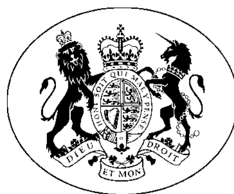

EMPLOYMENT TRIBUNALS

Claimant:	**Mr Ian Boyles**
Respondents:	**Mr Richard Clarke** **Mavericks Motorcycles Ltd**
Heard at:	**Mold & by Video Link** **On: 1st - 4th November 2021**
Before:	**Employment Judge R F Powell**
Members:	**Ms Owen** **Ms Burge**
Representation:	
Claimant:	**Mr A Roberts, Employment Law Consultant**
Respondents:	**Ms R Thomas, of counsel**

Judgment

The unanimous judgment of the Employment Tribunal is:

1. **The Claimant was unfairly dismissed.**
2. **The Second Respondent made a series of unlawful deductions from the Claimant's wages.**
3. **The Second Respondent failed to provide the statutory particulars of the claimant's hours and days of work in May 2017.**
4. **The claims of discrimination arising from disability are dismissed.**
5. **The claims of failure to make reasonable adjustments are dismissed.**
6. **The claim of harassment in respect of requests for copies of the claimant's 2019 Med 3 statements is well founded and succeeds, the remaining claims of harassment are dismissed.**
7. **The claims of direct discrimination are dismissed.**

.

REASONS

1. The claimant in this case is Mr Ian Boyles. Mr Boyles was employed by Mavericks Motorcycles limited on the 25th of April 2016. The major shareholder, and only manager, of that limited company was Mr Richard Clarke. Mr Boyles resigned, without notice on the 6th October 2020.

2. On the 9th of June 2020 Mr Boyles presented claims against Mr Richard Clarke and Mavericks Motorcycles Ltd asserting the following claims:

a. A series of unlawful deductions from wages.

b. Failures to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010.

c. Harassment for a reason related to disability contrary to section 26 of the Equality Act 2010.

d. Unfavourable treatment arising from disability contrary to section 15 of the Equality Act 2010.

e. Failure to provide a written statement of the claimant's terms and conditions in accordance with sections 1 and 4 of the Employment Rights Act 1996 and section 38 of the Employment Act 2002.

f. After the claimant's employment came to an end on the 6th October 2020, he was permitted to amend his claim against Mavericks Motorcycles Ltd by the addition of a claim for constructive unfair dismissal and a claim, against both respondents, of direct discrimination.

3. In the bundle of documents, prepared for this final hearing, there are 123 pages which encompass three preliminary case management hearings and a number of iterations of further and better particulars and the respondents' reactions thereto.

4. It is not proportionate to set out in the introduction to this judgment the detail of the case management in its various stages.

5. The tribunal have read through these documents including the order of Employment Judge Moore dated 1st of September 2020, the order of Employment Judge Howden-Evans dated 6th April 2021 and the further order of Employment Judge Moore dated 18th August 2021. Each of these orders demonstrates the tribunal trying to identify, with sufficient clarity, the issues that would fall to be determined at a final hearing.

6. The last of these, set out a synopsis of each claim; which is found at pages 138 to 143B of the bundle. This document, in conjunction with a permitted further and better particular of the asserted "PCPs" in respect of the section 20 EqA 2020 claims (pages 143G and 143 J) have been the foundation of the case, and to which all three parties have referred in their cross examination, their written submissions and their oral submissions in closing.

7. In addition, to multiple disputes upon the elements of each of the claims noted above, the respondents also challenged whether many of the claims are within the employment tribunal's jurisdiction (the respondents arguing that they were presented outside of the relevant statutory periods for presentation) and the respondents denied that they knew, or should have known, of the claimant's disability for the purposes of the section 15 and section 20 and 21 claims of the Equality Act 2010.

8. The respondents admitted that the claimant was a person with the disability of kidney cancer from February 2019.
Of
9. This claim was heard over a period four days, within that period the tribunal was asked to consider a bundle of 522 pages and hear from six witnesses whose evidence in chief was set out in their respective written witness statements and each of whom was cross examined:

a. Mr Ian Boyles, the claimant.

b. Mr Steven Burnett, a customer of the respondent.

c. Miss Nicola Hudson, a former employee of the respondent between October 2018 and May 2019.

d. Mr Howard Martin-Taylor, a personal friend of the claimant.

e. Mr Andrew Woolley, a personal friend of the claimant and a customer of the respondent.

f. Mr Richard Clarke, director and general manager of the first respondent**.**

10. Mr Burnett's witness statement had 37 paragraphs, the larger part of that statement is concerned with his own complaint about the service provided by Mavericks Motorcycles limited. It is clear that Mr Burnett is deeply dissatisfied with the length of time taken by the respondent and the standard work.

11. Relevant to the case before us are three of those paragraphs ; paragraph 16 in which he describes Mr Clarke asking him if he would take the claimant to one of the claimant's hospital appointments because Mr Clarke was unable to do so, paragraph 22 in which he describes speaking to the claimant in the pub and the claimant brought up the issue of his cancer. Lastly, he witnesses the claimant stating that his family, a few close friends and the employees of Maverick Motorcycles, including Mr. Clarke, were aware of his condition.

12. Miss Hodgson's evidence described her employment as a service coordinator, the range of tasks she was required to undertake, that she was presented with extensive To Do List which would beyond achievement within her working hours, that approximately 3 months after she commenced employment her role was changed to operations manager which included responsibility for health and safety and, eventually, finance. She goes on to describe her unhappiness with her work environment and her decision, after four months employment, to look for alternative employment. She confirms one aspect of Mr Boyle's evidence; that day tasks of building bikes and manufacturing parts for bikes took place both on the respondents' premises and in Mr Boyles home workshop and states that Mr. Clark spoke highly of Mr Boyle's abilities and engineering skills.

13. Mr. Martin Taylor confirmed that Mr Boyles used his own workshop at home and his own tools in order to enable the respondent to provide those services which was beyond the capability of the respondents' own workshop facility. The greater part of the balance of his statement is, in our judgment, the restatement of information that he received from the claimant.

14. Mr Wooley's statement confirmed he had been a friend of the claimant for 15 years and that on the 17th of August 2020 he accompanied Mr Boyles to the respondents' premises to witness a grievance meeting. He states that the meeting lasted approximately 15 minutes and that, in the course of that meeting, Mr Boyles offered the respondents copies of HMRC statements which appeared to reflect discrepancies between the amount paid to the claimant and that which had been registered with the HMRC as paid by the respondent . All of which, he says, were not viewed by the respondents. He also asserts that the respondents' written note of the grievance meeting bore little resemblance to the actual discussion he witnessed.

15. As is apparent from our summary above, for the majority of the allegations with which we are concerned, the only direct witness evidence available came from Mr Boyles and Mr Richard Clarke.

16. The evidence in chief of Mr Boyles was presented in a lengthy statement of 144 paragraphs which unfortunately was drafted on his behalf in a manner which was more akin to a closing submission than a statement of fact presented in a chronological order. In the course of his cross examination his direct answers on matters of fact were inevitably distinct from paragraphs in his witness statement (in which Mr Boyle referred to himself in the third person and, instead of setting out the facts, made reference to the assertions of fact set out in contemporaneous documents).

17. Another characteristic of his statement, again stemming from its unusual format, was its use of rhetorical questions, summations and argument. In the course of cross examination by Ms. Thomas the claimant gave a clearer account of his recollection of the facts ; unencumbered by the stylistic devices noted above.

18. Mr Clarke's evidence was presented on behalf of both respondents. He was initially cross examined by Mr. Roberts. On a number of occasions, the tribunal intervened when it became concerned that a proportion of his questions were expressed in such broad terms that they were inherently difficult to understand, for the Tribunal and for Mr. Clarke.

19. Mr. Roberts explained that he had been involved in this case intermittently and took on the role of advocate at a late juncture for this final hearing. In particular he was not au fait with the discrimination aspects of the claim. Upon the claimant's request, and with the respondents' consent, the claimant undertook the balance of the cross examination of Mr. Clarke.

20. Although the tribunal concluded its deliberations shortly after the conclusion of the submissions, the provision of these reasons has been delayed by professional and personal circumstances affecting the Employment Judge.

Findings Of Fact

21. The Tribunal's findings of fact are unanimous. We set them out in two parts. The first part reflects the relevant evidence which we consider necessary to set out the foundation for the

majority of our conclusions. Further findings of fact, which are discrete to the particular claims, are recorded in our conclusions. Thought out our analysis we have taken into account the burden resting on the claimant to establish the facts on which he relies.

The start of the employment relationship

22. Maverick Motorcycles Ltd was an expression of Mr Clarke's enjoyment of motorcycling and his belief that, with the benefit of a capable mechanic and engineer, there was a viable business in North Wales and the borders for a business which promoted services of restoration and custom building of bespoke motorcycles (manufacturing unique parts rather than building motorbikes from commercially common parts).

23. The business could not trade without a person who was both a very competent mechanic and an engineer capable of designing and fabricating bespoke frames and other parts).

24. In April 2016, Mr Boyles, a keen motorcyclist with a substantial engineering back ground in the Armed Forces, agreed to join the first respondent. In short, Mr Boyles was the only person employed by the respondent who possessed and exercised all the skills needed to fulfil the core functions of the business.

25. Mr Boyles was employed in accordance with the terms of a contract which stated he was employed to carry out all workshop related technical, mechanical and engineering tasks as requested.

The claimant's pay

26. His annual salary was £22,500.00 per annum. He was to be paid monthly and the payment would be made on the 26th of each month, or within two working days of that date [169]. The gross monthly payment due to the claimant was £1,875.00 [265].

27. On the 24th May 2017 the claimant's salary was raised to £32,500.00 [245] which equated to twelve monthly payments of £2,708.33 before deductions.

28. The pay slips dated from 31st May 2017 onwards do not show that gross figure being paid on any occasion. The pay slips show gross figures which vary between £2,539,09 [277] and £2,632.43 [303] in the period prior to the reduction of the claimant's salary for reasons related to his ill health absence and return to work on a part time basis.

29. Similarly, the respondents' bank account details of payments and the claimant's bank account receipts (all of which are net of deductions) do not tally with the monthly gross sum due for an annual salary of £32,500.00.

30. We further find that there were a considerable number of occasions when the respondent's payment of the claimant's salary was paid late in the month or, not at all. For example, half of the claimant's salary for April 2018 was paid on time and the balance paid in May. There were no payments made in June or July [339] and that underpayment was balanced by overpayment in September 2018.

31. It is common ground that the claimant consented to some of these underpayments because, at the outset of the business he accepted that the business would not generate sufficient income. His consents were not in writing. His consents were not always given before the due date for the contractual payment.

32. Evidence of these agreements are found in text and WhatsApp messages: [499]; "I'll send some money over this week haven't forgotten", [500] "sent you a grand", [502]: " I'll get you a grand in August as promised that's in hand" [512]; Doing the finances now, we can just manage to send £2k over this month is that okay for you? And; "On a knife edge really with you not here for two months.(I've put the plan in writing to show how we make it up, what's due and an ssp estimate."

33. During the claimant's sickness absence, from September 2019, he received Statutory sick pay ("ssp"), In August 2019 he had been promised his full contractual pay [349] and payment of £1,000.00 in both October and November 2019.

34. The August 2019 payment made by the respondent totaled £3,000.00 [340]. It is clear that the total sum was a salary payment of £1500 and a part payment of outstanding unpaid wages; [349].[1]

35. It is convenient here to explain the cause of the Tribunal's uncertainties through an example of the discrepancies in the documents presented by the parties for the month of August 2019:

a. The claimant's bank account shows two payments totaling £3,000 [340].
b. The HMRC record shows a taxable income of £2632,43 [322].
c. The Respondent's "Schedule of Payments" dated the 25th January 2020 shows a payment of £3,000 [329].
d. The respondent's pay slip for this period shows the gross sum of £494.95 [304].

36. Of the above, items b. and d. are records of information which came from Mr Clarke. Mr Clarke stated in cross examination that the HMRC and pay slip information were processed by the company's accountant. We conclude however that the only person who had direct knowledge of the amounts paid was Mr Clarke, who made the payments, the accountants are more likely than not to have relied upon his instructions and information provided by him.

The claimant's work

37. We find that Mr Boyles was responsible for managing all of the mechanical and engineering tasks carried out within the company workshop. We find that the company lacked sufficient equipment to enable Mr Boyles to undertake his full range of tasks at the respondent's premises. He regularly worked at home, using his own engineering and manufacturing tools and equipment to the benefit of the second respondent. In doing so, he regularly worked in excess of his contractual hours.

---

[1] The August entry in the column titled "Salary Due" is £1,500.[340]

38. The respondent was a very small business and, although as it progressed it engaged a mechanic to assist Mr Boyles and an administrative assistant, the primary function of the second respondent's business was very largely dependent on the capabilities of Mr Boyles.

39. As with many new micro businesses, the second respondent was dependent on the financial investment of the owner rather than the income generated. Secondly in our judgment in the period prior to that with which we are primarily concerned, Mr Boyles and Mr Clarke worked well together and Mr Boyles, appreciating the financial difficulties this nascent business faced, was willing to accept temporary underpayments of his agreed monthly salary.

40. Throughout the period with which we are concerned there were continuous financial difficulties which required further investment from Mr Clarke or through third party investors. We further find that Mr Clarke's role, as managing director, was focused on business development; promoting the business by developing good inter- personal relationships with potential customers and through other formats such as Facebook and the second respondent's website.

Mr Boyle's health

41. By 2018 Mr Boyles began to suffer from a series of serious medical concerns including detached retina, then skin cancer and finally, and most pertinent to this case, kidney cancer. In part, this potentially life-threatening illness reduced Mr Boyles' willingness accept late payment of his wages, on a frequent basis and he felt that, after two to three years of long hours that he was "being put upon" by the respondents in respect of the volume and number of tasks he was expected to complete during his contracted hours and, in his home workshop, thereafter.

42. In February 2019 [147] an ultrasound scan identified a large complex cystic mass on Mr Boyles' left kidney. By the 20th March 2019 it had been diagnosed as; " likely RCC"; renal cancer [148]. Mr Boyles' had surgery on the 2nd August 2019 and was then absent from work until early November 2019.

The respondent's knowledge of Mr Boyles' disability

43. There was dispute between the parties about the respondents' knowledge of the claimant's kidney cancer. Mr Boyles gave evidence that he told Mr Clarke the nature of his illness in conversation. Mr Clarke denies that.

44. We have noted from the documentary evidence of the text and whatsapp dialogue between Mr Boyles and Mr Clarke that Mr Boyles' was open about his own, and his wife's, medical conditions and medical appointments between 2017 and September 2019; [489, 450, 491,492, 494, 497, 499, 503, 505, 506, 510, 511 & 513].

45. We note that Mr Clarke does not ask the claimant the nature of his illness in these exchanges in the period from May to September 2019.

46. Similarly, in Mr Clarke's email of the 8th September 2019 [349], a month after the claimant's operation on his kidney, he does not ask the reason for the claimant's absence and refers to the need to see a doctor's certificate which confirms that the claimant is fit to return to work [345]. In Mr Clarke's email, he refers to having recently met Mr Boyles and he appears to anticipate Mr Boyles' return to work in November on a part-time basis.

47. We heard Mr Boyles' evidence that he had been frank with Mr Clarke about the nature of his illness and Mr Clarke's denial. We also took into account that, in cross examination Mr Clarke, at a date he did not recall, accepted he had asked Mr Boyles: "Do you know what you are dealing with?"

48. We took into account the very modest corroboration in the evidence of Mr Burrell; that the claimant had told Mr Burrell that he had told people at work about his kidney cancer.

The relative reliability of the key witnesses

49. We further took into account our overall conclusion that, neither Mr Boyles nor Mr Clarke were wholly reliable witnesses; both having a partisan stance and evidently bearing a degree of ill will towards each other. Both in the course of cross examination taking the opportunity to go beyond the question asked.

50. Our general conclusion was that Mr Boyles was the more candid witness. We found that Mr Clarke had a tendency to try and avoid answering direct questions. He embellished his evidence and he made statements, which on examination, were not credible for example:

51. He gave evidence that his accountant was the second respondent's Finance Director, which he then conceded was not true. A trait present in his correspondence of referring to the second respondent's HR department, in a company of two mechanics and Mr Clarke.

52. He gave evidence that he had investigated the claimant's grievance with care, but could not explain what he had done, or how, without understanding the precise nature of the grievance 9which we address later) he could have done so.

53. His witness statement, at paragraph 53 suggested that a cause of the delay for holding a grievance meeting, between February and August 2020 was the need, in the absence of legal advice to draft an ET3 i response to the 9th June 2020 claim. That explanation was undermined by the correction to his statement; that it was ACAS conciliation , not an ET1 which had occurred in early April 2020. It was also undermined by the fact that on the 21st August, after the grievance meeting, he applied to the Tribunal for an extension of time to present the respondents' ET3s.

54. Mr Clarke's evidence in, paragraph 53 of his witness statement stated : " I did not have solicitors instructed" was also at odd with his correspondence dated 9th April 2020 [387] and 20th April 2020 [391] both of which state that; "This has now been passed to our legal team, and as of now, all matters will be dealt with through our legal team and ACAS", "...this matter has now been passed on to our legal team"

55. Another example of our concern about Mr Clarke's candour is within his 13th June 2020 email to Mr Boyles [399]. Mr Boyles had sent an email to Mr Clarke on the 21st February 2020. It was titled: "Complaint of disability discrimination and unlawful deductions from wages".

56. The first line of text below that title read as follows: “Please see this email as a formal grievance”.

57. The email concluded: I look forward to receiving your response in writing within ten days or in line with the company’s grievance policy.

58. On the 2nd of March Mr Boyles emailed Ms. Tilman, co-director of the second respondent and, in their private life; Mr Clarke’s partner. That email complained of Mr Clarke’s failure to respond to his grievance and attached a copy of the grievance itself. That prompted a response from Mr Clarke [377] the same day. After a month ACAS conciliation was commenced and concluded on the 14th May 2020.

59. In the above context, Mr Clarke’s 13th June letter stated at the second and third paragraph;

“I would therefore like to take this opportunity to remind you of the importance of airing your concerns and to resolve matters through the formal process , if you wish to do so.

“If you do wish to exercise your right to raise a formal grievance then I would kindly request that you confirm this (in writing) with the next five days and arrangements will be made for you to be invited to a formal grievance hearing in line with our procedures.”

53 In the context of the claimant’s earlier correspondence, Mr Clarke’s response is misleading, ignored the existence of correspondence, of which he was well aware, and tries to present his management of the claimant’s concerns in a manner which is incompatible with the facts.

54 We do not consider it proportionate to provide further examples, but it is by reason of these characteristics of Mr Clarke’s evidence that we find Mr Clarke to be a less than candid witness and a witness who is less reliable than Mr Boyles.

55 We therefore find that Mr Boyles’ evidence persuades us that it is more likely than not that he informed Mr Clarke of the diagnosis of kidney cancer before the commencement of his sickness absence on the 2nd August 2019.

56 We find that Mr Clarke’s actions thereafter were done in the knowledge of the claimant’s cancer and Mr Clarke’s knowledge that Mr Boyle’s sickness absence between August and November 2019 arose from his cancer, its treatment and his recovery.

Mr Boyles’ sickness absence in 2019

57 On the 6th September 2019 Mr Clarke wrote to Mr Boyles expressing his good wishes for a speedy recovery and indicating that, from the 9th September 2019 Mr Boyles would be in receipt of statutory sickness pay. That decision was in accordance with Mr Boyles’ contractual terms ; which did not include any entitlement to contractual sick pay.

58 Mr Clarke noted that, if Mr Boyles felt well enough to return to work, the second respondent would require a doctor’s note confirming Mr Boyles was fit to do so [345].

59 On the 8th September Mr Clarke sent a message to Mr Boyles [512] referring to the 6th September email.

60 On the 21st September 2019, at 17,.15 Mr Clarke sent a message to Mr Boyles forewarning him of an email he was sending that same day. The email was sent about 8 minutes later.

61 The email was sent in the context of Mr Clarke's knowledge that Mr Boyle's current MED 3 certificate ran to the 24th September.2019. He stated the need to prepare a return-to-work plan and that he and Mr Boyles should perhaps consider planning for the claimant to work afternoons for the first two weeks after his return to work. He proposed that a plan would be discussed at a return-to-work interview and suggested that Mr Boyles prepared his thoughts so he could discuss which work tasks he would be able to undertake [349-350].

62 On the 29th September Mr Clarke messaged Mr Boyles to confirm that some money was "being sent over" and that Ian Grey ["little E"] would be pleased to see Mr Boyles, if he popped into work for a chat [513].

63 On the 6th October Mr Clarke messaged the claimant, whose previous MED 3 certificate had indicated the Claimant would not be fit to return to work until the 30th November 2019[352], " Could do with an update on return to work dates if you know "[515] .

64 To which Mr Boyles replied; " Got some issues I need to sort out with the medics tomorrow morning. I'll pop in afterwards when I know more."

65 The Tribunal finds that, in the absence of Mr Boyles, the respondent's business was not able to complete as much work, and some specialist work could not be progressed at all. That had a substantial adverse effect upon the second respondent's income; Mr Clarke had referred to a £20,000 drop in income for the months of August and September 2019, which was a significant proportion of the second respondent's annual income.

66 On the 26th October 2019 Mr Clarke wrote to Mr Boyles to update him on a number of changes in the business. The first was a change in premises, which subject to planning permission, would be operational in March/April 2020.

67 The Second was:

"As Workshop Director you'll be responsible for all the work carried out in there, and together with Ian Grey [Mr Boyles' assistant mechanic], order parts directly, hopefully improving efficiencies all round".

68 He also informed Mr Boyles that he intended to; "introduce new commercial businesses outside of Mavericks motorcycles in the new year"; in essence a new limited company owned and managed by Mr Clarke.

69 The tribunal finds that the wording; "you'll be …" is reasonably interpreted as an instruction rather than a suggestion which was proposed as a topic for discussion.

70 These additional tasks were not welcomed, given Mr Boyles was, when well enough to work full time, already more than fully occupied with his existing responsibilities.

Mr Boyles' return to work in November 2019 and the 2020 disputes

71 Mr Boyles returned to work in early November 2019. He worked five days a week during the afternoons and was not required to undertake tasks which he considered too physically onerous whilst he continued to recover from the consequences of his surgery.

72 His £32,500.00 annual salary was adjusted down by 50% to reflect the reduced number of hours a week he worked.

73 The relationship between the two gentlemen continued to deteriorate and by the 9th January 2020 the claimant was absent from work due to stress and anxiety. He remained unfit to attend work for the remainder of his employment.

74 After the Christmas close down Mr Boyles and Mr Clarke met on Monday 6th January 2020 to discuss the plans which had been outlined in the October email.

75 Mr Clarke's rationale for a restructure was the increase in the work undertaken the company necessitated a restructure to manage the growth. This Mr Clarke proposed to do by:

" Up to this time, I had been carrying out all the tasks and activities relating to the workshop other than the actual repairing of vehicles. I identified that I needed to spend my time elsewhere to further grow the business and that, these tasks should be undertaken by a senior member of the team within the workshop department"

76 The workshop department consisted of two people. There was only one senior person; Mr Boyles.

77 Mr Boyles was dismayed at the plan Mr Clarke had formulated. The tenor of the changes discussed on the 6th January 2020 are reflected in Mr Clarke's email of the 17th January 2020 [383]. A series of additional responsibilities are set out, which included the following:

"To date aspects of the role have been supported by back-office staff and myself. As explained on our meeting and outlined in writing, as a business, this is not commercially necessary or feasible."

78 In practice this meant Mr Clarke was stepping away from day-to-day management of the second respondent and Mr Boyles and Mr Gray would be responsible for all aspects of the operation of the workshop. The email confirmed that Mr Clarke had told Mr Boyles:

"From 6th January 2020, our Workshop Director is required to action, manage and take responsibility for the following areas of the workshop". The list included being responsible for;

a. Ordering all the material and parts needed in the workshop and administering all the records and invoices associated with the task of ordering all the materials.

b. Training evaluations and training of staff.

c. Health and Safety Evaluations.

d. Preparing electronic bills for all clients and ensuring the achievement of monthly targets.

e. Liaising with trade partners and suppliers.

79 We find that Mr Clarke presented the above as an instruction based on a decision which had been made. We do not accept Mr Clarke's evidence that the claimant had "first choice" to accept the role.

80 Mr Boyles was upset and angered by this instruction; he was still in recovery, still working part time, his previous tasks had kept him fully occupied when he was in good health and he was not familiar with some of the additional tasks, in addition, Mr Clarke had still not paid all of Mr Boyles' outstanding wages and at that date Mr Boyles' wife was in intensive care. All of which was known to Mr Clarke.

81 On the 9th January 2019 Mr Boyles, on finding that Mr Clarke was not at work, went to Mr Clarke's house to demand he received his unpaid wages. The amount of the underpayment had never been agreed but it is evident that, even on Mr Clarke's account [356] it was at least a net sum of £1,700.00. Mr Boyles was undoubtedly agitated. That day he was also confirmed as unfit to attend work due to stress and anxiety [355]. He remained unfit to attend work until his resignation.

82 On the 6th February 2020 Mr Boyles met Mr Clarke for a review meeting. Mr Clarke's summary of that meeting was set out in an email of the 16th February 2020 [363-4].

83 Within that email is the following reference to Mr Boyles' "sick notes" for 2019:

> "You state that you have 2019 sick notes, and will provide these to us (note; sick notes have now been supplied, unverified)."

84 The email also recorded that Mr Boyles was:

> "Refusing to attend work and unwilling to discuss your future employment until you feel monies owed is satisfactorily concluded"

85 In addition to his health related absence, on the 17th February Mr Boyles repeated his 9th January statement; that he would refuse to attend work until all of his outstanding salary had been paid [359]. He was particularly upset that the second respondent had access to sufficient finances to obtain larger premises and afford substantial work to be undertaken at those premises [365] but would not make good his underpaid wages.

86 Mr Boyles' reply to Mr Clarke's email was a root and branch rejection of the accuracy of Mr Clarke's summary. Mr Boyle stated that he had not received a pay slip for nearly two years , he had not received a shares certificate for the 10 % shareholding in the second respondent he had been awarded in 2017 and that he was not a charity; he should not be required to accept the unpaid salary piecemeal to assist the respondent.

87 Mr Clarke did not respond.

88 On the 21st February Mr Boyles' submitted a grievance, which as noted above, neither respondent directly acknowledged nor did they act upon it in accordance with the second respondent's grievance procedure [176-7] which stated that ; "both employee and employer should follow the ACAS code of Practice on Disciplinary and grievance Procedures."

The Claimant's grievance

89 On 21st of February 2020 Mr Boyles submitted a grievance which alleged that, despite requests for money owed as wages, an amount in the sum of £6,654.74 had not been paid and efforts to resolve that dispute had been without success.

90 By late March the respondents had not agreed to conduct a formal grievance process and Mr Boyles commenced early conciliation through ACAS on the 30th March.

91 By the 9th June 2020, the date on which the ET1 was presented to the Tribunal, the grievance had not progressed.

92 On the 13th June Mr Clarke invited Mr Boyles to submit a grievance, despite knowing full well that Mr Boyles had done so more than three months earlier.

93 On the 22nd June 2020, Mr Boyles informed Mr Clarke that he had presented a claim to the Employment Tribunal on the 9th June 2020 [410].

94 On the 17th August a grievance meeting took place and on the 21st August the respondents applied for an extension of time to present their responses, which was granted at the Preliminary Hearing held on the 1st September 2020.

95 The respondents provided a grievance outcome on Friday 2nd October 2020 and Mr Boyles resigned on Tuesday 6th of October 2020 stating that he had resigned in response to:

   a. underpayment of wages,
   b. unpaid work,
   c. belittlement in front of customers and staff,
   d. the first respondent's treatment of him during his period of sickness,
   e. assertions of disability discrimination and;
   f. the failure to investigate or respond to his grievance in a reasonable fashion.

Discussion and Conclusions

96 The relevant legal matrix for each head of claim is set out in the context of our conclusions on each allegation. We have addressed claims which are made against both respondents before turning to those which are against the second respondent alone.

The claims of discrimination

Direct Discrimination

97 Section 13 of the Equality Act 2010 states that:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. …

Section 23 of the same Act provides that: (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

98 The applicable legal principles were summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, and remain good law.

99 In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator: Nagarajan v London Regional Transport [1999] IRLR 572 HL

100 If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

101 Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts, then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.

102 The explanation for the less favourable treatment does not have to be a reasonable one: Zafar v Glasgow City Council [1998] IRLR 36 HL In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation.8 If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The

inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

103 It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases, it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Employment Tribunal is acting on the assumption that the first hurdle has been crossed by the employee.

104 It is incumbent on an Employment Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are. In this respect the tribunal has taken into account the guidance in Bahl v Law Society [2004] IRLR 799 CA 9, Brown v London Borough of Croydon [2007] IRLR 259 CA and Anya v University of Oxford [2001] IRLR 377 CA.

105 It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was.

106 However, as the EAT noted (in Ladele) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.

107 If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question).

5.1.1:[2] Withheld pay or failed to pay or paid wages late.

108 It is not in dispute that the respondents intermittently failed to pay the claimant his salary, in part or in full, across three and a half years of the claimant's employment with the respondent.

109 The claimant was a person with a disability (on the impairment as pleaded) from February 2019. By that date the respondent had been intermittently making late payments or missing payments, for over two years.

110 In our judgment it is unambiguously the case that Mr Clarke started to ask the claimant to accept part payments from February 2017 and had an intrenched belief that he could rely on the claimant's generosity of spirit to wait for his pay until adequate customer payments were made to the respondent, rather than, as a principal shareholder and founder, provide the second respondent with additional funds from Mr Clarke's personal resources.

111 Although we have doubts about Mr Clarke's candour this pattern of his behaviour did not alter after the claimant's diagnosis of cancer and it was a pattern of behaviour which was to Mr Clarke's short-term advantage.

112 We find that in no sense whatsoever was the conduct of failing to pay the claimant's salary, or full salary, on time because of his disability; it was wholly because of the small financial benefit it gave to Mr Clarke.

5.1.2: Increased work duties and responsibilities.

113 We firstly take into account our finding of fact that the proposed increased duties were never actually imposed on Mr Boyles; because he refused to attend work for the respondents from the 9th January 2020.

114 It is correct that Mr Clarke first proposed the increase in responsibilities in the autumn of 2019; more than six months after the claimant had the impairment of kidney cancer. It is also correct that Mr Clarke had opened, and was a director of, a new company using the "Mavericks" name in the summer of 2019. It is also common ground that the second respondent, could function without any significant day to day support from Mr Clarke who, by this time did not contribute much to the business. In fact, Mr Clarke's witness statement suggests that the second respondent would operate more efficiently without him.

115 The Tribunal has reached a conclusion that Mr Clarke wished to distance himself from the second respondent's business and the rather mundane tasks to which he found himself tied. He preferred to look to new projects and in order to do so he had to place the burden on an employee of the second respondent, at that time, there was only one possibility in the short term; Mr Boyles.

116 We do not consider that Mr Grey, the proposed comparator was in materially similar circumstances; he was the junior employee who lacked Mr Boyles' range of skills, length of

[2] This numbering is a cross reference to the "Summary of the Case" numbering of the issues [138 -143b]

experience and knowledge of the company. We consider that a hypothetical comparator would be a person with the above characteristics, but without the claimant's protected characteristic. In short, the only person who had the breadth and depth of experience within the company to be capable to take on the additional burden at short notice.

117 On consideration of the above, we find the proposed treatment of the claimant was not less favourable

118 Moreover, for the reasons we have set out above, we find that the respondents' have demonstrated that the actions of Mr Clarke were wholly based on his self-interest and the proposed decision to put the duties on Mr Boyles was solely because there was no one else employed by the second respondent who could possibly take them on. The decision was in no sense whatsoever influenced by Mr Boyles' disability.

5.1.4: Failed to provide the claimant with details of his pay when he reduced his hours

119 It is correct that the respondents did not provide pay slips for the period in which the claimant was working 20 hours a week; half of his full contractual hours. Mr Clarke did inform the claimant that his salary would be "on a part time basis" [349] but at that point the proposed 20 hours a week had not been agreed nor tried by Mr Boyles. It is also correct that Mr Boyles effectively only attended work for about eight weeks before he declined to attend work on the 9th January 2020.

120 In light of the respondent's failure to provide pay slips or any contemporaneous documentary break down of the claimant's wages for about two years prior to 25th January 2020 [361]. It is very difficult to understand how this conduct could be viewed as less favourable treatment or was ; "because of" Mr Boyles 2019 disability; the respondents had treated Mr Boyles that way since early 2017 and, as set out later in this judgment, incorrectly paid since that date. In this sense, on a comparison of the treatment of Mr Boyles with, and without, the protected characteristic of disability the treatment was no less favourable. Indeed, we have upheld Mr Boyles' complaint of a breach of section 4 of the Employment Rights Act 1996 which occurred in 2017.

121 We have reached the conclusion that Mr Boyles has failed to establish that he was less favourably treated or that the treatment which was applied to him in late 2019 was in any sense whatsoever influenced by the respondents' knowledge of his disability.

5.1.5: failure to provide the claimant with pay slips until he raised a grievance and continued to underpay the claimant

122 In respect of this issue, the material evidence cited above is relevant to this allegation and our conclusions are the same and for the same reasoning; the respondents' conduct was a well-established pattern that did not materially alter when Mr Clarke became aware of Mr Boyles disability; it was not in any sense whatsoever "because of" the Mr Boyles' disability.

5.1.6: Failure to conduct a grievance hearing on 21st February 2020, conducting a 10-minute grievance meeting in August 2020 and failing to uphold the claimant's grievances.

123 It is of some importance to note that the claimant's grievance of the 21st February 2020 [369-70] Is titled "Complaint of disability discrimination and unlawful deductions from wages"

124 The first paragraph sets out the reasons why Mr Boyles considered that he was a disabled person. In the second he refers to the reasons why, on 9th January 2020 he refused to attend work until he was paid the wages he was owed. The balance of the complaint is focused on the underpayment of wages.

125 It was never likely that a grievance hearing would be conducted on the 21st February 2020; the day on which the grievance was submitted. A reasonable time frame might well have been shortly after the claimant had set out a quantification of the underpayment in his email of the 3rd March 2020 [378]. The respondents acknowledged that email on the 9th March, although the second respondent was in the process of moving its business to new premises, the resolution of the claimant's grievance held the prospect of his potential return to work (subject to his health) and his resumed contribution to the second respondent's income.

126 Mr Clarke's evidence on this point, at paragraph 52 of his witness statement, is unpersuasive; by the 3rd of March 2020 Mr Clarke knew how much the claimant said was outstanding and knew the method by which he had calculated it [378].

127 Mr Clarke made no contact with the claimant until prompted by an email from Mr Boyles on the 8th April. Mr Clarke's response [387] makes reference to "Employment Dispute" but that was a reference to the Early Conciliation Process which the claimant had started on the 30th March 2020. Thereafter, it appears that Mr Clarke consciously took no action on the grievance because of the ACAS conciliation and thereafter, the anticipation of potential tribunal proceedings.

128 We have referred to the content of Mr Clarke's letter of the 13th June in our explanation for doubting his candour as a witness. As we have found, his correspondence to be misleading on that date we do not know what unknown event or person prompted him to invite the claimant to a grievance hearing. However, we are satisfied that Mr Clarke's conduct of the grievance hearing and the content of the grievance outcome were motivated by a desire to successfully defend the claim which Mr Boyles had informed him had been presented to the tribunal in late June 2020.

129 Because there are different phases of time to be considered in this allegation, we set out our conclusions discretely.

130 With respect to the respondent's conduct from early April 2020 to the grievance outcome of the 2nd of October 2020. We find that the sole motivation of the respondents was the avoidance of tribunal proceedings and thereafter of a finding against them. Delaying the grievance, prior to the issue of proceedings prevented the claimant addressing, in his ET1, any explanation the respondent might later put forward, the grievance hearing allowed Mr Clarke to better understand Mr Boyles' claim, before the ET3 was submitted. The grievance outcome was delayed until after the response had been submitted to the tribunal was it worded in way which did not enable the claimant to understand the respondents' investigation or detailed rationale for their denials.

131 We have therefore reached the decision that in respect of the above period, the respondent's conduct was wholly motivated by the claim, not Mr Boyles' disability; in essence, the reason for the respondent's behaviour was its response to protected act[3], not Mr Boyles protected characteristic of disability.

132 In light of the above, it is perhaps obiter to express our decision on less favourable treatment. We find that Mr Grey was not a suitable comparator as he had not raised a grievance, started Early Conciliation or informed the respondents that he had presented a claim to the tribunal.

133 In our judgment a hypothetical comparator would be a person, who was not disabled, had made a complaint about unpaid wages, refused to work until the payment was made, raised a grievance about the under payment and then gone through the process of commencing a tribunal claim, absent a complaint based on his own protected characteristic. In our judgment, Mr Clarke's response; to inhibit the prospect of litigation and then, to do that which could be done to lessen the likelihood of a judgment against himself and the second respondent would have been materially the same. We therefore find that the conduct post early April 2020 was not less favourable treatment.

134 We then turn to the period from the 22nd February to early April 2020. We have found that, in normal circumstances a grievance hearing might have taken place in mid-March. Whilst we have no great faith in Mr Clarke's evidence, we accept the undisputed fact that the respondent moved premises in March and take judicial notice that the Lockdown in Wales came into effect in late March 2020 and continued for several months thereafter. In that context we do accept Mr Clarke's evidence that these two events, cumulatively affected the respondents in March and into April 2020 and thereby distracted him from the addressing the claimant's grievance. promptly.

135 Because Mr Clarke's evidence is corroborated, we find on the balance or probabilities, that this initial;period of delay was no sense whatsoever influenced by the claimant's protected characteristic of disability.

136 By reason of the above, find that the claims of direct discrimination are not well founded and are dismissed.

137 We note from our findings of fact that we rejected Mr Clarke's explanation for the delay in arranging the grievance from 30th March until this letter of the 13th June. Thereafter, as the correspondence shows the delay until 17th August was caused by the availability and/or health issues.

138 In our judgment on a closely related allegation under section 15 of the Equality Act we have concluded that the length of the grievance hearing and Mr Clarke's lack of scrutiny was;

[3] There was no claim under section 27 of the EqA nor any application to add such a claim.

"…. more likely than not that the respondents' lack of scrutiny and their lack of investigation was the claimant's evident intent to bring proceedings in the Employment Tribunal".

139 That finding is material to this decision for the period from the 30th March to 13th June 2020.

140 We have also found that by the 6th February 2020 Mr Clarke bore some antipathy towards the claimant consequent to the claimant's refusal to attend work untiless his outstanding wages were paid.

Discrimination arising from disability

15 Discrimination arising from disability

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

(a) A treats B unfavourably because of something arising in consequence

of B's disability, and

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

a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not

reasonably have been expected to know, that B had the disability.

141 In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe** [2016] I.C.R. 305, EAT. Langstaff P cautioned against a "deliciously vague" approach to causation and concluded that the Act requires Employment Tribunals to approach causation in two stages:

> "26 The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus on the words "because of something", and therefore has to identify "something"—and second on the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B".

In **Pnaiser v NHS England** [2016] I.R.L.R. 170, Simler J summarised the proper approach to section 15:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the

conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or because of it.

142 In **Hall v Chief Constable of West Yorkshire** [2015] IRLR 893, Laing J approached the test by asking: what was the "effective cause" of the unfavourable treatment?

143 The concept of "because of" in section 15 is no different from the concept in section 13. To determine this particular question (in a non-obvious case) therefore requires a consideration of the motivation of the decision-maker, and whether the "something" in the particular case materially influenced them. See: City of York Council v Grosset [2018] ICR 1492 (CA) at paragraphs 36 – 37; Dunn v Secretary of State for Justice [2018] EWCA Civ 1998, at paragraph 18.

144 As noted by the claimant the "something" does not need to be directly linked to the disability; there is a loser causation test under section 15: University of Edinburgh v Shiekholeslami [1018} IRLR 1090.

145 The term unfavourable is synonymous with the term detriment for these purposes is to be broadly defined; it will protect against any disadvantage and should be found to exist if "a reasonable worker would or might take the view that the treatment in issue was, in all the circumstances, to his detriment: Jeremiah v Ministry of Defence [1979] QB 87 CA and Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL, at paragraphs 104 to 105.

146 *The Defence* The burden of proof is on the respondent to prove:

a. Any proven unfavourable treatment was for a legitimate aim and

b. It acted proportionally.

147 In Bank Mellat v HM Treasury (No 2) [2014] AC 700 per Lord Sumption: "20 … the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community…"

Knowledge of the claimant's disability - section 15(2)

148 The Employment Tribunal has found that Mr Clarke did have the requisite knowledge at the material time.

149 The something arising from the claimant's disability is recorded in EJ Moore's Order [142, paragraph 6.2.1]: "An Inability to meet the demands of an increased workload"

The specific allegations

150 Because of his inability to meet the demands of an increased workload, did the respondent:

6.1.1 Try to massively increase the claimant's role / responsibility's

151 We have already set out our conclusions in respect of this allegation in our analysis of the direct discrimination claim. There is of course a potential, and material, difference between the protected characteristic and something which arises from it. But in this instance, we found that the respondents' motives were those of Mr Clarke's personal interest; to distance himself from day-to-day involvement in the workshop which, after four years of trading had not made a profit, and to focus on new ways of developing the business. By reason of these findings, we have concluded that the sole reason for the respondent's conduct was Mr Clarke's motivation which was in no sense whatsoever "because of" the claimant's inability to meet the demands of an increased workload.

6.1.2 & 3: Informing the Claimant on the 6th January 2020 that his role was to be workshop director.

152 The claimant had been referred to as Workshop Director on the 26th October 2019 and, as a business card in his name showed [475], he had been presented to customers as the Workshop Director. He made no complaint about the prior practice of describing him as a director nor a repetition of that description in the 26th October 2019 email.

153 Whilst the claimant knew that this description was not the title on his contract and he was aware it was reflective of a degree of aggrandisement by Mr Clarke he had not considered it to be unfavourable treatment and it was not a complaint raised in his grievance of the 21st February 2020.

154 We have concluded that, on an objective assessment the reference to Workshop Director was not unfavourable treatment. On a subjective analysis, in light of the history of the use of that title and the absence of a contemporaneous complaint we find that the claimant did not find the title unfavourable; it was the imposition of new duties which caused him to be upset.

155 Further, the references to the claimant as the Work Shop direct were, in our judgment, in no part "because of" the averred "something" which arose from the claimant's disability.

6.14 & 5: owing the claimant unpaid wages, causing the claimant to ask for monies due to him and not sticking to an agreed repayment plan

156 As noted above these omissions or deliberate failures by the respondents, through Mr Clarke, were present before Mr Boyles became unable to meet the demands of his role following his surgery. We have reached a conclusion elsewhere in this judgment that Mr Clarke's omissions and failures were because the second respondent's income was insufficient to pay the claimant and Mr Clarke's unwillingness to provide personal financial support to the second respondent to enable it to meet its contractual promises to Mr Boyles. Those reasons were wholly unrelated to the claimant's disability or the pleaded "something" arising from it.

6.1.6 The respondent referred to sicknotes as "unverified" in an email on 16th February 2020

157 We find that the respondent stated in the email of the 16th February 2020: "You stated that you have 2019 sicknotes, and will provide these to us (note: sick notes have now been supplied, unverified)"

158 The common understanding of the word "unverified", is in our judgment; that something has not been confirmed, its authenticity or accuracy is uncertain.

159 We have copies of the relevant certificates within the bundle[343, 344 & 348 as examples] they are signed, dated, contain relevant details of the claimant's treatment in hospital and advise that he was too ill to attend work in any capacity. The respondents had not asked for these sicknotes in 2019 and believed, correctly that the claimant was too ill to attend work.

160 In the grievance outcome the explanation for the use of the word "unverified " was explained thus; "This was based upon non-receipt of the sick notes" which we conclude is reference to the non-receipt during the claimant's 2019 absence.

161 On the face of the email, the claimant was reasonable to believe that the respondents were not satisfied of the veracity of those medical certificates. Whether that was the respondent's intention or not, the manner of expression was unfavourable treatment of the claimant.

162 We then considered whether that term was used "because of" the claimant's inability to meet the demands of the workload. We cannot find any logical connection between the apparent challenge to the veracity of 2019 medical certificates and the claimant's limited ability to meet the demands of his workload. None was identified in cross examination or in the closing submission on behalf of the claimant.

163 Hypothetically, we considered whether the respondents' unfavourable act was a consequence of the claimant's refusal to return to work until, on his case, his overdue wages were paid; a statement he first made on the 9th of January 2020; the same day as he was certified unfit to attend work in 2020. However, that is not the pleaded case and that was not the case the respondents had to meet.

164 We considered whether unconsciously, the respondent was motivated to retaliate against the claimant because he refused to take on the new responsibilities. That would have been a feasible argument if the respondent had been addressing its comment to the 2020 medical

certificates, but it was not; there is express comment on the claimant's 2020 absence and the lack of timely presentation of medical certificates, which the respondents were content to accept [364; "future Absences"].

165 We therefore find that the unfavourable treatment was not because of the claimant's inability to meet the demands of his workload.

6.1.7: The length of the grievance meeting on the 17th August 2020 and Mr Clarke's disinterest in Mr Boyles's case.

166 The dispute over the exact length of the grievance meeting was modest. Mr Boyles asserted the meeting lasted for 10 minutes. Mr Woolley asserted it lasted for approximately 15 minutes and Mr Clarke asserted the meeting was in the region of 20 minutes. It was, on any of these accounts a short meeting given the scope of the issues raised in the grievance., which had been expanded to include the issues raised in the claimant's ET1. Mr Clarkes rationale for the brevity of the meeting, as set out in his witness statement, was: "once I believed that I understood the issues and was in a position to go away and look at them, I adjourned the meeting". Mr Woolley's account was that Mr Clarke only asked questions about the claimant's disability claims.

167 Mr Clarke went on to say that it took him a lot longer to investigate the issues. Given the date of the grievance outcome letter, it appears Mr Clarke took seven to eight weeks. Somewhat longer than the ten days he indicated in his email to Mr Boyles dated the 21st August [431].

168 By the 2nd October, as evident from point 1 on page 439, the respondent's had formed the view that; "We will continue to investigate any errors you feel may exist in relation to unpaid wages…." It is difficult to reconcile Mr Clarke's assertion that he ended the grievance meeting because he understood the claimant's complaint with his lack of understanding after 7 weeks and the absence of any request during those weeks for additional information or explanation.

169 As we have noted in our findings of fact, a cursory comparison of the gross amounts recorded on the second respondent's monthly pay slips for claimant's salary of £32,000.00 per annum (£32,000.00 /12 = £2.666.66) would have alerted the respondents to a regular underpayment of circa £66.66 per month.

170 Similarly, a reconciliation of the pay slips against the respondent's own records of payments made to the claimant's bank account would have shown a deficit in payments of around £1,000.

171 Further, had the respondent's reconciled the claimant's bank account records of payment received from the respondent's bank statements of payments made, it would have been evident there was an apparent difference, of a little under £5,000.00, which had not, on the face of those documents available to the respondents, been received into the claimant's bank account.

172 In our judgment, it is more likely than not that the respondents' did not make any effort to investigate the unlawful deductions or conduct any analysis of the available information in

the period after the grievance meeting. We find that the duration of the grievance meeting reflected the respondents' desire to obtain a clearer understanding of the claims of discrimination alleged in the tribunal proceedings, before they submitted their response to those claims

173 We find that such conduct and disinterest was unfavourable.

174 However, the pleaded "something" is the claimant's inability to meet the demands of the workload upon him.

175 In our judgment, focusing on the issue of "because of" the claimant's physical abilities were not a consideration in the respondent's conscious or unconscious reasoning. We find it is more likely than not that the respondents' lack of scrutiny and their lack of investigation was the claimant's proceedings in the Employment Tribunal. That is not an allegation which is before us.

176 By reason of the above, the claims under section 15 of the Equality Act 2010 are not well founded.

The claims in respect of alleged failures to make reasonable adjustments

177 Sections 20 and 21 of **Equality Act 2010**. set out three requirements. Materially (s20(3)) there is a duty on an employer, where a PCP 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.

The elements of the prohibited act

178 Once the employer has such knowledge, then the tribunal considers the questions posed by HHJ Serota QC in **Environment Agency v Rowan** at paragraph 27:

"In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the Act by failing to comply with the section 4A duty must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or

(b) the physical feature of premises occupied by the employer,

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice

applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters, we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing *the disabled person concerned at a substantial disadvantage."*

179 The words of **Rowan** may however insufficiently emphasise the need to show, or to understand, what it is about a disability that gives rise to the substantial disadvantage, and therefore what it is that requires to be remedied by adjustment. Without knowing that, no assessment of what is, or is not, reasonable by way of adjustment can properly be made**: Chief Constable of West Midlands Police v R Gardner** EAT/0174/11/DA paragraph 53.

180 **Royal Bank of Scotland v Ashton** [2011] ICR 63, which drew attention to the fact that the Act where it speaks of making adjustments is concerned with outcome and not with the process by which the outcome is reached.

181 In **Salford NHS Primary Care Trust v Smith** EAT/0507/10 noted that a reasonable adjustment is one which prevents or ameliorates a PCP placing the claimant at a substantial disadvantage in comparison with persons who were not disabled. Reasonable adjustments are primarily concerned with enabling the disabled person to remain in, or return to, work with the employer. Matters such as consultations and trials, exploratory investigations and the like do not qualify as reasonable adjustments.

182 The statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission. Courts are obliged to take it into consideration whenever it is relevant: section 15(4). Chapter 6 is concerned with the duty to make reasonable adjustments. Paragraph 6.2 states:

> *"The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers … unfavourably an*d means taking additional steps to which non-disabled workers … are not entitled."

183 Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by "reasonable steps" and paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantive disadvantage. So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness: **Paulley v First Group plc** [2015] 1 WLR 3384, paras 44-45.

184 In circumstances where a number of adjustments had been made, it was perfectly natural and entirely appropriate' to consider the adjustments as a whole: **Burke v College of Law** [2012] All ER (D) 29.

185 Considerations of the respondent's operational needs are relevant considerations for the tribunal: **Chief Constable of Lincolnshire v Weaver** UKEAT/0622/07 and **O'Hanlon v Commissioners for Inland Revenue & Customs** [2007] IRLR 404 in which it accepted that the Employment Tribunal was entitled to have regard to the overall cost of altering sick pay rules in favour of the disabled when assessing whether an adjustment in a particular case was reasonable.

186 The claimant set out the Practice Criteria or Provision which he asserts put him at a substantial disadvantage in a two-page document in the bundle [143I-J].

187 **The first "PCP**" is Mr Clarke's practice of not providing tools which were needed in the second respondent's workshop and requiring the claimant to undertake work as his home workshop; where such tooling and machines were available.. The pleading states:

"This state of affairs meant the claimant used his own equipment and machines…to get the job done and largely on his own time, especially early in his employment" [143I].

188 His pleading states that he was at a substantial disadvantage compared to others because;

" ..able bodied personnel may have been able to cut corners in respect of not having the correct equipment or tools but this would mean considerable physical effort which the claimant would not be able to accomplish and jobs that were possible would have taken longer."

189 There is one clear reference to the issue of PCP in the claimant's witness statement [paragraph 57] which does not assist us to understand his claim.

190 The claimant had access to his own tools and used them until, according to his pleading; " the pay issues became unsufferable". The claimant did not give evidence being adversely affected by fatigue or pain prior to his 2nd August 2019 operation.

191 Thereafter he was absent from work until early November and, upon his return he agreed to work part time and, as we find was not required to undertake tasks, which he considered put him at a substantial disadvantage.

192 Upon his return to work the claimant was not required to work in excess of the 20 hours a week which he agreed to work. Nor was the claimant required to work from home in addition to the 20 hours.

193 By reason of the above, on the claimant's own evidence, the tribunal finds that the claimant was not subject to the above PCP nor was he subject to the pleaded substantial disadvantage for the purposes of section 20 of the Equality Act 2010.

194 ***The Second PCP** is set out as follows:*

"The respondent has a practice of randomly changing employees' job title and role to suit his own agenda."

195 He goes on;

"Therefore, the claimant respectfully asks that the massive increase in role and duties be considered again as a PCP."

196 The Tribunal understood this to refer to the meeting between the claimant and Mr Clarke on the 6th of January 2020 wherein he directed the claimant to take up additional responsibilities.

197 There was no evidence before us that the claimant ever took up any of those responsibilities. He was classified as too ill to attend work from the 9th January 2020 and also expressed his refusal to attend work at all until his outstanding salary remained unpaid.

198 It was also acknowledged by Mr Clarke that the claimant would remain on adjusted hours until the end of January 2020 and there was no evidence before the Tribunal that a fixed date for the implementation of the changes had been decided.

199 At its highest the claimant's case must be the respondent stated an intention to impose the additional responsibilities within a month; an event which did not take place.

200 The third PCP is the respondent's expectations of all employees to commit to working extra hours for things like events both internal to the business and external without pay or expenses.

201 It is not apparent how the above PCP would place a disabled person at a disadvantage. Mr Roberts and Mr Boyles did not address this in evidence, cross examination or closing. Regardless of the above, there was no evidence of this PCP being applied to Mr Boyles in 2019 to 2020.

202 By reason of the above we have concluded that the claimant has not demonstrated that he was subject to the PCP's he has pleaded, nor has he demonstrated that he was at a substantial disadvantage in respect of the "PCP"'s he has pleaded.

203 We find that these claims are not well founded.

Harassment contrary to section 26 of the Equality Act 2010

Statutory provisions

The relevant statutory provisions state:

(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.

(2)-

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

…disability

204 The proper interpretation of the relevant statutory provisions on harassment is explained in the following authorities:

Richmond Pharmacology v Dhaliwal *[2009] IRLR 336*

Grant v HM Land Registry & anor *[2011] IRLR 748*

General principles

1. *The relevant principles derived from these authorities are as follows.*

2. *The prescribed elements of unlawful harassment are*

   a. *unwanted conduct;*
   b. *having the purpose or effect of either:*
   c. *violating the claimant's dignity; or*
   or related to the prohibited grounds.

205 *Although many cases will involve considerable overlap between those elements of harassment, it would normally be a 'healthy discipline' for tribunals to address each element separately and to ensure that factual findings are made in each regard (Dhaliwal).*

206 *When considering whether the conduct had the prescribed effect on the claimant, although the tribunal must consider objectively whether it was reasonable of the claimant to consider that the conduct had that requisite effect, the claimant's subjective perception of the conduct in question must also be considered.*

207 *In* ***Dhaliwal****, the EAT (Underhill P) said that:*

> *"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."*

208 The Court of Appeal echoed these sentiments in Grant v HM Land Registry & anor [2011] IRLR 748 when it stated in relation to whether an effect could 'amount to a violation of dignity' or properly be described as 'creating an intimidating, hostile, degrading, humiliating or offensive environment' that:

'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.

209 The pleaded incident of unwanted conduct are as follows[4]:

a. Calling Fit notes for cancer treatment
b. Called the claimant's recovery unverified
c. Sent text messages on the 28th August and 4th,21st and 23rd September asking to know when the claimant would return to work

The Unwanted Conduct

"unverified"

210 We find that the respondent did not describe the claimant's recovery from his operation as "unverified"; the word unverified referred to the Med 3 statements, not the claimant's recovery.

211 As the claimant has not proven the alleged unwanted conduct occurred, we find this allegation is not well founded.

Requests to know when the claimant would return to work

212 We find that Mr Clarke did send messages to the claimant on the four dates:

213 On the 28th August 2019, after the claimant had been absent for 26 days, he wrote as follows (our emphasis added):

"E, I hope you are feeling a bit brighter. **Could you let me know if you'll be in next week?**" I am happy to have you here on short days with light work if that's okay for you, it would be helpful, Thanks" [510]. That message was sent two days before the expiry of the claimant's Med 3 certificate.

214 On the 4th September Mr Clarke wrote:

"Hope everything goes well for you today, give me a bell tomorrow with an update when you get a chance, cheers."

[4] 8.1 on page 143A.

215 On the 21st September;

"Sending an email over on salaries and return to work. Doing the finances now, we can just manage to send £2k over this month is that okay for you? **On a knife edge really with you not here for two months…"**

216 The email of the 21st September 2019 gives relevant context to the messages of the 21st and 23rd September [349]. These communications were sent three days before the claimant's Med 3 expired on the 24th September 2019.

217 On the 23rd September he wrote:

"How did you get on today?" and in response to the claimant describing himself as poorly (in somewhat graphic terms), Mr Clarke replied:

" Okay I was a little concerned I hadn't heard from you."

218 We find that only 28th August 2019 message had a direct reference to the claimant's return to work date. We find that the 21st September message implied the respondent's need for the claimant's return to work.

219 As will be noted below, we have been willing to examine possible ulterior, and unspoken motives. However, as the relationship between Mr Boyles and Mr Clarke was still reasonably positive in September 2019 we find that the remaining messages could not be reasonably construed otherwise than as genuine enquires as to the claimant's health. That is particularly so when they are sent at times when the respondent would be anticipating some imminent update from the claimant.

220 The 28th August 2019 message asks the claimant if he will be able to return to work. There was substantial debate in cross examination on the subject of the advice the claimant and received from his surgeon and his doctor on the likely duration of his post operative absence. We did not find that particularly helpful and find that the first Med 3 statement [343] advised that the claimant would be unfit for work for 28 days; to the 30th August 2019.

221 The respondent's first message asked for the claimant's views two days before the claimant's potential return to work date. Whilst we do not doubt the claimant was genuinely offended that the respondent's thought he might be for to return, on light duties, we have reached the conclusion that on any objective assessment it would be proper to contact an employee shortly before the expiry of the period for which their absence was anticipated and to ask for both an update on the employee's health and to indicate the employer's willingness to make adjustments to enable the employee to return. In our judgment it is clear that no offence was intended.

222 The two messages which refer, or imply, the respondents' desire for the claimant to return were also made at a time when the respondents would reasonably anticipate the possibility of the claimant's return, unless a doctor advised a further period of absence.

223 The question is one which would, in the industrial experience of the panel, be commonly asked shortly before a possible return to work date; to enable the respondent to plan and to have an opportunity to make any appropriate arrangements for an employee's return.

224 Whilst the tribunal accept that the claimant subjectively found the comment unwanted, in our judgment that perception was not reasonable. Moreover, such comments were of the sort of "unfortunate phrase" which should not be "caught by the term of harassment"; as per Dhaliwal, cited above.

The February 2020 request for Med 3 Statements

225. We find that the respondents did require the claimant to provide copies of his Med 3 statements for the period between 2nd August and November 2019. That is evident from the 16th February 2020 email which we have discussed earlier in this judgment [363].

226 We find that, on the claimant's evidence and that of Mr Clarke, because the claimant had verbally informed the respondents of his certified periods of sickness absence and had not been asked to provide the Med 3 statements, they had not been shown to the respondents prior to the request on 6th February 2020.

227 We note that the request for those certificates arose in the context of a significant break down in the working relationship; in particular the claimant's refusal to attend work due to unpaid wages. The claimant genuinely believed the request was a challenge to his honesty and that challenge was unwanted.

228 We accept that the respondent could make a request for copies of such certificates for its records and note that in the same email it refers to the claimant's 2020 sickness absence as being potentially viewed as "unauthorised absence"; for which the company was "not liable to make any statutory payments…"

229 Mr Clarke had not requested copies of the Med 3 statements between 2nd August 2019 and 5th February 2020. Throughout that period the given rationale for requesting the Med 3 statements had existed, but was not actioned. In our judgment the trigger for the February 2020 request was Mr Boyles' refusal to attend work whilst his overdue wages remained unpaid.

230 We find that the conscious motivation of Mr Clarke's request, despite his denial in cross examination, was a consequence of the claimant's refusal to attend work and the adverse impact of that refusal on the second respondent's income (as described by Mr Clarke in his previous correspondence; the reduction of £20,000.00 during the 2019 absence). In short, he wanted to examine the Med 3 statements in case he might find grounds to challenge the claimant over his receipt of sick pay in 2019 and find a basis to assert an overpayment to Mr Boyle in that period.

231 Was the proven conduct related to the claimant's disability?

232 The Tribunal directed itself in accordance with the guidance in Tees Esk and Wear Valleys NHS Foundation Trust (appellant) v Aslam and another (respondents) [2020] IRLR 49, a synopsis of which is set out in the head note to the case:

"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.

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."

233 Mr Clarke's motive was not directly related to the claimant's disability. However, the manner by which Mr Clarke decided to give effect to that motivation, was closely related to the claimant's disability; the 2019 sick pay was a direct consequence of the claimant's absence due to his disability.

234 In this context the respondent's conduct was related to the claimant's protected characteristic for the purpose of section 26 of the Equality Act. Furthermore, in our objective assessment Mr Boyle's perception of Mr Clarke's conduct was reasonable.

235 That conduct undoubtedly had the proscribed effect set out in section 1(b)

236 By reason of the above we find that the claimant was subject to harassment for a reason relating to his disability on the 6th February 2020 when the respondent requested the aforesaid MED 3 statements. This claim is well founded and succeeds.

Allegations Against the Second Respondent

Allegation 11.1[5]

By the 9th June 2020, had the respondent failed to provide a statement of terms and conditions of employment in accordance with section 1(2) and (3) of the Employment Rights Act 1996, to the claimant?

237 Section 1 of the Employment Rights Act 1996 states:

Statement of initial employment particulars.

(1)Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.

2)Subject to sections 2(2) to (4)—

(a)the particulars required by subsections (3) and (4) must be included in a single document; and

(b)the statement must be given not later than the beginning of the employment.

(3)The statement shall contain particulars of—

[5] This numbering is taken from EJ Moore's case summary, as noted above.

(a)the names of the employer and worker ,

(b)the date when the employment began, and

(c) in the case of a statement given to an employee, the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

(4)The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment of a statement given under section 2(4) containing them) is given, of—

(a)the scale or rate of remuneration or the method of calculating remuneration,

(b)the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),

(c)any terms and conditions relating to hours of work including any terms and conditions relating to—

(i) normal working hours,

(ii)the days of the week the worker is required to work, and

(iii)whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined.

(d)any terms and conditions relating to any of the following—

(i)entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),

(ii)incapacity for work due to sickness or injury, including any provision for sick pay,

(iia)any other paid leave, and

(iii)pensions and pension schemes,

(da)any other benefits provided by the employer that do not fall within another paragraph of this subsection,

(e)the length of notice which the worker is obliged to give and entitled to receive to terminate his contract of employment or other worker's contract,

(f)the title of the job which the worker is employed to do or a brief description of the work for which he is employed,

(g)where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,

(ga)any probationary period, including any conditions and its duration,

(h)either the place of work or, where the worker is required or permitted to work at various places, an indication of that and of the address of the employer,

(j)any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made,

238 Section 4 of the act states:

Statement of changes.

(1)If, after the material date, there is a change in any of the matters particulars of which are required by sections 1 to 3 to be included or referred to in a statement under section 1, the employer shall give to the worker a written statement containing particulars of the change.

(2)For the purposes of subsection (1)—

(a)in relation to a matter particulars of which are included or referred to in a statement given under section 1 ... , the material date is the date to which the statement relates,

(b)in relation to a matter particulars of which—

(i)are included or referred to in an instalment of a statement given under section 2(4)

(ii). . . . .

the material date is the date to which the instalment relates, and

(c)in relation to any other matter, the material date is the date by which a statement under section 1 is required to be given.

(3)A statement under subsection (1) shall be given at the earliest opportunity and, in any event, not later than—

(a)one month after the change in question, or

(b)where that change results from the worker being required to work outside the United Kingdom for a period of more than one month, the time when he leaves the United Kingdom in order to begin so to work, if that is earlier.

(4)A statement under subsection (1) may refer the worker to the provisions of some other document which is reasonably accessible to the worker for a change in any of the matters specified in sections 1(4)(d)(ii) to (iii) and 3(1)(a) and (c).

(5)A statement under subsection (1) may refer the worker for a change in either of the matters specified in section 1(4)(e) to the law or to the provisions of any collective agreement directly affecting the terms and conditions of the employment which is reasonably accessible to the worker.

(6)Where, after an employer has given to a worker a statement under section 1, either—

(a)the name of the employer (whether an individual or a body corporate or partnership) is changed without any change in the identity of the employer, or

(b) in the case of a statement given to an employee, the identity of the employer is changed in circumstances in which the continuity of the employee's period of employment is not broken,

and subsection (7) applies in relation to the change, the person who is the employer immediately after the change is not required to give to a statement under section 1; but the change shall be treated as a change falling within subsection (1) of this section.

(7)This subsection applies in relation to a change if it does not involve any change in any of the matters (other than the names of the parties) particulars of which are required by sections 1 to 3 to be included or referred to in the statement under section 1.

(8)A statement under subsection (1) which informs an employee of a change such as is referred to in subsection (6)(b) shall specify the date on which the employee's period of continuous employment began.

239 The tribunal find that on the 18th of April 2016 Mr Clarke sent an email to the claimant which stated: "Ian, contract enclosed, come back to me with any questions, it's a standard contract with the exception of your bonuses" [166] to which Mr Boyles replied on the 20th of April: "Hi Richard, please accept this email as acceptance of your contract of employment..."

240 The evidence of Mr. Clarke stated that a copy of the contract, in electronic format was attached to that email. Mr Boyles was uncertain as to whether that was the case. At page 169 with the bundle is a document titled written statement of terms and conditions of employment. On the 8th page is a signature which Mr Boyles accepted as his. It is dated 16th of May 2016 there is a further appendix containing restrictive covenants and flexible employment terms, each of which is signed and dated in the same manner [174- 175].

241 In cross examination, the claimant's case was that he had being asked, and agreed, to hand back the copy of the contract which was signed. The respondent did not dispute that but asserted that the claimant had received a copy of the contract attached to the email to which we have referred above.

242 The claimant’s witness statement on this issue [paragraph 75 and (292)] is largely concerned with questions relating to a shareholding and the related documentation which is not an express issue for this Tribunal to determine.

243 The issue for us to determine is “When these proceedings were begun, was the respondent in breach of its duty to give the claim it a written statement of employment or of particulars or of a change of those particulars?”

244 With respect to the assertion that there had been a failure to provide the claimant with a written notice of the change of his terms and conditions following an increase in the claimant’s salary upon the increase his hours to five days a week, the tribunal notes the letter of the 24th of May 2017 [187] which sets out in writing the claimant’s increased gross salary alongside share allocation but does not, for the purposes of Section 1 subsection (4)(c) set out any terms or conditions relating to hours of work including any terms and conditions relating to normal hours of work.

245 The claimant’s original contract stated [169] that his normal hours of work were Tuesday to Friday and he was employed full time. It also stated: “with reasonable notice your hours may vary to suit the business needs and its customers. This is integral to the business as customer service is paramount.”

246 Based on this evidence we have reached the following findings of fact; we consider the contemporaneous email evidence is persuasive. Although there are no attachments visible on the print out of the email from Mr. Clark to Mr Boyles dated the 18th of April 2016, it is more likely than not, by reason of Mr Boyle's response accepting the terms of the contract that he had seen a copy. We conclude, on the balance of probabilities, that a copy was received by the claimant in an electronic format, and was available for the claimant to retain.

247 The content of that contract, at that time, satisfied the requirement of Section 1 of the employment rights act 1996.

248 The letter from the respondent to the claimant of the 26th of May 2017 included an express reference to the increase in the claimant’s salary. Whilst it is common ground that the claimant began to work five days a week the letter does not refer to that permanent change in the hours of work or the days of work.

249 Thus the above change to claimant’s contract had not been set out in a statement which complies with section 4 of the Employment Rights Act by the 6th June 2020.

250 By reason of the above the second respondent was in breach of section 4 of the Employment Rights Act 1996 and this claim is well founded.

251 We note that we did not find that there was a breach of section 4 in respect of the claimant's temporary reduced hours in November 2019; this was a temporary reasonable adjustment and such a temporary adjustment was one which was expressly encompassed by the terms of original contract of April 2016.

Allegation 10.1: Did the Respondent make unauthorised deductions form the claimant's wages and, if so, how much was deducted?

252 Section 13 and 23 of the Employment Rights Act state:

Right not to suffer unauthorised deductions.

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting “wages” within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

Complaints to employment tribunals.

(1)A worker may present a complaint to an employment tribunal—

(a)that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b)that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c)that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d)that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2)Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b)in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3)Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

…..

(4A)An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the

wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B)Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j)

253 The tribunal also notes Ms. Thomas' submission:

> "Pursuant to Bear Scotland Ltd v. Fulton [2015] ICR 221 the question of whether there is a 'series' of deductions is a question of fact, that will require a sufficient factual and temporal link between the deductions. It was also held that a gap of three months before between any two deductions will break the 'series of deductions. Pursuant to S23(4A) the Tribunal is limited to considering complaints about deductions made in the 2 years ending with the date of presentation of the complaint (6th June 2020).

254 And on liability, referring to her analysis set out in a table of payments;

> " The amounts highlighted in red are months where there was no pay or less pay than stated on the corresponding pay slip. Having regard to the limitation date of 31st December (as extended by early conciliation) the Respondent submits that in the months of January and April 2020 the Respondent did not make payment on time to the Claimant. If the Tribunal were to consider that November 2019 formed part of a series of deductions then that would also be in time. In respect of any earlier payments there is more than a three-month gap and such claims would be out of time. In respect of the period for which the claim is in time there is no overall shortfall".

255 The Tribunal made the following relevant findings of fact: that the respondent had not paid the claimant his full contractual salary, on any occasion it was due, since the pay increase of May 2017. This failure was an unbroken series of deductions between 31st May 2017 and the 31st August 2019, and occurred again in November and December 2019 (in respect of the calculation of the percentage reduction of the claimant's full salary).

256 The Tribunal also found that, for August 2019, the properly payable sum was the claimant's full salary, and by reason of the evidence from the respondent, in its table of payments, only £1,500.00 of the £3,000 August 2019 payment was in respect of his August salary. This too amounted to a deduction.

257 We find that, there were a series of part payments or wholesale failures to pay the claimant, without any period of three months intervening between, February 2019 and April 2020.

258 We find there was an unbroken series of deductions, by the failure to pay the claimant his full contractual monthly salary (or the pro rata thereof) for the two-year period up to 31st December 2019.

259 None of the deductions were agreed by the claimant and the tribunal finds that none of the deductions were attributable to an error of computation; a matter we considered albeit that was not argued by the second respondent. Those deductions occurred in the context of the respondent's failure to provide pay slips to the claimant and thereby preventing him from checking whether his net pay was consistent with his gross monthly entitlement.

260 We therefore find that the claim is well founded and succeeds.

Constructive unfair dismissal

The Legal Matrix

261 Section 95(1)(c) of the Employment Rights Act 1996 states that an employee is dismissed by his employer if the employee terminates the contract under which he is employed, with or without notice, in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

262 We note that lawful conduct is not something that is capable of amounting to repudiation and therefore conduct cannot be repudiatory unless it involves a breach of contract Sparfax Limited -v- Harrison [1980] IRLR 442 Court of Appeal.

263 In this case, Claimant alleges the Respondent breached the implied term of trust and confidence.

264 The implied obligation of mutual trust and confidence in employment contracts requires 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 employee/employer". This is a definition which has been cited in cases such as Malik -v- BCCI, Woods -v- WM Car Maintenance Services, Imperial Group Pension Trust -v- Imperial Tobacco and Lewis -v- Motorworld Garages Limited; all of which are well known to the experienced practitioners who have assisted the parties.

265 The implied obligation is formulated to cover a great diversity of situations and a balance has to be struck between the employer's interests in managing the business that they run as they see fit, and the employee's interests in not being unfairly and improperly exploited. It is a mutual obligation though it seems that implied terms adds little to the employee's implied obligations to serve his employer loyally.

266 In assessing whether there has been a breach it is clear that what is of significance is the impact of the employer's behaviour on the employee rather than that which the employer intended, BG PLC -v- O'Brien [2001].

267 The burden lies on the employee to prove the breach on the balance of probabilities, this means that the employee must prove the alleged act or omission, and the employee must prove that the employer's conduct was without reasonable and proper cause.

268 The test whether such proven conduct, in the absence of reasonable and proper cause, amounts to a breach is said to be severe; Gogay -v- Hertfordshire County Council [2000]

269 It is not enough for the employee to prove the employer has done something which is simply in breach of contract, or "out of order", or perhaps unreasonable. He must prove that the degree of breach was sufficiently serious, or calculated, to cause such damage that the contract can be fairly regarded as repudiated and that repudiation accepted. The cases of Croft -v- Consignia

PLC and The Post Office -v- Roberts both indicate that the quality of the breach must be substantial.

270 Those cases, along with *Lewis*, also indicate that a repudiatory breach may be formed of the cumulative effect of a number of incidents which of themselves, in isolation, may or may not be repudiatory.

271 We note two more cases, the first is Omalanju -v- The London Borough of Waltham Forest which directs us that the "final straw" need not of itself be a repudiatory breach or unreasonable or blameworthy conduct but it must have a degree of fault. Thus, entirely innocuous behaviour cannot sensibly be viewed as adding any weight to the accumulation of potentially repudiatory behaviour and therefore not be the final straw.

272 Lastly, we note that in cases where a final straw is alleged, but not proven, what matters is the Tribunal's findings of fact. If the Tribunal has concluded that the repudiatory breach existed prior to the "final straw" then it may not matter whether that final straw is proven.

273 However, if the final straw is not proven, it will be important to analyse the Claimant's conduct in the period following the last incident which is found to have contributed to a cumulative breach; it is likely to be a material consideration in respect of any question of affirmation.

274 We then turn to the issue of affirmation, in particular we have been guided by the case of W E Cox Toner International Limited -v- Crook [1981] IRLR 443 and Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121; deciding to resign is for many, if not most, employees is a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to them in their community. Their mortgage, regular expenses, may depend upon it and economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter's case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

275 We have also taken into account the guidance in Bashir v Brillo Manufacturing Co [1979] IRLR 295 and El Hoshi v Pizza Express ltd [2004] EAT do not establish any general principle in law with respect to the respect of receipt of sick pay and affirmation. They are explicable on their particular facts.

276 Lastly, we note that the effective cause does not need to be the sole or dominant cause of the resignation; Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493.

277 If the Claimant were to establish that he resigned in response to a proven repudiatory breach of contract then we must go on to consider whether the reason for his constructive dismissal was a potentially fair one. That requires us to determine what were the set of facts or beliefs held by the employer at the time of the dismissal Maund -v- Penwith District Council [1984] ICR 143. In this case, the pleaded potentially fair reason is capability or some other substantial reason.

278 Additionally, Ms. Thomas cited the authority of Singh v Moorlands Primary School & Anor [2013] EWCA Civ 909 (25 July 2013). We accept her proposition that the parties 's pleadings in the Employment Tribunal fall within the principle of "judicial proceedings immunity".

Discussion and conclusions

279 In respect of the alleged repudiatory breach, we summarise the following from our findings of fact set out above, that the claimant has proved the following:

280 That the second respondent tried to impose a substantial number of additional responsibilities upon the claimant without consultation or forewarning and, but for the claimant's refusal on 9th January 2020, would have done so.

281 That the second respondent described the claimant's 2019 medical certificates as "unverified".

282 That the respondent failed to conduct a grievance hearing within a reasonable period from April 2020 to the 17th August 2020.

283 That the respondent conducted the 17th August Grievance hearing was brief and it was apparent the respondent was disinterested in the grievance investigation.

284 That the respondent chose not to investigate the claimant's grievance in respect of the under payment of wages despite having sufficient documentary evidence to do so.

285 The second respondent's grievance outcome stated that it was incapable of investigating the claimant's alleged underpayment of wages when, on the documentary evidence before it, it was able to do so.

286 That the respondent unreasonably delayed providing the claimant with the outcome to the grievance.

287 The grievance outcome intentionally avoided making any finding on the allegation of underpayment of wages.

288 We find that the claimant has proven that respondent's the aforesaid conduct of the grievance procedure was motivated by the respondent's covert intention to limit its potential liability in litigation. Such conduct was not with reasonable and proper case.

289 We find that the claimant has proven that the imposition of substantial additional responsibilities, without warning or consultation, at a time when the claimant was working part time due to his health, was without reasonable and proper cause.

290 We find that the claimant has proven that the second respondent's description of the claimant's 2019 sick notes caused the claimant to believe the respondent doubted they were genuine. The respondent's explanation is that the use of the word unverified was a mistake. A written statement which implies a criticism of the veracity of the claimant's medical evidence, is a serious one. We find that such a mistake does not amount to a reasonable and proper cause.

291 In our judgment, the aforesaid cumulative conduct of the respondent amounted to conduct which seriously damaged, and eventually destroyed the claimant's trust and confidence in the second respondent; a breach of the implied term of trust and confidence.

292 The tribunal notes that, with respect to the multiple findings on the grievance, they go beyond the description in case summary [139]. However, the respondent was on notice of the wider context and pleaded to them in its amended ET3, which was presented after the promulgation of the case summary [143U, paragraph 23].

293 We note, that on a consideration of the claimant's resignation letter, the reasons given for his resignation on the 6th October 2020 were numerous and certainly beyond those recorded in the case summary. The most obvious being the alleged unlawful deductions from wages. However, we had confined out findings to those matters of which we were satisfied the parties were on notice by the conclusion of the evidence.

294 We find that the claimant, four days after the last act we found proven, resigned in response to the repudiatory conduct of the respondent.

Affirmation

295 Ms. Thomas submitted that the claimant had evidently affirmed his contract because he had expressed some months earlier a loss of trust in the second respondent and he confirmed that in cross examination. She correctly states those facts. It was also the claimant's evidence that he hoped that the trust could be restored through the grievance process and he was concerned about finding alternative work in his circumstances.

296 Save for the claimant's continued involvement in the non-contractual grievance process, there is very little evidence of affirmation of the contract. The claimant expressly, and repeatedly stated he would not undertake any work for the second respondent until his unpaid wages were paid; he was expressly refusing to act in accordance with his contractual duties.

297 The Claimant commenced Early Conciliation on 30th March 2020 and presented a claim for discrimination and unlawful deductions from wages on the 9th June 2020. He manifestly was not accepting the respondent's conduct to that date. Furthermore, the claimant was absent with mental health problems throughout the last ten months of his employment.

298 In any event, the claimant resigned within two working days of the last act which contributed to the cumulative repudiatory breach.

299 We find that the claimant did not affirm the contract.

300 By reason of the above we find that the claimant has proven that the respondent's acts, or deliberate omissions, recorded above were without reasonable and proper cause and amounted to a repudiatory breach of his contract of employment. We find that his acceptance of that breach amounted to a dismissal for the purposes of section 95(1)(c) of the employment Rights Act 1996.

A potentially fair reason for dismissal.

301 On this issue the respondent bears the burden of proof. Whilst the respondent may rely on evidence from any source to discharge the burden, Mr Clarke did not give evidence on this

point. The tribunal notes that Mr Clarke's response to the claimant's resignation invited the claimant to withdraw his resignation and continue his employment with the second respondent. There had been no indication of the commencement of any capability proceedings at the date of dismissal.

302 Whilst the burden on the respondent is not an onerous one, there is no evidence that the respondent, at the material time was contemplating dismissal, as noted above, the evidence suggests the respondent wanted to continue the employment relationship.

303 For the above reasons, the respondent has not established that the dismissal was for a potentially fair reason and accordingly, we find that the claimant was unfairly dismissed.

304 A separate order will be issued in respect of a remedy hearing.

____

Employment Judge R F Powell
Dated: 28th January 2022

REASONS SENT TO THE PARTIES ON 2 February 2022

FOR THE TRIBUNAL OFFICE Mr N Roche