will necessarily follow that the person whose circumstances were materially different to the claimants would have been treated the same. There is no need, in that case to undertake the task of constructing a hypothetical comparator.

42. When we consider the reason that the claimant was treated in a particular way and/or the reason for different treatment to the claimant and that of a comparator we must consider whether the treatment was because of a protected characteristic or not. That means we must analyse both the conscious and the subconscious mental processes or motivations for actions and decisions. Again, s.136 of the Equality Act regulates the burden of proof. Whether the comparator that is used, if one is used, is an actual person or a hypothetical person the comparator's circumstances must be the same as the claimants, other than the protected characteristic in question.

43. In relation to comparators in relation with disability the EHRC Code gives useful guidance. Paragraphs 3.29 and 3.30 in particular, and the example which follows:

> *3.29 The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).*
>
> *3.30 It is important to focus on those circumstances which are, in fact, relevant to the less favourable treatment. Although in some cases, certain abilities may be the result of the disability itself, these may not be relevant circumstances for comparison purposes.*
>
> *Example: A disabled man with arthritis who can type at 30 words per minute applies for an administrative job which includes typing, but is rejected on the grounds that his typing is too slow. The correct comparator in a claim for direct discrimination would be a person without arthritis who has the same typing speed with the same accuracy rate. In this case, the disabled man is unable to lift heavy weights, but this is not a requirement of the job he applied for. As it is not relevant to the circumstances, there is no need for him to identify a comparator who cannot lift heavy weights.*

44. In relation to disability, in this case the claimant relies on a mental impairment and therefore the relevant comparator would have to be somebody who did not have that condition. Thus, if we find that the reason for particular treatment of the claimant was that the claimant was absent from work, for example then the relevant comparator would have to be someone who was also absent from work for a similar amount of time but who did not have the same particular mental impairment.

Discrimination arising from disability

> Section 15 EA 2010 states
>
> (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.

45. The elements that must be made out in order for the claimant to succeed in a S.15 claim are:
    a. there must be unfavourable treatment;
    b. there must be something that arises in consequence of the claimant's disability;
    c. the unfavourable treatment must be because of (in other words, caused by) the something that arises in consequence of the disability, and

d. the alleged discriminator cannot show at least one of the following:
    i. that the unfavourable treatment was a proportionate means of achieving a legitimate aim AND/OR
    ii. that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability.

46. The word "unfavourably" in Section 15(1) EA 2010 is not separately defined by the legislation and must be interpreted consistently with case law and taking account of the Equality and Human Rights Commission's Code of Practice on Employment.

47. The section does not require the disabled person to show that his or her treatment was less favourable than that experienced by a comparator.

48. Dismissal can amount to unfavourable treatment, as could treatment which is much less disadvantageous to an employee than dismissal. However, it does not follow that there has been unfavourable treatment merely because a Claimant can prove that they genuinely believe that they should have had better treatment.

49. There is a need to consider two separate steps when considering causation. One is that the disability had the consequence of "something" (which is an objective test); the second is that the claimant was treated unfavourably because of that "something" (which requires consideration of the decision-maker's thought process and motivation, both conscious and subconscious).

50. When considering whether the claimant was treated unfavourably because of that "something", the "something" need not be the sole reason for the treatment, but it must be a significant, or more than trivial, reason. It does not matter if the employer was unaware that the "something" was connected to the person's disability.

51. A complaint of discrimination arising from disability will not succeed if the Respondent is able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim relied upon should be legal, should not be discriminatory in itself and must represent a real, objective consideration. Business needs and economic efficiency may be legitimate aims, but simply demonstrating that one course of action was less costly than another may not be sufficient.

52. In relation to proportionality, it is not necessary for the Respondent to go as far as proving that the course of action which it chose to follow was the only possible way of achieving the legitimate aim. However, if less discriminatory measures could have been taken to achieve the same objective, then that might imply that the treatment was not proportionate. It is necessary to carry out a balancing exercise which takes into account the importance (to the Respondent) of achieving the legitimate aim, and the means adopted to pursue that aim, in comparison to the discriminatory effect of the treatment. It is unnecessary that the Respondent demonstrate that it had itself carried out the necessary balancing exercise; what matters is that the tribunal carries out that exercise, based on the evidence presented at the tribunal hearing. If a Respondent employer has failed to make a reasonable adjustment which

would have prevented or minimised the unfavourable treatment, it will be very difficult for that Respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

53. Section 20 EA 2010 says, in part

> (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.
>
> …
>
> (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
>
> (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

54. Section 21 EA 2010 says, in part

> (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.

55. Paragraph 20 of Schedule 8 states (in part)

> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> (b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

56. The expression “provision, criterion or practice” (“PCP”) is not expressly defined in the legislation, but we must have regard to the guidance given by the Equality and Human Rights Commission’s Code of Practice on Employment to the effect that the expression should be “construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions” and that it “may also include decisions to do something in the future” and even one-off or discretionary decisions.

57. The Claimant must clearly identify the PCPs to which it is asserted adjustments ought to have been made. We must only consider those PCPs as identified by the claimant. See **Secretary of State for Justice v Prospere EAT 0412/14**.

58. When considering whether there has been a breach of Section 21, we must precisely identify the nature and extent of each disadvantage to which the claimant was allegedly subjected. Furthermore, we must consider whether there is a substantial disadvantage when the relevant (alleged) PCP is applied to the Claimant in comparison to when the same PCP is applied to persons who are not disabled.

59. The claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred that the duty may have been breached. If he does so, then we need to identify the step or steps, if any, which the Respondent could have taken to prevent the claimant suffering the disadvantage in question. If there appear to be such steps, the burden is on the Respondent to show that the disadvantage would not have been eliminated or reduced by the potential adjustment and/or that the adjustment was not a reasonable one for it to have had to make.

60. There is no breach of section 21 if the employer did not know, and could not reasonably have been expected to know, that the Claimant had the disability. Furthermore, in relation to a particular disadvantage, there is no breach of section 21 if the employer did not know, and could not reasonably have been expected to know, that the PCP would place the Claimant at that disadvantage.

Unfair dismissal

61. Section 108 makes clear that the right of unfair dismissal only applies to an employee who has been continuously employed for a period of not less than two years ending with the effective date of termination.

62. Section 98 of ERA 1996 says (in part)

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> …
>
> (b) relates to the conduct of the employee,
>
> …

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

63. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for the fair reason relied on.

64. Provided the respondent does persuade us that the claimant was dismissed for that reason, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996. In considering this general reasonableness, we will take into account the respondent's size and administrative resources and we will decide whether the respondent acted reasonably or unreasonably in treating the capability (or the impossibility of completing the training programme, as the case may be) as a sufficient reason for dismissal.

65. In considering the question of reasonableness, we must analyse whether the respondent had a reasonable basis to believe that the Claimant lacked capability (or that there was not realistic possibility of completing the training programme, as the case may be). We should also consider whether or not the respondent carried out a reasonable process prior to making its decisions. In terms of the sanction of dismissal itself, we must consider whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA).

66. It is not the role of this tribunal to assess the evidence and to decide whether the claimant should or should not have been dismissed. In other words, it is not our role to substitute our own decisions for the decisions made by the respondent.

67. We must take care not to conflate the tests for whether a dismissal was a breach of the Equality Act with the tests for whether the dismissal was unfair contrary to the Employment Rights Act. For example, when considering (as we must do in accordance with Section 15 EA 2010) whether a dismissal was proportionate, we must perform our own balancing exercise, but when considering whether the dismissal was unfair, we must look at the employer's rationale. A dismissal which is discriminatory is not necessarily a dismissal which is unfair.

68. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account by the Employment Tribunal if it is relevant to a question arising during the proceedings (see section 207(2) of the Trade Union and

Labour Relations (Consolidation) Act 1992). The ACAS Code sets out one procedure, for both 'conduct' and 'poor performance', but acknowledges that an employer might choose to have separate procedures. Having (and following) a separate procedure for performance is permissible, provided that the procedure for poor performance meets the basic principles of fairness set out in the Code.

69. As mentioned by the House of Lords in **Polkey v AE Dayton Services Ltd 1988 ICR 142**, employers might not be considered to have acted reasonably in dismissing for lack of capability unless they have given the employee fair warning and a chance to improve. The ACAS Code confirms the importance of warnings as part of the process, stating at paragraph 19: "Where … employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A … failure to improve performance within a set period would normally result in a final written warning." Paragraph 21 of the Code states that a warning should set out what improvement in performance is required, together with a timescale. However, it does not automatically follow that a dismissal will necessarily be unfair if no formal warning is given (as also mentioned by the House of Lords in Polkey). Furthermore, the ACAS code acknowledges that sometimes it might be appropriate to issue a final warning, where no first warning was given, or to dismiss, where no prior warning was given.

70. In Wincanton Group plc v Stone [2013] IRLR 178, at para 37 Langstaff P gave a summary of the law on warnings in misconduct cases.

(1) The Tribunal should take into account the fact of that warning.

(2) A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it sees appropriate.

(3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.

(4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.

(5) Nor is it wrong for a Tribunal to take account of the employers' treatment

of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.

(6) A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.

71. In Bandara v BBC 2016 WL 06639476, the EAT confirmed (having considered both Wincanton and also the Court of Appeal's review in Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374) that a tribunal assessing an unfair dismissal claim can, in an appropriate case, decide that the sanction of final written warning for a prior incident was a manifestly inappropriate sanction. A tribunal should only take that step if it there is something that is drawn to the tribunal's attention which enables it to conclude that the sanction plainly ought not to have been imposed, and this requires more than simply deciding that the sanction of final written warning had been outside the band of reasonable responses.

72. Subject to the comments above, where a final written warning is live, then the issue of whether the decision to dismiss was fair or unfair requires consideration (as per Section 98(4)) of whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant.

Unauthorised Deduction from Wages

73. Part II of the Employment Rights Act 1996 (sections 13 to 27) deals with "Protection of Wages". Section 13 (alongside the exceptions set out in Section 14) deals with the right not to have unauthorised deductions made from wages. Other than deductions authorised by statute (which is not an issue in this case), for a deduction to be authorised it must either be one which is authorised by the contract of employment (with either the term itself being part of a written agreement, or else the term itself being something which the Respondent has explained to the Claimant in writing, before the date of the deduction) or be one which the employee has agreed to in writing (such agreement occurring after the date of the specific event which is said to be the reason for the deduction, but before the deduction itself. As per section 13(3), a shortfall (other than one due to computation error) in the sums properly payable to the worker is to be regarded as a deduction even if the employer does not refer to it as a deduction.

National Minimum Wage

74. In accordance with section 1(1) of the National Minimum Wage Act 1998

A person who qualifies for the national minimum wage shall be remunerated by

his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

Working Time Regulations

75. Regulation 14 deals with compensation related to entitlement to leave on termination of employment.

(1) This regulation applies where–

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be–

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula–

(A X B) - C

where–

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

Analysis and Conclusions

The duration of employment and the dismissal

76. We are satisfied that based on the claimant's evidence that he started work on 24 April 2017 on a part-time basis.

a. He agreed to perform a number of hours working for the respondent and they agreed to pay him for that work and, furthermore, they

agreed to pay him in cash.

b. The first payment that he received was for approximately £450 which he made his mother aware of in early July and she noted in her diary. The claimant paid approximately £150 to his mother and put the remainder into his bank account and he deposited that on 4 July 2017. After that date the claimant was paid in cash the sum of £370 per month some of which he deposited into his bank account and some of which he paid to his mother.

c. Due to the lack of documentation, there is some uncertainty about the particular days of the week, and the number of hours which the Claimant worked. There was a degree of flexibility. However, there was a requirement by the Respondent that the Claimant would attend and perform work, and both parties were aware that the Respondent was relying on the Claimant to do the work. Both parties also knew that, as per the agreement, the Respondent was going to pay the Claimant for the work done. We are satisfied that he was going each week and that he was required to do around 12 hours per week. The fact that Mr Dance either did not see, or else does not remember seeing, the Claimant entering and leaving the premises very often does not cause us to doubt the Claimant's account. The Claimant's recollections of the particular start and finish times of his work for the Respondent is probably not correct, as we are satisfied that Mr Langdon's account of the earliest time that the Claimant could leave his job for Mr Langdon (at the end of the early shift) and the latest time that he could arrive, if rostered on the late shift, is accurate. However, the exact start and finish times is not crucial and the fact that the Claimant does not accurately recall the exact start and finish times does not cause us to doubt his reliability as to the overall number of hours per week that he was working for the Respondent.

d. The claimant worked continuously from 24 April 2017 until in around April and May 2018 the claimant and the respondent agreed to make the arrangement more formal and he was given the letters which appear on pages 43 (12 April 2018) and 47 (3 May 2018). Although the letters refer to "following a successful interview", that it is not what happened. The Claimant had not been interviewed. Although the letters state and imply that there is to be a new contractual relationship, and that, for the first time, the Claimant was going to be performing work and receiving pay, that is not the case. He had been working and being paid (in cash) since April 2017.

e. From May 2018 onwards he was paid via payroll and the payments were taken into account, for the first time, for PAYE purposes.

f. Our decision is that there was a contractual arrangement from April 2017, and there was mutuality of obligation; the agreement was that the Claimant would turn up and do the work and that the Respondent would pay the Claimant for so doing. There was no suggestion (and we find that it is not the case) that the Claimant was allowed to send a substitute; the contract had to be performed by him personally. The Claimant had some flexibility in relation to what time he performed

particular tasks at (and/or in what order), but we accept the Claimant's oral evidence about the fact that there was a list of duties that he was required to perform to check on and to feed the animals and that he was obliged to do those duties daily. He did not have the freedom to decide that duties on that list did not need to be performed, that was Mr Claridge's decision not his. Furthermore, as an when required, he was obliged to do ad hoc duties as per the instructions of either Mr or Mrs Claridge, such as purchasing food, purchasing animals, and similar. He was under the Respondent's control.

77. For these reasons, our finding is that the Claimant was an employee of the Respondent from 24 April 2017 onwards.

78. There was no break in his employment until (as discussed below) it was terminated and therefore the total duration of his employment is 24 April 2017 to 24 October 2019 which is more than two years.

79. The respondent wrote to the claimant on 24 October 2019 which was an email which appears at page 60 of the bundle. The respondent's email stated that the claimant should, "Please accept this written email as your notice and you can leave with immediate effect".

    a. In our view, the meaning of the email on page 60 is that it was terminating employment with immediate effect. The Claimant read the email the same day and regarded it as having terminated his employment with immediate effect. It is therefore our finding that the effect date of termination was 24 October 2019. The Respondent's communication was sent at 13:14.

    b. The claimant read the email and responded to it at 14:41 the same day. He said he disagreed and would take legal advice. Mr Claridge replied at 15:52 to say "No problem. We already have". (See 352 of the bundle). Mr Claridge was not a witness, but the plain meaning is that the Respondent is suggesting that they are comfortable with the dismissal decision sent at 13:14.

    c. The following day, 25 October, the respondent sent the email which appears at page 63 of the bundle. That refers to "further notification of gross misconduct" and that actions taken by the Claimant after the email exchange just mentioned could be "another disciplinary measure which has now endorsed the final decision that termination of your employment is the best way forward". Our finding is that this email does nothing to contradict what we have found were an unequivocal communication at 13:14 on 24 October. The email does not state or imply that the Respondent had purported to retract the dismissal, and that the Respondent was treating the Claimant as still being in employment (in the respondent's opinion) as of 25 October 2019. The email seeks return of the keys "with immediate effect". This email did not terminate the Claimant's contract of employment, because it had already been terminated the previous day.

80. We also note that, in the response submitted in May 2020, which was

accepted by REJ Foxwell as an amendment to the response served previously, the respondent stated that employment terminated on 24 October 2019.

81. There was no witness evidence form the respondent's side in relation to the reasons for termination and therefore it is appropriate for us to pay attention to the contents of the email of 24 October and the events which immediately preceded it. The email at 13:41 on 24 October 2019 was a direct response to an email the claimant had sent at 9.30am that morning (the body of the message appears on page 354 of bundle, separated from the header, which is at foot of page 60). He ended his email "look forward to hearing from you". The email attached a sick note and commented that he was going to be off for the next two weeks as he did not wish to risk getting ill or causing further injury. He commented that he knew that the employer did not pay sick pay but mentioned that he believed he was entitled to statutory sick pay. He referred to statutory sick pay and asked the employer about the procedure for that.

82. The reason that the claimant was off sick was that on 21 October 2019 he had transported a caiman to the respondent's premises and as he was releasing it to the enclosure he needed to remove the tape from the caiman's mouth. As he did so the caiman bit him and as a result the claimant needed hospital treatment including having the wound cleaned out under general anaesthetic.

    a. The contemporaneous documents prove that the date was 21 October 2019. See exchange of WhatsApp messages on 20 October, in which the Claimant reminds Ms Claridge that he is picking the "caiman" up "tomorrow". (page 345).

    b. Slightly earlier than that exchange (though exact time and date unknown, it was later than 10 October 2019 and earlier than 20:55 of 20 October), at page 347, there is a WhatsApp message from Mrs Claridge to the claimant stating that her husband did not want to spend money unnecessarily on a box to bring the caiman to the respondent's premises and suggesting the claimant look for a container in the yard. On 20 October 2019, the claimant reminded Mrs Claridge that he was picking up the caiman and discussed the transport arrangements. To extent that the Respondent seeks to argue that the Claimant acted without its knowledge or consent, we reject that argument based on the Claimant's evidence and the contemporaneous documents.

    c. At 348 there are WhatsApp messages from the following day (21 October) including the claimant giving Mrs Claridge an update to say that he had been back from hospital, had x-rays, booster tetanus and that the surgeon was going to have him in the following day, 22 October.

    d. Further down the page on 22 October he did reply to say that he had general anaesthetic and that part of a tooth had been found in his arm. He had stitches and his arm was put in a sling. He sent that message at around 19.07 stating that the sick note said he should

refrain from work for two weeks, but he would see how he goes and offering to do some light duties for the respondent in the meantime. Mrs Claridge replied a few minutes later to say, "Thanks for the update but we do not pay sick pay so don't know what you were expecting so a chat may be beneficial asap."

e. We accept the Claimant's account that his offer was to come to the respondent's premises to do duties such as to assist Mrs Claridge with the marketing duties and with labelling. He was willing to provide advice on the animal care by phone or text message.

f. The Claimant replied (at 19:18) to ask, "What do you mean what was I expecting". He said "feel free to pop round and talk". Ms Claridge's response immediately (19:19) was, "Please deal with this professionally tomorrow. We will arrange with you."

g. There were some further messages from Mrs Claridge later on 22 October and on 23 October 2019 which implied that the respondent was expecting the claimant to still attend to his duties.

83. As mentioned, the Claimant sent an email at 9.30am on 24 October. According to page 350 it appears that Mrs Claridge may have attempted to telephone the claimant not long after he sent his 9.30am email. However, and in any event, it is common ground between the parties that there was no meeting between them after the claimant sent his 9.30am email and before the dismissal email was sent at 13:14.

a. The dismissal email itself starts by referring to "This very unacceptable situation".

b. The second paragraph of the email goes on to say that the respondent believes that the claimant ought to have come back to them in relation to the animals (although as we have mentioned earlier he had offered to assist in his WhatsApp messages and had also stated that he had a sick note).

c. The email goes on to point out that Mr Claridge was at the dentist but the difference between the claimant and Mr Claridge was that Mr Claridge would return to work on returning from the dentist.

d. This second paragraph is the one that ends by stating that the claimant is being dismissed with immediate effect. It is therefore our finding that the author of the email, namely Mrs Claridge on behalf of the respondent, was terminating the claimant's employment because of his absence from work.

e. In the third paragraph, the respondent refers to the claimant's request for statutory sick pay in a dismissive manner and it seems to us therefore that the claimant's request for statutory sick pay was an influencing factor on the decision to terminate employment. We heard no evidence form Mrs Claridge or Mr Claridge and so it is unclear whether the Respondent believed that by dismissing the claimant that would mean that they were not obliged to pay statutory sick pay, or whether Ms Claridge was offended by the request for a

reason other than financial.

f. The fourth paragraph of the email refers to the incident with the caiman. It includes a paragraph which is not supported by the contemporaneous documents and includes the allegation that no member of the staff was aware of the claimant's activities. Apart from being inconsistent with the WhatsApp messages this is also inconsistent with the license which appears on page 333 of the bundle which is the respondent's license to keep dangerous wild animals which was amended on 16 October 2019 to add dwarf caiman and therefore the respondent was well aware that the claimant was bringing a dwarf caiman to the Secret Sanctuary.

84. The Respondent has offered various explanations of its dismissal reason.

a. In the ET3 form submitted in April 2020, the respondent states that the dismissal reason was failure to follow correct company procedure, refusal to attend a follow-up meeting to provide effective feedback and vital paperwork.

b. In the response submitted in May 2020, under the heading 'Dismissal', the document includes, on page 30(j), the sentence, "After learning of the above we felt there was possibly no future for Mr Grover with the Sanctuary and contacted Acas for advice." That particular comment follows immediately on from the respondent's reference to the claimant having contacted South Bedfordshire Council with the intention of cancelling the Dangerous Wild Animal License and also allegedly trying to take down the Secret Sanctuary's Facebook page. Since these were incidents or alleged incidents which happened after 24 October 2019 it follows that they were also not the reason for dismissal.

c. In the same document at page 30(k), under the heading "Our conclusion" the respondent refers to the caiman incident and the Dangerous Wild Animals Act and suggests that it is possible that the claimant breached that legislation on 20 October 2019 in relation to the caiman. We have heard no evidence form any witness on the respondent's side to say that prior to the claimant's dismissal they took into account the provisions of the Dangerous Wild Animals Act and that as a result of their opinions about that legislation they decided to dismiss the claimant. It is not consistent with the email on page 60 of the bundle. [For completeness, we did hear evidence from a witness called on behalf of the claimant, Mr Darton, and he is familiar with handling animals of the size of the caiman in question as well as larger animals. It was his opinion that it was not a breach of the Dangerous Wild Animals Act for one person acting alone to releasee the caiman back into the enclosure and remove the taping from the animal's mouth. It is not necessary for us – when considering the fairness of the dismissal - to form a view as to what the legislation does require but (a) we are not persuaded that the respondent dismissed the claimant because of an opinion that he had acted in breach of that legislation and (b) to the extent that it matters for the notice pay allegation, the Respondent has failed to

prove that the Claimant breached that legislation.]

d. Another thing that the respondent mentions at page 30J is a claim that the claimant was dismissed as a result of working dangerously. It states that there was not a health and safety risk assessment in place. We had no evidence from anybody on behalf of the respondent about this issue and no evidence that it was the claimant as opposed to the directors who would have been responsible for drawing up a risk assessment. In any event, it is not something mentioned in the dismissal email.

85. The May 2020 document claims that the claimant acted without his employer's consent or prior knowledge. That assertion is false, and it was not the reason for his dismissal.

Unfair Dismissal

86. Our finding is that the reason given in the response forms was not the dismissal reason for the reasons mentioned above. The decision to terminate employment was communicated following a paragraph which referred to his absence from work around 24 October 2019 not specifically to the caiman incident. The paragraph that did refer to the caiman incident did so inaccurately and untruthfully. The termination communication was sent less than 4 hours after the Claimant notified that he was going to be absent and asked about SSP. The principal reason for the dismissal was because the Claimant had informed the Respondent he would be absent and he asked about pay during that absence.

87. Another thing of significance mentioned in the 13:14 dismissal email is the reference to "a number of disciplinaries" in the "last few months". This is in the context of Mrs Claridge stating that it was not the fact that absence alone was the reason for the dismissal but that the absence was not a "one off incident".

a. The only evidence that we heard on this matter was from the claimant. In his witness evidence he states that on his return from holiday on Monday 23 September 2019 after two weeks off, he came to work at around 8am as usual. This was the first day that he was due back after his holiday.

b. At 9am Mr Claridge asked to speak to him. During the conversation Mr Claridge said that some animals had escaped and some animals had died while the claimant was on holiday. The claimant was then taken to a meeting room and had a meeting with both Mr and Mrs Claridge which he was told was to be a disciplinary hearing. He had not had any written invitation to the meeting.

c. On the claimant's account he thought that Mr and Mrs Claridge were annoyed that he had not returned to work until the Monday despite the fact that he and his family had returned home from a trip a few days earlier. During the meeting he was told that the allegations were that he had not been efficient with the animals before he went on holiday (accusations which he did not agree with).

d. We accept what the claimant says in paragraph 46 of his witness statement that he had not received the document that is shown on page 58 of the bundle and there was no evidence form the respondent to say otherwise. In any event, no reasonable employer could expect the Claimant to perform those duties while on annual leave, and the fact that the Claimant happened to live near to the workplace, and had returned home prior to 23 September does not change that.

e. In his particulars of claim, the claimant accepts that he was told that he had one month to improve failing which he would be dismissed.

f. One document placed in the bundle by the Respondent is said to be a written warning letter dated 20 September 2019. We accept the claimant was still on holiday as of that date. Other documents placed in the bundle by the Respondent refer to earlier warnings.

g. No evidence has been provided by the respondent that these warnings were ever issued to the claimant and he denies receipt of the document dated 20 September 2019. We accept the claimant's denials and, in any event, there was no evidence of the claimant having been issued with either the 20 September 2019 document or any other oral or written warning.

88. Given that the warning is not in writing and the only evidence about it is what we heard from the claimant, it is unclear whether it was intended to be a disciplinary warning (although we accept the claimant was told it was administered during a disciplinary hearing) or a warning that his performance had to improve. In any event, to the extent that the respondent is seeking to argue that the claimant's performance needed to improve he was given no written information about what he needed to do to improve his performance and he was given no written list of job duties generally either during the earlier parts of his employment or around 23 September 2019.

89. It is our finding that the claimant was dismissed because he did not come into work (having informed the respondent that he was ill and that he had medical evidence; and having also asked about sick pay). That dismissal was not for a fair reason, either in isolation or in conjunction with the warning. It is also not for any of the reasons the respondent relied on in its pleadings.

90. In terms of the procedure prior to the termination, the claimant was not invited to a hearing, not given the chance to respond to any allegations, not told what any allegations were, not warned that he might be dismissed and not told that he could appeal against the decision. The Respondent's reference to the warning and the "number of disciplinaries" means that the Respondent was – at the time – suggesting that this was a conduct dismissal (the conduct presumably being his failure to attend work in circumstances in which the Respondent "would not have expected [the Claimant] to do anything manual". However, without any legitimate reason, the Respondent failed to comply with any of the requirements of the ACAS Code on disciplinaries and grievances.

91. In light of our findings about the reason for dismissal, it is not necessary to say a great deal about the status of the warning which the claimant admits

was given orally and about which no right of appeal was offered. We accept that it would not be appropriate for us to go behind this warning but our decision is that it was not part of the principal reason for dismissing the claimant. The warning itself had no relevance to the fact that the claimant was signed off sick at the time in question.

92. The dismissal therefore was procedurally unfair as well as not being for a fair reason. The claimant submitted an appeal in December 2019. Initially the respondent stated that it would potentially consider that appeal but in the event it did not do so.

Disability

93. We accept the claimant meets the definition in s.6 of the Equality Act as being a disabled person. We base our decision on the evidence in the claimant's own impact statement, pages 158 to 161. This is corroborated by the evidence of other witnesses including the respondent's witnesses as well as the school records in the bundle.

94. Because of difficulties in early life the claimant was a late starter in his education and had learning difficulties through his school career. He was assessed as having special educational needs and his school provided him with different adjustments from time to time including learning support assistants, allowing him to have private space out of the classroom. His family also paid for extra assistance including extra lessons and speech therapy. He has communication difficulties including in written communication, some of the time his writing can be ok but he needs assistance, for example, from his mother or somebody else. Filling in forms and writing letters is difficult for the claimant and he struggles to breakdown large amounts of information. He also struggles with telephone calls. He has difficulties understanding new concepts and socialising with people. He finds it difficult to stand up for himself.

95. There is no specific diagnosis in the bundle that suggests the claimant has semantic pragmatic disorder. We do note that in 2001 a senior educational psychologist recommended further investigation and stated that it was possible that he had such a disorder. It was noted at the time that the claimant often had quite major difficulties in interpreting the meaning of his coursework and that 98% of the claimant's age group could be expected to achieve better scores on the tests described in the document. The senior educational psychologist was of the opinion that the claimant had information processing problems and difficulties in areas of cognitive functioning and that he had specific language difficulties.

Direct Discrimination

96. Paragraph 5.8 of the list of issues describes the less favourable treatment allegations.

97. Re 5.8.1, we do accept that the claimant was given tasks to do by the owners of the business including driving family members around.

    a. We have not been persuaded by the evidence that in doing these extra tasks (as described for example, at page 20 of the witness

statement and evidenced at the bundle pages referred to there) that the claimant was asked to do these pieces of work outside the hours that he was contracted to work for the Respondent.

b. He was not supplied with a written job description but we are satisfied by the entirety of the evidence including what the claimant said about his normal day to day duties and including what is said in the letters on pages 43 and 47 of the bundle that tasks such as taking the director's children to school were outside of the duties of the post as envisaged when the claimant was appointed.

c. However, we are satisfied that the claimant did not object to doing these tasks at the time, and to the extent that there was shopping for personal items, it seems likely to have been that it was done at the same time as a trip to purchase items for use in the business.

98. Re 5.8.2, it is factually correct the claimant was invited to a disciplinary meeting on 23 September 2019 without notice and without the right to be accompanied.

99. In terms of 5.8.3, that is not made out on the facts. On the facts the claimant was transporting the caiman to Secret Sanctuary and the respondent was aware that he was doing it that day. Based on the evidence we heard, the Claimant was not specifically told that no one was available, rather, he attempted to phone Mrs Claridge's mobile and there was no answer and nor were they in the office when he arrived. He did not go looking elsewhere on the site to find anybody who might have been able to assist him. [We accept that realistically the only person who could/should have been assisting with the movement of this large reptile was Mr Claridge, but the Claimant was not expressly told to do it by himself].

100. In relation to these allegations we do not find that the claimant was treated less favourably than the appropriate hypothetical comparator would have been treated, taking into account that the appropriate hypothetical comparator would have the same skills and aptitudes as the claimant.

a. In any event, in terms of 5.8.1, the reason why the claimant was asked to do those things is that it was convenient for the directors to ask the claimant to assist them in those ways during his working hours.

b. In relation to 5.8.2, the reason why the claimant was asked to attend a disciplinary meeting without notice or the right to be accompanied is that the respondent did not wish to give him any such rights. There is no evidence before us to indicate that they might have given such rights to someone without the Claimant's disability.

c. We reach these conclusions acknowledging that the respondent has not led any evidence as to the reason why it treated the claimant in this way. However, the claimant has not shifted the burden of proof such that he has proven any facts from which we might conclude that his disability was the reason for the treatment.

Discrimination arising from disability

101. Paragraph 5.12 of the list of issues describes the less favourable treatment allegations and 5.11 the "something arising".

102. In terms of 5.11.1, our decision is that the claimant, because of his disability tends to agree to things that other people say easily and to acquiesce to various requests.

103. In terms of 5.11.2, our decision is that because of the claimant's disability the claimant can struggle with certain tasks unless given clear instructions about how to do them. However, this is subject to the fact that we heard the claimant's oral evidence and he described to us a typical day of work at the Secret Sanctuary and the tasks that he would perform and the order in which he would perform them. It was clear to us that the claimant did have a good understanding of the tasks that were required of him in performing his duties. Furthermore, in relation to marketing, it was the claimant who was able to provide assistance to Mrs Claridge in using Facebook for example.

104. In terms of 5.12.1, (a replication of 5.8.1), we do agree that the claimant was asked to do these things.

    a. We are not persuaded that it is unfavourable treatment in all the circumstances including the close relationship between the claimant and Mr Claridge's family which had lasted over many years since 2005, and the fact that the friendship was arising, originally, out of a shared interest in reptiles and other animals.

    b. Furthermore, we do not believe that this arises out of the specific things described in paragraph 5.11. Just because the claimant's disability tended to make him acquiescent it does not follow that he would not have been asked to do these things otherwise.

105. In terms of 5.12.2 (a replication of 5.8.2), it did happen and it was unfavourable treatment.

    a. While it was unfavourable treatment our decision is that the cause of the unfavourable treatment was not either of the things mentioned 5.11.1 or 5.11.2 respectively.

    b. 5.12.2 refers specifically to an invitation to a disciplinary meeting and the fact that the claimant was not given notice or the right to be accompanied. There are no facts from which we could infer that Respondent held that meeting (without notice) either because of the Claimant's acquiescence or because of his inability to carry out tasks without clear instructions.

106. In relation to 5.12.3, the claimant did receive a warning as discussed in particular at paragraphs 40-42 of his witness statement.

    a. However, in his witness statement the claimant does not suggest that it was an inability to carry out tasks unless given clear instructions that was the cause of this warning. At paragraphs 35 and 38 in particular he disputes that problems, if any, were because of his

actions as opposed to being because of the respondent's actions.

b. Furthermore, at paragraph 40 and 45, he suggests that the reason for the warning was the fact that he had taken holiday.

c. As discussed in relation to unfair dismissal, the reason for the dismissal was the fact that on 24 October 2019, the Claimant notified the Respondent that he was going to be absent for 2 weeks and asked about SSP. It was not because of anything mentioned in paragraph 5.11.

d. Therefore, we are not persuaded that there are any facts from which we could infer that the unfavourable treatment was discrimination within the definition in s.15.

107. In 5.12.4 (which broadly corresponds to 5.8.3) we did not find that allegation was made out on the facts in that the claimant did not call for assistance on arrival at the Sanctuary and he was not told by the owners that no one was available. Although it is also mentioned in 5.12.4 that the claimant was never given assistance with tasks, it specified that the "failure to attend and assist" is the act that was said to be unfavourable. The failure to attend and assist was because the claimant did not make sufficient efforts to locate anybody on the site on arrival and did not ask for assistance, after his arrival.

108. In relation to 5.12.5, this duplicates some elements of 5.12.3. We do find that the claimant was not given a performance improvement plan; if he had been dismissed for performance reasons then the lack of instructions on what standards of improved performance were required would have been a very relevant issue. However, we do not accept that the reason that the claimant was given no performance improvement plan was either of the things mentioned at 5.11.

109. In relation to 5.12.6, we accept the claimant's account in paragraphs 60 and 61 of his witness statement.

a. We are not satisfied that there are facts from which we could infer that the reason the respondent was so unsympathetic to the claimant's injuries was because of those things mentioned in 5.11.

b. It is difficult for the tribunal to know the respondent's actual reasons because Mr and Mrs Claridge did not give evidence. However, on the claimant's own account the respondent did not like the fact that he had been away on holiday in September and had not returned to work over the weekend following his holiday. In October, the WhatsApp messages reveal a degree of scepticism about the extent of the claimant's injuries (scepticism which was entirely unwarranted). The messages also make a point that the Respondent would not be willing to pay sick pay.

c. Therefore, it is more likely than not that the reason for the respondent seeking to persuade the claimant to work despite the fact that he was not fit enough to do so was because the respondent did not wish to make alternative arrangements (such as take one of their other employees off more lucrative work) for looking after the animals.

Reasonable adjustments

110. Paragraphs 5.16 to 5.21 of the list of issues set out the reasonable adjustments claim, and paragraph 5.17 sets out the alleged PCPs.

111. 5.17.1 in the list of issues states "The application of the disciplinary procedure". In his closing submissions, the Claimant's representative amplified this alleged PCP as being applying R's disciplinary procedure which lacked (i) an investigative stage; (ii) setting out the charges in writing; (iii) allowing / ensuring that employees are accompanied; (iv) providing written notes of meetings; (v) providing written outcomes; and/or (vi) providing an opportunity for appeal.

112. We accept that the respondent applied the PCP set out in 5.17.1 of the list of issues and did so as described in paragraph 59.1(a) of the claimant's submissions. It applied a disciplinary procedure to the Claimant which lacked any formality whatsoever. While we did not hear evidence as to how other employees were disciplined (other than Ms Jones brief and vague comments) the respondent has not sought to allege that it applied the disciplinary procedure differently to the Claimant than it did to other employees.

113. As written in the list of issues, 5.17.2 was "the Respondent required the Claimant to perform his duties in a particular way". In described in paragraph 59.1(b) of the claimant's submissions, it was suggested that the correct interpretation of this was "not providing employees with clear, written instructions of the tasks they were asked to perform". We do find that the respondent applied the PCP described in 59.1(b) of the submissions to the Claimant. Again, we did not hear any evidence from the respondent that there were or were not written instructions for other employees. Our decision, on balance of probabilities, is that the Respondent generally failed to give clear written instructions to its employees and that is applied this PCP to others, not just to the Claimant.

114. In terms of disadvantage:

    a. The claimant was not disadvantaged because of his disability by the application of the disciplinary procedure in September 2019. The Claimant's evidence to us (which we accept) was that he did put a clear case across at the meeting, not that he would have liked to put a clear case across, but was unable to because of his disability.

    b. Given the fact that a warning was issued orally, it seems the respondent did not decide that his arguments were such that it should refrain from a warning. However, we are not persuaded that any disadvantage caused by his disability led to the warning. On the Claimant's own account, there had been no wrongdoing on his part, but the warning was issued anyway.

    c. The failure to provide the outcome in writing and the notes of the meeting and the opportunity to appeal are things that would disadvantage any employee. They disadvantaged the Claimant, but not because of his disability.

    d. In relation to lack of written instructions for doing the job, based on

> our findings of fact the claimant commenced working for the respondent in April 2017 and just over a year later he was taken on officially on the books. Throughout that first year there were no written instructions and yet the claimant performed the tasks well enough to be offered the job more formally. The claimant has not proved any particular lack of knowledge in relation to how he should perform his duties and indeed he has relevant qualifications in this area. He described to us what he did in a typical day, and we are satisfied both (a) that that is what he did and (b) that the Respondent must have been satisfied with what he was doing because they did not issue him a warning for work from April 2017 to early September 2019. They issued him a warning, the Claimant believes, because he did not end his holiday early (or else do unpaid work during his holiday) and only returned to work on 23 September.

115. Therefore, the failure to make reasonable adjustments claim fails.

Harassment

116. In relation to harassment, the 6 examples of unwanted conduct are at paragraph 5.22.1 to 5.22.6 of the list of issues.

117. 5.22.1 mirrors 5.8.1. We accept that the claimant was required to carry out duties that were not in his job description but we are not satisfied that this was unwanted conduct. Furthermore, we are not satisfied that the claimant's dignity was violated.

118. In relation to 5.22.2, we have found that the claimant was expected to return to work on 21 October 2019, the same day that he was injured. This was unwanted conduct. We also accepted that this conduct meets the definition in s.26(1)(b) even if the purpose of the treatment was not to violate the claimant's dignity', the effect was that it did so. However, we have not found facts from which we might draw that inference that the unwanted conduct was related to the claimant's disability. The claimant had a disability, and the Respondent acted unreasonably, but our decision is that the two things were unrelated.

119. In relation to 5.22.3, this is a remark which would be out of time as it appears to have been alleged to have happened at Christmas 2018. We accept that it is unwanted conduct. However, it wold be cheapening the words in 26(1)(b) to say that a comment about choosing his hours to suit himself would violate his dignity. We find that this is not part of a continuing act. We do not extend time as – given the vagueness of the allegation, the lack of a contemporaneous complaint and the reliance on oral evidence only – the prejudice to the Respondent of extending time outweighs the prejudice to the Claimant of refusing to do so.

120. In terms of 5.22.4, we accept the claimant was criticised in September for the fact that he had taken time off until Monday 23 September rather than return to work over the weekend. This was unwanted conduct and given that it happened in the same meeting at which he was given a warning and threatened with potential dismissal, we accept that it had the effect of violating his dignity. However, we have not found facts from which we might draw that

inference that the unwanted conduct was related to the claimant's disability. The claimant had a disability, and the Respondent acted unreasonably, but our decision is that the two things were unrelated.

121. In terms of 5.22.5, the claimant has not proven to our satisfaction that the respondent actually prevented him from taking rest breaks and days off as per the Working Time Regulations.

122. In terms of 5.2.6, it is true that the claimant was dismissed and true that he was dismissed via email and without any hearing or investigation. Self-evidently this was unwanted conduct and had the effect of violating his dignity. However, we have not found facts from which we might draw that inference that the unwanted conduct was related to the claimant's disability. On the contrary, our decision is that he was dismissed because of the 2 week sickness absence which the Claimant needed due to the injuries caused by the caiman. That absence and those injuries were not related to his disability.

123. For these reasons, the harassment allegations fail.

Time Limit Generally for EQA claims

124. ACAS early conciliation commenced on 24 December 2019 and lasted to 7 February 2020. The claim was presented on 7 March 2019.

125. Acts or omissions which were on or after 25 September 2019 were in time. Acts or omissions from prior to then were only in time if part of a continuing act, or if we exercised discretion to extend time.

126. We have already said why we do not extend time for the allegation about what was said at Xmas 2018.

127. The allegations that there were breaches of EQA by calling the Claimant to a disciplinary hearing and/or giving him a warning on 23 September 2019 are out of time. For them to be part of a continuing act which continued until a date within the time limit, we would have had to have decided that there was a contravention of EQA within the time limit, and we did not make such a decision.

128. Had the allegations had merit, we would have been willing to extend time on just and equitable grounds. A reasonable employer ought to have documented the meeting and the outcome, and if the Respondent is prejudiced by the lack of documentation, then that is of its own doing. The prejudice to the Respondent of an extension by a few days would be slight. The Claimant has at least a partial explanation for not meeting the time limit, given the findings which we have made about the nature of his disability. The balance of prejudice would have been in favour of extending time.

129. However, in any event, we did not find in the Claimant's favour on the substance of the claims.

Unauthorised deduction from wages

130. The Claimant has been over the age of 25 at all relevant times. He was entitled to be paid at least the national minimum wage throughout his

employment.

131. His evidence was that in the last several months of his employment he worked 41.5 hours each week.

    a. This averages more than 179 hours per month, meaning that, to receive minimum wage (£7.83) he should have been receiving no less than £1401 (gross) in an average month.

    b. Put another way, 41.5 hours per week at £7.83 per hour is £324.94 per week (rounded down). He should therefore have been receiving at least £1408 per calendar month (gross).

132. In each of the months July, August and September 2019, he received no more than £1333.33 gross Therefore the Claimant successfully demonstrates that there has been an unauthorised deduction from his wages. All matters in relation to quantification of the award that we will make (including the duration of the period for which we will award loss) will be determined at the remedy hearing. For the avoidance of doubt, the period for which we might make an award is not confined to the period in which the Claimant worked 41.5 hours per week.

Holiday Pay

133. The Claimant's holiday year runs from the anniversary of his employment, 24 April. The period 24 April 2019 to 24 October 2019 is 184 days. His full years entitlement was to 5.6 weeks. For the part year, his entitlement was to 184/365 x 5.6 = 2.82

134. In that period, the leave actually taken by the Claimant was 2.6 weeks.

135. Therefore, his remaining entitlement, in accordance with Regulation 14 of the Working Time Regulations 1998 was to a payment equivalent to 0.22 weeks pay.

136. If the parties fail to reach agreement, the precise sum will be determined at the remedy hearing.

Notice Pay

137. The Claimant had worked for more than 2 years and less than 3. His statutory notice entitlement was therefore to a minimum of 2 weeks' notice. He did not have a lengthier entitlement to contractual notice.

138. The Claimant had not breached the employment contract in such a way as to disentitle him to a notice period. (In fact, we are not persuaded that there was any breach at all). He did not fail to follow the Respondent's instructions in relation to the caiman, and he did not act without authority. He did what the Respondent told him to do, namely collect the caiman and bring it to the Respondent's premises. The Respondent did not offer him any assistance. The Respondent did not instruct him that he should not attempt to release the caiman unaided. The Claimant's absence was for genuine reasons and was on medical advice. The Claimant did more than his contract required in terms of being willing to have phone discussions with the Respondent about what

might need to be done in his absence. His enquiry about SSP, like his other dealings with the Respondent, was polite and reasonable.

139. After the Claimant was informed of the termination of his employment, he sought to extricate himself from the Respondent's Facebook account. The Claimant did not deliberately attempt to damage the Respondent's business interests, or property. The Claimant made a genuine error which, for a short period, seemed to have deleted some of the Respondent's data from Facebook. We accept Graham Grover's uncontradicted evidence that the problem was quickly fixed by him and the Claimant with no lasting damage to the Respondent.

140. The Respondent breached the Claimant's contract of employment by failing to give notice, and the measure of damages is 2 weeks' net pay. If the parties fail to reach agreement, the precise sum will be determined at the remedy hearing.

Remedy hearing

141. There will be a one day hearing by CVP and parties have already been notified of the time and date.

142. The Respondent failed to supply the Claimant with a written statement of employment particulars that met the requirements of Part I ERA and that is something which will be taken into account at the remedy hearing.

143. The Respondent unreasonably failed to comply with ACAS Code on disciplinaries and grievance when it dismissed the Claimant for alleged misconduct. The parties were informed at the hearing that the panel is considering awarding the maximum 25% uplift because of the complete failure to follow the code, though that will be subject to the parties further submissions, and – once the other awards have been determined - consideration of proportionality of the uplift sum.

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Employment Judge Quill

Date: 11 October 2021.

Judgment sent to the parties on

.....15 October 2021.....
THY
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For the Tribunal office