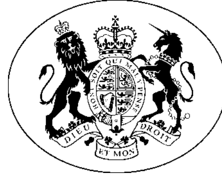

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr S Putman	**v**	(1) Onriver (UK) Limited (2) Mr Zhengmao Cheng

Heard at: London Central **On**: 05, 06, 07 & 08 July 2022

Before: Employment Judge B Beyzade
Ms Z Darmas, Tribunal Member
Mr D Shaw, Tribunal Member

Representation

For the Claimant: Mr D. Wilson, Lay Representative
For the Respondents: Mr Z. Cheng, Director 1st respondent/2nd respondent

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The complaint of unauthorised deduction from wages against the first respondent in respect of the claimant's arrears of pay relating to the month of December 2020 is well founded and succeeds. The remainder of the claimant's claim of unauthorised deduction from wages (pay arrears and bonus) is dismissed.

2. The complaint of unauthorised deduction from wages against the first respondent in respect of holiday pay between 1 April 2021 and 31 May

2021 is well founded and succeeds. The remainder of the claimant's claim of unauthorised deduction from wages (holiday pay) is dismissed.

3. The complaint of failure to provide pay statements in respect of 1 January 2021 to 31 May 2021 made against the first respondent pursuant to sections 8 and 11(1) of the *Employment Rights Act 1996* is well founded and it succeeds.

4. The complaint of failure to provide an initial statement of employment particulars and statement of change made against the first respondent pursuant to sections 1 and 4 of the Employment Rights Act 1996 and section 38 of the Employment Act 2002 is well founded and it succeeds.

5. A remedy hearing shall take place **at 10.00am on 28 October 2022 which is listed for one day by Cloud Video Platform before Employment Judge Beyzade, Ms Darmas and Mr Shaw** to consider the sums of money to be awarded to the claimant in respect of his successful claims (as set out above).

6. The complaint of direct disability discrimination contrary to section 13 of the Equality Act 2010 is dismissed as it is not well founded. This means that the respondents did not subject the claimant to discrimination because of his disability.

7. The complaint of harassment related to disability contrary to section 26 of the Equality Act 2010 is dismissed as it is not well founded. This means that the respondents did not subject the claimant to harassment related to his disability.

8. The first respondent's counterclaim is dismissed.

REASONS

Introduction

1. The claimant presented a complaint of unlawful deduction from wages (arrears of pay, bonus and holiday pay), failure to provide statement of employment particulars and statement of change, failure to provide itemised pay statements, direct disability discrimination and harassment related to disability which the respondents denied.

2. In their ET3 Form, the respondents also indicated that they were making a counterclaim for repayment of monies advanced to the claimant by the first respondent by way of a number of alleged loans which the claimant denied.

3. A final hearing was held on 5, 6, 7 and 8 July 2022. This was a hearing held by Cloud Video Platform ("CVP") video hearing pursuant to Rule 46 of *Schedule 1 of the Employment Tribunal Constitution and Rules of Procedure Regulations 2013* ("ET Rules"). We were satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in hearing were able to see and hear the proceedings.

4. The parties prepared and filed documents in advance of the hearing consisting of the claimant's chronology, claimant's contract of employment (signed and dated on 10 February 2016), Schedule 1 NEST pension contribution detail, Schedule 2 claimant discrimination statement, Schedule 3 claimant harassment statement, Schedule 4 schedule of text messages, Schedule 5 summary of hospitalisations and cardiologist letter, and Schedule 6 grievance and resignation letters. We also had before us a copy of the Tribunal file which included a copy of the ET1 Form, ET3 Form, claimant's Schedule of Loss, and the Case Management Orders dated 07 March 2022.

5. On the second day of the hearing both parties sent by email copies of various documents including the claimant's HSBC bank statements from 17 April 2019 to 27 June 2021, claimant's payslips in relation to 2019, 2020 and January to May 2021, and P60s for the years 2020 and 2021. The claimant also supplied a schedule setting out his payslip and bank statement analysis (2019 and 2020) at the same time. Neither party objected to these documents being adduced as part of the evidence in the case. We gave permission for both parties to rely on those documents. We determined that this was in accordance with the overriding objective (Rule 2 of the ET Rules) and that the parties could deal with any matters arising from those documents fairly and justly in evidence and submissions (neither party objected to this approach). The claimant's representative sent a number of comments by email to the Tribunal on the documents and the Tribunal advised that those comments should be raised during the parties' submissions at the conclusion of the hearing.

6. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

   (i) [Please see the agreed issues at Annex 1 below – this is taken from pages 9-13 of the Case Management Orders dated 07 March 2022].

7. The claimant gave evidence at the hearing on his own behalf and Mr Z Cheng, Director of the first respondent (and who is also the second respondent) gave evidence on behalf of the respondents.

8. The claimant was represented by Mr Wilson, a lay representative and Mr Cheng represented both respondents. Although the respondents' solicitor ceased acting about a week before the final hearing, the Clerk to the Tribunal under our direction contacted Mr Cheng who eventually logged into the hearing and told us that he was unaware that his solicitor ceased acting and he had not been checking his emails. Upon his request, we provided him with a brief adjournment to speak to his solicitor. We confirmed with him thereafter that he was in a position to proceed and to

represent the respondents in respect of this claim. He confirmed that he did not wish to make any applications, nor on being asked (if he required a Mandarin interpreter) did he request an interpreter to be provided by the Tribunal. Mr Cheng confirmed that he was happy to proceed with the hearing and to represent both respondents.

9. Both parties made oral closing submissions.

Findings of Fact

10. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -

11. The claimant was employed by the first respondent from 01 February 2016.

Contract of employment

12. The claimant signed a contract of employment on 10 February 2016 which described his role as Sales Advisor. His normal working hours were stipulated as 30 hours per week, his salary as £15,000 gross per annum (no overtime was payable), and holiday entitlement was 25 days plus bank holidays in each holiday year which ran from 1 April to 31 March (any holiday not taken by 31 March may not be carried forward without written permission).

13. The employment contract also provides that if an employee were unable to attend work for any reason he must inform Mr Cheng by 09.00am on the first day of absence preferably by telephone and the failure to do so may result in sickness pay not being paid. There are also certification requirements (self-certification for 7 days and thereafter a fit note is required) and subject to complying with these requirements and being off sick for four days or more, an employee is entitled to Statutory Sick Pay.

14. Clause 5.4 of the claimant’s employment contract provided as follows:

"Under the Employment Relations Act, 1996, you authorise the Company to deduct from your salary, any overpayments or monies owing to the Company, including, without limitation, any overpayment of salary, professional subscriptions and any advances or loans made to you by the Company. In the event of such monies being due to the Company upon the termination of your employment, and if your final salary is insufficient to allow for the whole of any such deduction, you will be required to repay the outstanding amount due to the Company within one month of the date of the termination of your employment."

Claimant's duties

15. The claimant's duties included estates management, looking after the first respondent's assets, and overseeing the first respondent's workers. The claimant would be going around making sure everything was in order, especially for health and safety purposes, and that builders were carrying out their tasks normally.

16. He was required to work at the first respondent's offices at Suite 607, Britannia House, 11 Glenthorne Road, Hammersmith, London, W6 0LH or such other places as the first respondent may require.

17. The claimant also carried out additional duties including supervising Mr Cheng's personal cleaner in his house on Wednesdays, driving Mr Cheng to and from the airport when he travelled overseas and driving Mr Cheng to various places as required.

Claimant's remuneration

18. The claimant was paid £15,000.00 gross per annum and £6000.00 towards his season ticket in respect of train travel from his home in Kent to the first respondent's office which was located in Hammersmith. He initially worked part time hours although his working hours were later increased to 40 hours per week. The claimant was paid on a monthly basis.

Bonus payment - 2017

19. In January 2017 the claimant was paid into his Lloyds Bank account the sum of £2,084.00 which was a mix of the claimant's net salary, bonus, and expenses.

20. In February 2017 it was discussed that the claimant would be considered for a quarterly bonus of £2500.00.

21. On 20 June 2017 the claimant was paid into his Lloyds Bank account the sum of £2,950.69 which was a mix of the claimant's net salary, bonus, and expenses.

22. Thereafter on 19 October 2017 the claimant was paid into his Lloyds Bank account the sum of £3,324.00 which comprised the claimant's net salary, bonus, and expenses.

23. No bonus payment was made to the claimant in December 2017.

Bonus payment – 2018

24. On 05 April 2018 the claimant was paid into his Lloyds Bank account the sum of £2,783.37 which included the claimant's net salary, bonus, and expenses.

25. Then on 18 June 2018 the claimant was paid the sum of £2000.00 into his Lloyds bank account in respect of a bonus, and thereafter on 01 October 2018 the claimant was paid the sum of £1,867.00 which was a mix of net salary, bonus, and expenses.

26. There was no bonus payment made to the claimant in December 2018.

Bonus payment - 2019

27. On 16 March 2019 a payment of £2500.00 gross was made to the claimant and he had a loan deduction made of £2500.00.

28. On 5 May 2019 the claimant was paid a gross bonus payment of £7000.00.

29. On 28 June 2019 the claimant received a bonus payment of £2500.00, and he had a loan deduction made of £1800.00.

30. On 24 September 2019 the claimant was also paid a bonus payment of £2500.00, and he had a loan deduction made of £1768.00.

31. On 20 December 2019 the claimant was paid a higher bonus amount of £9500 gross, and he had a loan deduction made of £1105.89.

Bonus payment - 2020

32. On 30 March 2020 the claimant received a bonus payment of £2500 gross and the sum of £2500 was deducted from his salary by way of a loan.

33. There were no further bonus payments made to the claimant in 2020.

Salary payments in 2019 and 2020

34. The claimant received payslips throughout 2019 which recorded the following information:

Date	Base Salary	Bonus	Loan	Net Salary
1/30/2019	1750		-1,200.00	239.43
2/28/2019	1750		-1,200.00	239.43
3/16/2019	1750	2500	-2,500.00	567.3
5/5/2019	1750	7000		5698.98
5/31/2019	1750			1435.38
6/28/2019	1750	2500	-1,800.00	1247.03
7/31/2019	1750			1435.38
8/30/2019	1750			1445.16
9/24/2019	1750	2500	-1,768.00	1279.03
10/29/2019	1750			1445.16
11/28/2019	1750			1445.16
12/24/2019	1750	9500	1,105.89	6021.34
Totals	21000	24000	-9,573.89	22498.78

35. In respect of the claimant's payslips in 2020, the following information was recorded:

Date	Base Salary	Bonus	Loan	Net Salary
1/22/2020	1750			1435.38
2/28/2020	1750			1445.16
3/30/2020	1750	2500	-2,500.00	576.18
4/30/2020	1400			1227.2
5/29/2020	1400			1227.2
6/30/2020	1400			1227.2
7/30/2020	1400			1227.2
8/22/2020	1400			1227.2
9/18/2020	1225			1113.92
10/28/2020	1925			1567.52
11/18/2020	1400			1227.2
12/15/2020	1750			1454.24
	18550	2500	-2500	14955.6

Bank statements 2019 and 2020

36. The claimant's HSBC account was opened in April 2019 to coincide with the second flat he occupied (see below). We were not provided with bank statements prior to this date, and we did not have any financial statements from any other accounts held by the claimant including Lloyds, American Express, and Nationwide (to which Mr Cheng said he made payments). From the HSBC bank statements we had before us (April 2019 onwards), we noted that the claimant started being paid the monthly sum of £1880.00 and the first payment in the said amount was made to him by the first respondent on 31 May 2019. Regular payments of £1880.00 continued to be made to the claimant by the first respondent on a monthly basis up to and including September 2020.

Furlough leave

37. In March 2020 the United Kingdom government imposed a nationwide lockdown and many businesses including the first respondent's business was required to close as a result of the coronavirus pandemic. On 01 April 2020 the claimant signed an agreement pursuant to which he was placed on furlough leave and his salary was varied by agreement to £1400.00 gross per month.

38. As part of this agreement, the claimant was not required to work for a period from 01 April 2020.

Claimant's return to work

39. The claimant then returned to work, and he undertook some work between the end of May/early June and August 2020.

40. The first respondent's business did not cease to operate during the further period in which the UK Government imposed restrictions in late 2020.

41. Between April 2020 and September 2020 the claimant received equal monthly payments of £1880.00 (the payment reference stated that this related to salary and provided the relevant payroll month in each instance) into his HSBC bank account from the first respondent.

Events from end of August 2020

42. On 31 August 2020 the claimant visited the accident and emergency department at a local hospital due to a health issue.

43. The claimant advised Mr Cheng by WhatsApp message on 03 September 2020 at 11.30am that he was having financial difficulties, he wanted to discuss the options in terms of moving forwards, and that he had to use his overdraft facility. Mr Cheng advised at 11.45am that he would speak to the claimant later. The claimant messaged him at 1.06pm advising that he was on the bus and would contact him later. Mr Cheng asked the claimant to return to the office at 1.07pm that day, but the claimant refused to do so.

44. Mr Cheng sent a message at 1.10pm that day asking, “*who owe you money?*” and the claimant replied, “*No one but I have non left and im furious about it*.” The claimant continued to refuse to return to the office and he stated at 1.17pm “*I’m so angry im on the war path. I will talk to you later. But before i do please pay cash or transfer into my lloyd’s by 2.30*.” The claimant then confirmed he was still working for the first respondent, and he wanted to meet at 5pm that day.

45. On 5 September 2020 the claimant attended the first respondent’s office, he collected a cheque for £500.00 which was described as an employee loan, and then he left the office.

46. On 31 August 2020 the claimant was paid £1880.00 (the payment reference said this was a salary payment for August) and on 01 October 2020 he received a further payment on £1500 in respect of his September 2020 salary which was paid into the claimant’s HSBC bank account.

Claimant’s absence from work

47. The claimant was unable to work for a period of 4 weeks due to health issues from 04 October 2020. He continued to not carry out any work during that period albeit due his sickness absence.

48. On 02 November 2020 the claimant was paid the gross sum of £1500.00 in respect of his October 2020 salary, and he was paid a further sum of £500.00 by the first respondent on 05 November 2020 which was described by the claimant as a loan.

49. The claimant remained absent from work. On 13 November 2020 the claimant sent a WhatsApp message to the first respondent’s accountant enquiring about his expenses and whether he was still on furlough leave. She replied confirming he was on furlough leave until December 2020 and that he would be required to return to work in January 2021. The claimant did not hear anything further from Mr Cheng during November 2020.

50. Mr Cheng sent WhatsApp messages to the claimant on 08 and 09 December 2020, including a message at 9.41am on 09 December 2020 in which he enquired "*If you got other job to do, we need to stop your furlough salary*." Mr Cheng also requested medical evidence from the claimant arising from his hospitalisation (which the claimant said had occurred on 01 and 03 December 2020), but he was not provided with any medical evidence or fit notes by the claimant.

51. The claimant's payslip for December 2020 recorded that the claimant's gross salary payment for that month was £1750.00.

52. The claimant failed to return to work at the first respondent's offices in January 2021.

53. The claimant was advised by Mr Cheng on 04 January 2021 that he must return to work from that day, and that he must turn up to work every day. The claimant indicated that where he was able to do so he would be working from home.

54. The claimant did not take his work laptop from the first respondent's office until 07 February 2021 (when he removed it from the first respondent's office without permission), so it would have been difficult for him to undertake any or any material work. In addition there were a number of aspects of his role that the claimant would not be able to perform when he was working from home. The first respondent did not agree to the claimant working from home and this was contrary to Mr Cheng's instructions. The first respondent did not agree to the claimant remaining at home on furlough leave after 31 December 2020, as notified by the first respondent's accountant, and agreed on 13 November 2020. We did not accept that the claimant carried out any or any material work from home and in any event he was not authorised to work from home.

55. In around January 2021, Mr Cheng contacted the claimant by telephone, but the claimant refused to answer.

56. The final communications (by way of text messages) between the claimant and Mr Cheng were exchanged on 10 February 2021. At no time did the claimant indicate to the first respondent that he were ready, willing, and able to work between 1 January 2021 and 31 May 2021.

Additional rent income

57. Between July 2018 and February 2019 the claimant occupied a 2-bedroom flat at a monthly rental income of £1200.00, which he paid directly (except that in January 2019 and February 2019 in each month the sum of £1200.00 was deducted by the first respondent from his salary). The first respondent paid that sum of money to the estate agent in respect of rent on behalf of the claimant. The claimant had received £1050.00 rental income from the two tenants at that property during each month.

58. As a result of the claimant's eviction, the claimant moved to a 3-bedroom property in Kingston on 1 March 2019. The claimant paid £1500.00 per month in respect of rent. The claimant used his salary to pay this rental amount directly to the estate agents.

59. The claimant paid £1520.00 in terms of rent on 04 January 2021, which was an amount that had been paid to him by the first respondent.

60. The claimant's HSBC bank statements showed that he received the sum of £1500.00 from Richard Rivas on 01 February 2021, 01 March 2021, 01 April 2021, and the same amount was also paid to him on 30 April 2021. In each month between February and May 2021 a standing order payment was paid from the claimant's HSBC account in respect of rent.

Loans

61. On 08 January 2019 the claimant signed a staff loan document for the sum of £14,000.00 which was due to be repaid by the end of that year.

62. On the same date there was a second staff loan document signed by the claimant in relation to the sum of £7100.00, to be repaid in 12 monthly instalments by him by the end of December 2019.

63. On 28 July 2020 the claimant signed a further staff loan note in the sum of £1400.00. The claimant confirmed that he accepted that this sum was disbursed to him by the first respondent.

64. The same staff loan document records the following additional loan amounts that were paid to the claimant:

£500.00 on 04 September 2020

£500.00 on 06 November 2020

£500.00 on 30 November 2020

Deductions

65. As indicated in the table above showing 2019 salary payments, the total deductions from the claimant's pay in that year amounted to £9,573.89, whereas in 2020 the total sum deducted was £2500.00 (which was deducted on one occasion in March 2020).

Grievance

66. On 16 October 2020 the claimant sent a letter to Mr Cheng advising Mr Cheng that following 3 days' hospitalisation from 04 October 2020 he was told to rest for 4 weeks prior to a follow up appointment, he claimed his September 2020 salary had been underpaid by about £200.00, and he noted that his expenses claim for the period from 1 July – 30 September 2020 amounting to £1101.34 for mileage, parking and office sundries was not paid (and that it should be paid promptly).

67. On 17 November 2020 the claimant sent a further letter to Mr Cheng advising that he had not been reimbursed for his expenses in the amount of £1101.34, that he was forced to sign a document on 05 November 2020 confirming that he was taking a loan for £500.00 (which left £601.34 outstanding), and that he had not received any update in relation to his

furlough status. He advised that he continued to work from home (although we do not accept that the claimant had carried out any work since September 2020).

68. On 02 January 2021 the claimant sent a further letter to Mr Cheng advising that he had not received any response, he set out his understanding of his employment situation after he relocated from Kent to Kingston, and that he understood he was still on furlough leave up to the end of December 2020 after which he would return to his normal employment status, that he was moving his flat, and that there were difficulties in terms communication.

69. Although Mr Cheng passed these letters to the human resources department, no further action was taken by them.

Claimant's resignation

70. The claimant sent a letter on 31 May 2021 resigning from his position as Operations Manager with immediate effect which he says were due to work conditions becoming unbearable and wilful withholding of his salary since November 2020. Additionally eight complaints were cited including a claim relating to disability and a number of other serious complaints not related to his Tribunal claim.

Employment particulars for new role

71. In March 2019 the claimant was offered two roles by the first respondent's human resources department. Those roles were respect of more senior positions within the first respondent.

72. The claimant did not respond to the communications that were sent to him to accept the offer of the new roles.

Holidays

73. At the date that his employment ended, the claimant had not used or been paid any of his annual leave entitlement from 1 April 2021 until 31 May 2021. The claimant was required to use his holiday entitlement by the end

of 31 March 2021, and he failed to request any holidays, to use his entitlement between January 2021 and March 2021 (or, indeed, to request consent or permission to carry over his holiday entitlement).

Payslips

74. The first respondent did not provide the claimant with payslips between January 2021 and May 2021. This was because the claimant had not attended the office to collect his payslips, which were normally printed and placed on his desk each month. As the claimant was moving address, Mr Cheng was concerned about posting the claimant's payslips to the current address held on file for him and the claimant had not provided an alternative address to the first respondent.

75. In any event as the claimant was not ready, willing, and able to work during that period of time, his payslips did not record any salary payments owing to him. The only matter that would have been recorded on his payslips would have been his contractual holiday pay entitlement in respect of April and May 2021.

Disability

76. The claimant attended a specialist school when he was a child to meet his specialist educational needs. He was not diagnosed with dyslexia, and he did not undertake any assessment in respect thereof.

77. The claimant advised that this issue did not have any impact on his work, and he did not request any reasonable adjustments from the first or the second respondent. He also said that this did not have any effect on his activities outside work. The claimant said he colour coded documents to assist him with his purported disability. We were not provided with any further examples or evidence in respect of the impact of the claimant's purported disability on the claimant's day-to-day activities.

78. There was no medical or any other documents provided to us to show that the claimant suffered from dyslexia or that he had any disability, or in

relation to the impact of any purported disability on his day-to-day activities.

First and second respondent's knowledge

79. The claimant said he told Mr Cheng prior to signing his employment contract in 2015 during a casual meeting that he may take longer to learn. He did not see any reason to provide any further detail to Mr Cheng. He did not tell Mr Cheng or the first respondent that he had dyslexia (or any other disability) or that it had a substantial adverse impact on his day-to-day activities. He did not request any reasonable adjustments.

80. Mr Cheng advised that employees normally informed him in writing if they had a disability or health problem. This is because it may affect an employee's ability to perform their role. The claimant accepted that he did not advise the first respondent or the second respondent of any details relating to his purported disability in writing.

Alleged discriminatory events

Issues 5.2.1 and 6.1.1

81. We did not accept that Mr Cheng made the comments attributed to him by the claimant in February 2020 or that similar comments were repeated in the course of 2020 (please see issues at paragraphs 5.2.1 and 6.1.1).

Issues 5.2.2 and 6.1.2

82. In terms of the text message on 04 January 2021, it was accepted by the claimant that this was in fact the wrong date (please see issues at paragraphs 5.2.2 and 6.1.2). The relevant text message was sent by Mr Cheng on 13 January 2021, and it stated as follows [the relevant messages appear at Page 16 of Schedule 4]**:**

"If you moved out of your flat in Kingston, you could not have senior positions at Onriver (uk) Ltd, because no company will employ homeless as full time. Your position at onriver (uk) Ltd, on conditional that you have home address, and good track record."

83. We did not accept that that comment was not made in a pejorative way but rather it was related to the administration records of the company.

Issues 5.2.3 and 6.1.3

84. We made findings of fact above in relation to the rental payment arrangements (please see issues at paragraphs 5.2.3 and 6.1.3). The scheme was explained to the claimant, the claimant accepted the arrangements, and he did not challenge these at the material times. The arrangements continued for a year. He did not seek clarification and he continued to participate in the arrangements made and to receive the payments in question.

Issues 5.2.4 and 6.1.4

85. We had no staff loan document or any other documentary evidence showing that the claimant signed loan agreements in March 2020. There was no reference to any loan agreements signed in March 2020 either in the claimant's chronology or in his witness statement. In any event we did not accept that the claimant was forced to sign any of the loan documentation that was before us.

Issues 5.2.5 and 6.1.5

86. We have set out details of the claimant's letters sent to the first respondent raising various issues above. There was no reference to the claimant's dyslexia or any purported disability in the three letters that were sent from the claimant to the first respondent prior to starting his Tribunal claim. We noted that there were no responses sent to the three correspondences from the claimant. However we accepted that this was because the first respondent's human resources department failed to progress the matter.

Claimant's Employment Tribunal claim

87. The claimant contacted ACAS to start Early Conciliation on 20 February 2021 and he was issued his ACAS EC Certificate on 11 March 2021.

88. The claimant started his Employment Tribunal claim on 07 April 2021.

Observations

89. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

90. We made findings of fact in relation to payment of the claimant's bonus payments in 2017 and 2018 based on the claimant's chronology and evidence. We were not provided with a copy of the supporting bank statements. However, the fact that the relevant payments were made was not disputed.

91. We concluded that the claimant's bonus payments were discretionary in terms of their nature. There was no contractual entitlement for the claimant to be paid any bonus. There was no written evidence of any such bonus entitlement or bonus scheme rules. We also considered the fact that the bonus payments made to the claimant by the first respondent were sporadic, the claimant's bonuses were not paid on two occasions when the claimant says they should have been paid in 2018 (which was not disputed or subject of a complaint by the claimant at the relevant time), and the witness evidence showed that the arrangements put into place were inconsistent with there being an automatic or guaranteed bonus payment entitlement. The claimant did not supply any clear evidence of any terms and conditions relating to any purported bonus he claimed was owed.

92. Although the claimant provided copies of his HSBC bank statements from 2019 onwards, there was a significant number of bank statements that were not disclosed by the claimant. The claimant did not supply copies of his HSBC bank statements prior to 2019 or any other bank (or financial) statements other than from his HSBC account. This is despite the fact that reference was made during the witness evidence we heard to the claimant's other bank accounts held at Lloyds Bank, Halifax, Nationwide and American Express. Therefore the Tribunal did not have a complete set of information in relation to the payments made by the first respondent to the claimant.

93. There was also a substantial gap in terms of the copies of the WhatsApp and text messages we were provided with by the claimant, particularly between 03 September 2020 and 13 November 2020 which concerned a period during which the claimant did not attend work. This meant that we may not have had the full set of messages from which to determine what transpired between the relevant dates relating to the claimant's absence.

94. The claimant submitted three letters to the first respondent (referred to above) prior to making his Tribunal claim. He did not mention his purported disability, or his complaints of direct disability discrimination or harassment related to disability in any of his three letters sent to the first respondent (in any or any sufficient detail). The Tribunal were not provided with any or any satisfactory explanation from the claimant in respect of why these complaints were not drawn to the first respondent's attention prior to his Tribunal claim being initiated (including prior to contacting ACAS to start Early Conciliation and lodging his ET1 Form).

95. However the claimant did mention in those correspondences the fact he was unable to work due to his health for 4 weeks in October 2020 (which was not referred to in the hospital letter dated 31 March 2021 from Dr Jessica Webb that was supplied to the Tribunal). Had the claimant complied with the first respondent's sickness absence procedure (which he did not) and supplied the first respondent with a copy of his fit note, he would have been entitled to be paid Statutory Sick Pay only during the relevant period in October 2020. As he did not follow the first respondent's procedure in relation to his sickness, the claimant was not entitled to any payment (either sick pay or salary) at the relevant time.

96. The hospital letter dated 31 March 2021 supplied to the Tribunal did not refer to the claimant's purported disability or to his disability discrimination complaints. A copy of this letter was not supplied to the first respondent during the course of the claimant's employment. There was no other medical evidence or documentation supplied to the Tribunal during the

hearing (or, indeed, to the first respondent during the course of the claimant's employment).

97. The claimant had a Contract of Employment, so he was aware of the details relating to his annual leave entitlement.

98. In terms of the issues relating to the claimant's laptop, Mr Cheng reported this matter to the police. This shows that Mr Cheng considered that the claimant had refused to return to work. He described that the claimant came to the office without telling anybody and he grabbed the laptop computer.

99. The Tribunal observed that in terms of the witness evidence it heard, different witnesses were able to assist with or comment on specific aspects of this case. Where there was a conflict of evidence, the Tribunal made findings of fact on the balance probabilities based on the documents, and having considered the totality of the witness evidence, and accepted the evidence that set out the position most clearly and consistently.

<u>Relevant law</u>

100. To those facts, the Tribunal applied the law –

Unlawful deduction of wages

101. Section 13 of the Employment Rights Act 1996 ('ERA 1996') provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA.

102. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to perform personally any work for another party who is not a

client or customer of any profession or business undertaking carried on by the individual (s230 of the ERA).

103. Under Section 13(3) there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less than the total amount of the wages properly payable by him to the worker on that occasion.

104. Under Section 27(1) of the ERA 1996 “wages” means any sums payable to the worker in connection with their employment including arrears of pay and holiday pay.

105. A complaint for unlawful deduction from wages must be made within 3 months beginning with the due date for payment (Section 23 of the ERA 1996). If it is not reasonably practicable to do so, a complaint may be brought within such further reasonable period.

Annual leave

106. Under Regulations 13 and 13A of the Working Time Regulations 1998 a worker is entitled to 5.6 weeks annual leave in each leave year. Where a worker’s employment is terminated during a leave year the worker is entitled to a proportion of that leave and a payment in lieu in respect of any leave not taken. Less than half a day’s leave is rounded up to half day’s leave and if more is rounded up to a whole day. The holiday year begins on the date when employment begins unless a relevant agreement provides otherwise. A worker is entitled to leave paid at the rate of a week’s pay calculated under the Employment Rights Act 1996.

Contract, Custom and Practice and Common Law (ready, willing, and able to work analysis)

107. So long as the employee *is ready and willing to work*, then he is generally entitled to payment of the remuneration due under the contract unless there is a specific term (express or implied) to the contrary. Consideration of the principle is secondary to a careful analysis of the contract, as this

passage from Lord Justice Coulson's judgment in the *North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387* case makes clear:

"I consider that the starting point for any analysis of [whether the employer is entitled to withhold pay] must be the contract itself… Was a decision to deduct pay for the period [in question] in accordance with the express or implied terms of the contract? If the contract did not permit deduction then… the related question is whether the decision to deduct pay for the period… was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the "ready, willing and able" analysis… falls to be considered."

Discretionary bonuses

108. The starting point must always be the express terms of the contract of employment. However, the enquiry does not stop there, and Tribunals are prepared to rely upon implied terms in the employment contract to ensure some judicial oversight of discretionary bonus decisions. An example can be seen in *Dresdner Kleinwort Ltd v Attrill [2013] EWCA Civ 394*, *[2013] IRLR 548*. The Court of Appeal found that the August announcement constituted an effective variation of the claimants' contracts. The company was therefore subject to a binding contractual commitment to pay bonuses from a minimum fund of €400m even though, at the time the announcement was made, individual employees could not have pointed to a specific bonus entitlement.

109. As a result of developing case law, it appears that when exercising a discretion with regard to a bonus payment the employer must not act in a manner which is irrational or perverse. Equally, it must not ignore factors that are relevant or take account of irrelevant considerations. The irrationality/perversity test was identified some years ago by Burton J in *Clark v Nomura International plc [2000] IRLR 766*, QBD and was formulated in the following terms (see [40] of his judgment):

"My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in this way."

110. The burden of proof in such cases 'lies with the claimant throughout'. As explained at paragraph 57 of *IBM UK Holdings Ltd v Dalgleish [2017] EWCA Civ 1212*:

> *"If… the claimants show a prima facie case that the decision is at least questionable, then an evidential burden may shift to the employer to show what its reasons were. In such a case if no such evidence is placed before the court, the inference might be drawn that the decision lacked rationality. However in all cases the legal burden of proof rests on the claimant."*

Failure to provide statement of employment particulars

111. By section 1 of the ERA 1996 an employer is required to provide a worker with a written statement of particulars of employment and contains a number of initial employment particulars that must be included by the employer in the initial statement.

112. Section 38 of the *Employment Act 2002* ("EA 2002") provides that where the Tribunal finds that there was a breach of the duty under section 1 of the ERA 1996 and there is a relevant claim before the Tribunal, the Tribunal must (subject to ss. (5) of the EA 2002) award an amount equivalent to two an additional two weeks' pay and may if it considers it is just and equitable in all the circumstances increase the award made by an amount equal to four weeks' pay.

Failure to provide itemised pay statements

113. Section 8(1) of the ERA 1996 provides that a worker has the right to be given by their employer at or before the time at which any payment of his wages or salary is made to him, a written itemised pay statement. Section 8(2) of the ERA 1996 sets out the particulars that shall be provided in the statement.

114. Where the employer fails to provide such a statement or gives one that does not provide the required information, an aggrieved worker can refer the question to an employment tribunal to determine what the statement should have contained (ERA 1996 s 11(1)). Equally, if there is a dispute as to the particulars which ought to have been included or referred to in the pay statement (or in any standing statement of fixed deductions), either the employer or the worker can refer the matter to the Tribunal for a determination (ERA 1996 s 11(2)).

115. Firstly, if the employer has failed to provide a pay statement or if the pay statement or standing statement does not contain the required information, then the Tribunal *must* make a declaration to that effect (s 12(3)). This is the case even if the breach is purely technical, such as where the claimant has been given all the prescribed information orally rather than on their pay slip: see *Coales v John Wood & Co [1986] IRLR 129*, *[1986] ICR 71, EAT*. Secondly, the Tribunal *may* (but is not obliged to) make a financial award to the employee if any unnotified deductions have been made from the worker's wages *in the 13 weeks immediately preceding presentation of the claim*, albeit any financial award cannot exceed the aggregate of the unnotified deductions (s 12(4)).

Disability discrimination claims - S 6 Disability

116. S 6 of the Equality Act 2010 ("EqA 2010") states:

"s6 Disability
(1)A person (P) has a disability if—
(a)P has a physical or mental impairment, and
(b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
(2)A reference to a disabled person is a reference to a person who has a disability.
(3)In relation to the protected characteristic of disability—
(a)a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
(b)a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
(4)This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
(a)a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
(b)a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
(5)A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
(6)Schedule 1 (disability: supplementary provision) has effect."

Code of Practice

117. A Minister of the Crown is given power under s 6(5) of the EqA 2010 to issue guidance about the matters to be taken into account in determining any question for the purposes of considering whether a person is disabled for the purposes of the EqA 2010. A Tribunal which is determining for any

purpose of the EqA 2010 whether a person's impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities, is required by EqA 2010 Sch 1 para 12 to take into account any of this guidance which appears to it to be relevant. EqA 2010 Sch 1 para 11 provides that the guidance may give examples of effects which it would, or would not, be reasonable in relation to particular activities to regard as substantial adverse effects, and of substantial adverse effects which it would, or would not, be reasonable to regard as long term. This Guidance came into force on 1 May 2011; *Equality Act 2010 (Guidance on the Definition of Disability) Appointed Day Order 2011 SI 2011/1159*. The importance of the Secretary of State's Guidance as a source of assistance to Tribunals in identifying disability has been emphasised by the EAT: *Goodwin v Patent Office [1999] IRLR 4. However,* care must be exercised in using the Guidance, not to regard it as a set of legal tests which the claimant must satisfy.

Direct disability discrimination

118. By section 13 of the EqA 2010 a person discriminates against another if because of a protected characteristic, in this case disability, he or she treats the employee less favourably than he or she would treat others.

Harassment related to disability

119. Harassment is defined in section 26 of the EqA 2010:

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

120. In *Hartley v Foreign and Commonwealth Office UKEAT/0033/15 (27 May 2016, unreported)* it was held that the question whether there is harassment must be considered in the light of all the circumstances of the case. Where the claim is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording.

121. However, even where certain elements of the test for harassment are met (for example, unwanted conduct and the violation of the claimant's dignity), the Tribunal must still consider the "related to" question and make clear findings as to why any conduct is related to a protected characteristic (*UNITE the Union v Nailard [2018] IRLR 730; Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, EAT*).

Burden of proof – s 136 EqA 2010

122. The provisions relating to the burden of proof are to be found in section 136 of the EqA 2010, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an Employment Tribunal.

123. The correct approach to the application of these provisions was confirmed by the Court of Appeal in *Ayodele v. Citylink Ltd [2017] EWCA Civ 1913*.

124. S.136 of the EqA 2010 requires a two-stage approach. As a first stage, a claimant is required to establish facts from which an Employment Tribunal could decide that an unlawful act of discrimination has taken place. This is commonly known as a "prima facie case". Once that has been established, the onus shifts to the respondent, at the second stage, to prove a non-discriminatory explanation. According to the Court of Appeal in *Igen Ltd & Others v. Wong [2005] IRLR 258*, the respondent must at this stage prove,

on the balance of probabilities, that its treatment of the claimant was "*in no sense whatsoever*" based on the protected ground.

125. When considering these provisions, we remained mindful that the case law makes it clear that the claimant is required to establish more than simply the possibility of discrimination having occurred, before the burden will shift to the employer (*Madarassy v. Nomura International Plc [2007] IRLR 246*, for example).

126. Unreasonable treatment of a claimant cannot itself lead to an inference of discrimination, even if there is nothing else to explain it (*Bahl v. The Law Society & Others [2004] IRLR 799*).

Time limits for bringing a claim – s 123 EqA

127. The provisions relating to the time limit for bringing a claim under the EqA 2010 to the Employment Tribunal are set out in s123 of the EqA 2010:- (1) Subject to section 140B [a reference to the provision extending time for ACAS Early Conciliation] proceedings on a complaint within section 120 [the section giving the power to the Tribunal to hear claims under the EqA 2010] may not be brought after the end of— (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable. S 123(3)(a) of the EqA 2010 states "*conduct extending over a period is to be treated as done at the end of the period;*".

128. The time limit runs from when the act of discrimination occurs and not when the claimant becomes aware of it (*Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24*). The Tribunal does have a broad discretion to hear a claim out of time under s123(1)(b) of the EqA 2010. In *British Coal Corpn v Keeble [1997] IRLR 336*, it was suggested that the following factors are ones which the Tribunal should consider in exercising its discretion.

129. The factors which may be relevant to the exercise of the Tribunal's discretion are:- a. the length of and reasons for the delay; b. the extent to

which the cogency of the evidence is likely to be affected by the delay; c. the extent to which the party sued had co-operated with any requests for information; d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; e. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

130. However, in subsequent decisions it was made clear that the Tribunal has been given a very wide discretion under the EqA 2010 and it should not treat these factors as a "checklist" (*Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] ICR D5*) but, rather, should consider all relevant factors with no one factor being determinative.

131. The length and reason for any delay as well as the question of any prejudice to the respondent arising from the delay have been said to always be relevant factors (*Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050*) although the Tribunal requires to bear in mind that no one factor is determinative.

132. The burden of proof in the exercise of the discretion lies on the claimant and past cases have made it clear that it should be the exception and not the rule, with no expectation that the Tribunal would automatically extend time (*Robertson v Bexley Community Centre [2003] IRLR 434*). This does not, however, mean that exceptional circumstances are required for the Tribunal to exercise its discretion and the test remains what the Tribunal considers to be just and equitable (*Pathan v South London Islamic Centre UKEAT/0312/13*).

Remedy - EqA

133. In the event that the Tribunal finds that the employer has discriminated unlawfully, the remedies available to the Tribunal, in addition to a declaration to that effect, include the award of compensation for injury to feelings, subject to evidence that the complainant has suffered such injury. Guidance as to the amount that it is appropriate to award in that event is

given by the decision of the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police (No 2) [2003] ICR 318*.

Discussion and decision

134. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Unlawful deduction from wages (arrears of pay)
November 2020 – May 2021

135. In November 2020 the claimant was paid the net sum of £1500.00. The approximate gross pay made to the claimant by the respondent amounted to £1875.00. The claimant was due to be paid £1400.00 gross salary in November 2020. This is approximately £475.00 in excess of his salary entitlement for that month. There was therefore no deduction from the claimant's salary in November 2020.

136. In December 2020 the claimant did not receive any payment in respect of his salary. He was still on furlough leave until 31 December 2020 so he should have received £1400.00 gross salary for the month of December 2020. The deduction was not required or authorised by statute, or by a relevant provision of the claimant's contract (nor had the claimant previously signified in writing his agreement or consent to the making of the deduction). As he did not receive any salary payment in respect of December 2020, the claimant therefore suffered an unlawful deduction from his wages in relation to that month. The net amount of salary owed to the claimant in respect of his December 2020 salary payment shall be decided at the remedy hearing.

137. As evidenced in the documents before us, the claimant's furlough leave was to end at the end of December 2020 and the claimant was required to return to work in January 2021. However despite being aware of this the claimant did not return to work from January 2021. Therefore as the claimant was not ready, willing, and able to work between January and

May 2021, he was not entitled to payment of any wages during that period of time (we deal with holiday pay entitlement separately below).

Unlawful deduction from wages for tax years 2019/2020 - October 2020

138. Section 23(2) of the ERA 1996 requires that a Tribunal cannot consider any claims brought pursuant to section 13 of the ERA 1996 unless the claim is presented before the end of a period of 3 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."

139. The claimant's claim was presented on 07 April 2021. This is several months after the 3-months deadline elapsed in respect of presenting a claim relating to unlawful deduction of wages for the tax years 2019/2020 and up to October 2020.

140. We considered whether it was reasonably practicable for the claimant to present his complaint before the end of the relevant period of three months and whether any further period in which a complaint was presented within such period as we consider to be reasonable (ERA 1996 section 23(4)).

141. We determined that it was reasonably practicable for the claimant to present his complaint within the relevant period of three months.

142. The claimant advised that he was unwell for a period of 4 weeks in October 2020. There was no or no sufficient evidence before the Tribunal in respect of the claimant's sickness absence. We were not satisfied that the claimant's sickness was a reason that prevented him from bringing his claim during October 2020. However, even if we accepted that the claimant was unable to bring his claim during those 4 weeks of sickness absence in October 2020, there was no evidence before the Tribunal that there was any other impediment to the claimant in terms of presenting his claim after this period. In relation to the claimant's state of knowledge of the relevant deadline, there was no evidence before us that the claimant

was unable to take steps to obtain legal advice or to inform himself in relation to the deadline for presenting his claim.

143. Even if we had found that it was not reasonably practicable for the claimant to present his claim within the relevant timeframe (which we did not find), we would have considered that the complaint was not presented within such further period as we would consider to be reasonable.

144. Therefore, the Tribunal does not have jurisdiction to consider the claimant's claim relating to relating to unlawful deduction from wages for the tax years 2019/2020 and up to October 2020. In any event we will consider the claimant's claims briefly.

145. During the month of October 2020 the claimant may well have been entitled to be paid some Statutory Sick Pay, but he did not provide a fit note to the first respondent. He was in breach of the first respondent's sickness absence procedure. We found above that on 02 November 2020 the claimant was paid the gross sum of £1500.00 in respect of his October 2020 salary. He had therefore received an amount of salary that was in excess of his £1400 gross salary entitlement for that month while he was off sick (for 4 weeks).

146. From the HSBC bank statements we had before us from April 2019, we noted that the claimant started being paid the monthly sum of £1880.00 (from 31 May 2019). These continued to be paid to the claimant on a monthly basis up to and including September 2020. These payments appeared to be above the claimant's contractual salary entitlement.

147. The claimant was not paid a bonus after 30 March 2020. The claimant did not have any express or implied term in his contract of employment giving rise to any contractual entitlement to a bonus payment. On the evidence before us, there was no custom or practice that would mean the claimant was entitled to any bonus payments. We found that any bonus payments made to the claimant were discretionary. The claimant was on furlough leave after March 2020 for a period of time (thereafter the COVID-19

pandemic meant that there were a number of restrictions placed on individuals and businesses by the UK Government), and the claimant did not attend the respondent's premises to carry out work after August 2020. The irrationality/perversity test was identified some years ago by Burton J in *Clark v Nomura International plc [2000] IRLR 766*, QBD and was formulated in the following terms (see paragraph 40 of his judgment):

> *"My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in this way."*

148. The irrationality test was initially viewed as an aspect of (or certainly buttressed by) the implied term of trust and confidence and the obligation of 'fair dealing' referred to by Lord Steyn in *Johnson v Unisys Ltd [2001] UKHL 13*, *[2001] IRLR 279*. However it has echoes of the *Wednesbury* unreasonableness test in the public law field. Whilst the bar remains high, the decisions in *BM UK Holdings Ltd v Dalgleish [2017] EWCA Civ 1212*, *[2018] IRLR 4* at [45], adopting the reasoning in *Braganza v BP Shipping Ltd [2015] UKSC 17*, *[2015] IRLR 487*do appear to import *both* limbs of *Wednesbury* into the relevant test. Although the employee may be unable to show that the bonus decision was one that no reasonable employer could have reached, he may be able to demonstrate, for example, that relevant factors have been disregarded.

149. Considering the evidence before us, we did not accept that the first respondent's decision not to pay the claimant a discretionary bonus was irrational or perverse i.e. that no reasonable employer would have exercised his discretion in this way. The claimant has not demonstrated that any relevant factors have been disregarded by the first respondent or put forward any evidence to show a prima facie case of irrationality or that the decision by the first respondent is at least questionable.

150. We concluded that there is no unlawful deduction from wages pursuant to section 13 of the ERA 1996 in terms of the first respondent declining to

pay to the claimant the discretionary bonus payments that the claimant sought to recover in his claim.

Unlawful deduction of wages (holiday pay)

151. The claimant's holiday year ran from 1 April to 31 March (holiday not taken by 31 March may not be carried forward without written permission). The claimant did not present any evidence to show that he had been provided with written permission to carry any holidays forward into the next annual leave year. The claimant is therefore not entitled to any holiday pay claimed by him in respect of the period between 1 January – 31 March 2021 and his claim for holiday pay relating to those dates is dismissed.

152. We find that the claimant was entitled to holiday pay in respect of his employment between 1 April 2021 and 31 May 2021. The claimant's contractual holiday entitlement was 25 days plus bank holidays in each holiday year (as set out in our findings above). The claimant is entitled to his accrued holiday pay during April 2021 and May 2021, which represent the first two months of the first respondent's holiday year. The amount of holiday pay payable to the claimant during April and May 2021 shall be assessed at the remedy hearing.

Conclusion on unlawful deduction of wages claims

153. The first respondent has therefore made an unlawful deduction of wages in the sum of £1400 gross salary in respect of December 2020 and has failed to pay the claimant his holiday pay entitlement in respect of the period between 1 April 2021 and 31 May 2021. The remainder of the claimant's unlawful deduction from wages claims are dismissed.

Employment particulars

154. We considered the claimant's entitlement to employment particulars pursuant to s 1 and s 4 of the ERA 1996. Based on the findings of fact we made above, it was clear that the claimant was not provided with (by way of initial employment particulars and/or statement of changes) any or any updated details relating to his bonus provision, his season ticket allowance

provision, details relating to his pension entitlement, and details of the increased (and relatively new) 40 hours per week working arrangements.

155. Schedule 5 of the EA 2002 provides that the jurisdictions under which a claim may be made under section 38 of the EA 2002 include a claim under section 23 of the ERA 1996. Section 38 of the EA 2002 provides there when an employer is breach of its duty under section 1(1) or 4(1) of the ERA 1996 when the proceedings were begun, we must award to the claimant two weeks' pay and we may (if it is just and equitable in all the circumstances) award 4 weeks' pay instead. This does not apply if there are circumstances which would make an award or an increase unjust or unequitable.

156. The claimant's claim pursuant to section 38 of the EA 2002 therefore succeeds and we will determine any amount owed at the remedy hearing.

Payslips

157. In accordance with section 12(3) of the ERA 1996, we declare that the respondent failed to give the claimant any pay statement in accordance with section 8 of the ERA 1996 relating to his holiday pay owed during the months of April 2021 and May 2021. We will determine the amount of holiday pay owed at the remedy hearing. If the claimant seeks a further declaration from the Tribunal in respect of this matter, he may apply for these which will be considered remedy hearing.

158. We further declare that there were no other wages owed to the claimant in respect of the period between 01 January and 31 May 2021.

159. We consider that the payslips that were due were not sent to the claimant between 1 January 2021 and 31 May 2021 as it was not reasonably practicable for the respondent to contact the claimant during this time and the claimant did not contact the respondent during this period to request that his payslips be sent to an address nominated by him. In the circumstances, it does not appear appropriate to award any additional compensation.

Disability s 6

160. We do not accept that the claimant had a disability at the material times that relate to his claim. The claimant relied on a mental impairment namely dyslexia.

161. We considered the definition of disability in s 6 of the EqA 2010. We also considered *Appendix 1 – The Meaning of Disability of the Equality Act 2010 Employment Statutory Code of Practice* issued on 04 September 2015 which states "The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities." It is also stated that there is no need for a person to establish a medically diagnosed cause for any impairment. We are required to consider the effect of the impairment, rather than the cause.

162. We had regard to the documents to which we were referred including but not limited to the documents provided to the Tribunal by the claimant and the claimant's witness evidence in relation to his disability.

163. We were not satisfied that the claimant suffered from a mental impairment namely dyslexia at the material times which had a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities.

164. There was no or no adequate evidence before us to show that the claimant's dyslexia had a substantial and a long term adverse effect on the claimant's ability to carry out normal day-to-day activities. The claimant did not provide us with sufficient evidence to show that there was a substantial impact on his normal day-to-day activities (such as those set out in paragraph 15 of Annex 1 of the Statutory Code or otherwise). Furthermore, we had no or no sufficient evidence to show that any impairment had lasted 12 months; that the total period it lasts is likely to be at least 12 months; or that it was likely to last for the rest of the claimant's life.

165. The respondents dispute that they knew or ought to have known about the claimant's disability at the material times.

166. As we do not consider that the claimant had a disability at the material time within the meaning of section 6 of the EqA 2010, his claims for disability direct disability discrimination and harassment are dismissed.

Knowledge

167. Notwithstanding our conclusion in respect of s6 of the EqA 2010, we also considered the other aspects of the claimant's claim.

168. We do not accept that the respondents had actual knowledge of the claimant's disability. There was insufficient evidence before the Tribunal to show that the respondents had actual knowledge of the claimant's purported disability, namely a mental impairment (dyslexia) within the meaning of section 6 of the EqA 2010.

169. We did not accept that there was any evidence that the claimant disclosed his disability to the respondents at any time during the course of the claimant's employment.

170. We also do not accept that from the events summarised by the claimant in his evidence that the respondent had constructive knowledge of the claimant's purported disability. Those matters were not sufficient to show that the respondent had constructive knowledge that the claimant had a disability within the meaning of section 6 of the EqA 2010.

Direct disability discrimination

171. We did not accept that the events occurred in the manner in which they were described by the claimant.

172. We did not accept that the second respondent is (or was) aware of the claimant's dyslexia or that he accused him of "making it up", in February 2020, when the claimant passed the alcohol license sales test, or that the

second respondent told him that he's not as "thick" as he makes himself out to be. The claimant did not provide the Tribunal with any or any sufficient details of the circumstances surrounding this. The claimant also says similar comments were repeated in the course of 2020, but he has not provided any or any sufficient details of these in his witness evidence.

173. On 04 January 2021 the second respondent said to the claimant in a text message that nobody would employ him. The date of the text message in question is incorrect and we referred to the relevant text message above. As we indicated above, the text message in question was sent to the claimant in relation to the administration records of the first respondent. We do not accept that this was in any sense whatsoever connected to the claimant’s purported disability.

174. We made findings of fact above in relation to the rental payment arrangements in May 2019. The scheme was explained to the claimant, the claimant accepted the arrangements, and he did not challenge these at the material times. We therefore do not accept that the claimant was subjected to less favourable treatment by the respondents. In any event, even if this was less favourable treatment, this was a private rental arrangement reached with the claimant and it was in no sense whatsoever connected with the claimant’s purported disability.

175. There was no documentary evidence showing that the claimant signed loan agreements in March 2020. There was no reference to any loan agreements signed in March 2020 in the evidence before us. Notwithstanding this we did not accept that the claimant was forced to sign any of the loan documentation that were before us.

176. We have set out details of the claimant’s letters sent to the first respondent raising various issues in our findings of fact. There was no reference to the claimant’s dyslexia or any purported disability in the three letters that were sent before the claimant’s claim were presented to the Tribunal. Any failure

to respond to the claimant's correspondences was due to the inaction of the first respondent's human resources personnel. We were satisfied that any failure to respond by the first respondent was in no sense whatsoever connected with the claimant's purported disability.

177. In any event we were not satisfied that any of the matters alleged by the claimant in issues 5.2.1 to 5.2.5 took place because of disability. We therefore dismiss the claimant's direct disability discrimination complaint.

Harassment related to disability

178. We refer to our findings of fact above and our findings relating to direct disability discrimination which summarise our conclusions in relation to the events described by the claimant.

179. We were not satisfied that any of those matters alleged by the claimant in issues 6.1.1 to 6.1.5 were in any sense whatsoever related to the claimant's purported disability.

180. As we were not satisfied that any of those matters were related to the claimant's purported disability, we dismiss the claimant's claim for harassment related to disability.

Time - discrimination

181. Parties declined to make any submissions in relation to time limits.

182. We noted that the claimant's claim was presented on 07 April 2021. This means that any of the claimant's claims that took place before 06 January 2021 may be out of time. As all of the claimant's discrimination claims related to alleged events that took place between February 2020 and 02 January 2021, the claimant does not benefit from any extension by reason of engaging in ACAS Early Conciliation (which did not commence until 20 February 2021).

183. If ACAS Early Conciliation were to be considered, the list of issues envisages that this would extend the timeframe for presenting the claimant's discrimination claims by one month so that any complaint about events that occurred before 06 December 2020 will be out of time. We can then consider whether the earlier allegations could amount to conduct extending over a period within the meaning of section 123(3)(a) of the EqA 2010. However, if the timeframe for presenting a claim were 06 December 2020, in light of our conclusion that the claim relating to issues 5.2.2, 5.2.5, 6.1.2 and 6.1.5 be dismissed (these are the only issues that are alleged to have occurred after 06 December 2020), the remainder of the claimant's discrimination claims were presented outside the time limit in section 123(1)(a) of the EqA 2010.

184. We are not satisfied that the claimant has discharged the burden of proof on him so as to satisfy us to exercise our discretion to extend time to enable us to consider his claims on a just and equitable basis (section 123(1)(b) EqA 2010). The burden of proof in the exercise of the discretion lies on the claimant and past cases have made it clear that it should be the exception and not the rule. We considered the length of the delay, any potential prejudice to the respondent and in addition that we did not accept that the claimant proffered any good reason for the delay. It is not clear why the claimant did not take steps to seek advice or undertake appropriate research earlier in order to be able to bring his claims within the statutory timeframe.

185. We dismiss the claimant's discrimination complaints on jurisdictional grounds.

186. In the event that we are wrong in relation to our conclusion on time limits (above), we have considered the substantive points relating to the claimant's discrimination complaints earlier in this judgment (above).

Counterclaim

187. Whilst there is a right of counter-claim by an employer (SI 1994/1623 art 4), this arises only where there is an existing contract claim by the employee.

188. Article 4(d) of the *Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994* ("the Order") provides that in order to be a valid counterclaim, the original claim must necessarily have been brought under the Order or was unequivocally brought under it: *Read v Ryder Ltd UKEAT/0144/18 (16 November 2018, unreported)* (general unspecified claim for payment of last wage withheld by employer could have been under the Order or under the ERA 1996 Pt II; counterclaim held unavailable).

189. In this case the claimant did not bring any claim for breach of contract. His wage arrears, bonus and holiday pay claims were brought pursuant to section 13 of the ERA 1996.

190. Therefore, the Tribunal has no jurisdiction to consider the respondent's counterclaim and the respondent's counterclaim is dismissed.

<u>*Remedy*</u>

191. We direct that a remedy hearing shall be listed **for one-day before the same Tribunal at 10.00am on 28 October 2022 at London Central Employment Tribunal by CVP** in order to consider the compensation to be awarded to the claimant in respect of the claims where the claimant has succeeded.

192. We direct that **by not later than 4pm on 25 October 2022**, the claimant and the respondents shall send to each other and to the Tribunal copies of any documents that will require to be considered at the remedy hearing (including any witness statements, amended Schedule of Loss and any other documents that are relevant to the issues to be considered at the remedy hearing).

Conclusion

193. The claimant's claims for direct disability discrimination and harassment related to disability are dismissed.

194. The Tribunal finds that the claim from unlawful deduction from wages succeeds in relation to the claimant's wages owed in December 2020 and the claimant's holiday pay owed from 1 April 2021 until 31 May 2021. The remainder of the claimant's unlawful deduction from wages claim is dismissed.

195. The claimant's claim relating to the failure to provide a statement of initial and employment particulars and statement of changes (pursuant to sections 1 and 4 of the ERA 1996 respectively and section 38 of the EA 2002) succeeds.

196. The claimant's claim for failure to provide itemised pay statements in respect of the period between 1 January 2021 and 31 May 2021 succeeds. The remainder of the claimant's claim made pursuant to sections 8 and 11(1) of the ERA 1996 is dismissed.

197. The counter claim made in the respondents' ET3 Form is dismissed.

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Employment Judge Beyzade

Dated: 14 October 2022

Sent to the parties on:

.17/10/2022

For the Tribunal Office

Annex 1 - The Issues

1. The issues the Tribunal will decide are set out below.

1. **Unlawful deduction of wages**

1.1 Did the first respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?
1.2 Was any deduction required or authorised by statute?
1.3 Was any deduction required or authorised by a written term of the contract?
1.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
1.5 Did the claimant agree in writing to the deduction before it was made?
1.6 Did the imposition of the rental scheme by the first respondent constitute an unauthorised deduction of wages?
1.7 How much is the claimant owed?

2. Holiday pay

2.1 Does the first respondent owe the claimant holiday pay in the amount of £1192.00 in relation to the period of time between 1/1/2021 and 31/05/2021?

3. Failure to provide statement of terms of employment and itemised pay statements

Did the respondent fail to do the following:

3.1 Failure to provide itemised pay statements or adequate pay statements (ERA 1996 Sections 8 and 11)?

3.2 Failure to provide a statement of terms of employment (ERA 1996 Section 1 and s 38 Employment Act 2002)?

4. **Disability**

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1 Did he have a mental impairment: namely dyslexia?
4.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
4.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
4.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
4.1.5.2 if not, were they likely to recur?

5. **Direct disability discrimination (Equality Act 2010 section 13)**

5.1 The claimant's disability is dyslexia which he says is a disability within the meaning of section 6 of the Equality Act 2010.

5.2 Did the respondents do the following things:

5.2.1 The second respondent is aware of Simon's dyslexia but accused him of "making it up", e.g. in February 2020, when the claimant passed the alcohol license sales test, the Second Respondent told him that he's not as "thick" as he makes himself out to be. Similar comments were repeated in the course of 2020.
5.2.2 On 4 January 2021 the second respondent said to the claimant in a text message that nobody would employ him.
5.2.3 In May 2019 by imposing the rental payment scheme on the claimant which added a layer of complexity that challenged the claimant on account of his disability.
5.2.4 In March 2020 the claimant being forced into signing loan agreements.
5.2.5 By failing to respond to the grievance letter sent by the claimant dated 16 October 2020 and/or the follow up letter on 17 November 2020 and/or the further follow up correspondence dated 02 January 2021.

5.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who he says was treated better than he was. He was the only employee of the first respondent other than Second Respondent.

5.4 If so, was it because of disability?

5.5 Did the respondent's treatment amount to a detriment?

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

6.1 Did the respondents do the following things:

6.1.1 The second respondent is aware of Simon's dyslexia but accused him of "making it up", e.g. in February 2020, when the claimant passed the alcohol license sales test, the Second Respondent told him that he's not as "thick" as he makes himself out to be. Similar comments were repeated in the course of 2020.

6.1.2 On 4 January 2021 the second respondent said to the claimant in a text message that nobody would employ him.

6.1.3 In May 2019 by imposing the rental payment scheme on the claimant which added a layer of complexity that challenged the claimant on account of his disability.

6.1.4 In March 2020 the claimant being forced into signing loan agreements.

6.1.5 By failing to respond to the grievance letter sent by the claimant dated 16 October 2020 and/or the follow up letter on 17 November 2020 and/or the further follow up correspondence dated 02 January 2021.

6.2 If so, was that unwanted conduct?

6.3 Did it relate to disability?

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

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

7. Time – Direct disability discrimination and harassment related to disability

7.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before the letter dated 06 December 2020 may not have been brought in time. Were the discrimination complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

7.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

7.1.2 If not, was there conduct extending over a period?

7.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

7.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

7.1.4.1 Why were the complaints not made to the Tribunal in time?

7.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

8. ***Counter Claim***

8.1 *Is the first respondent entitled to bring a counter claim against the claimant?*

8.2 Is the first respondent entitled to repayment of monies advanced to the claimant by the first respondent by way of a number of alleged loans?

8.3 If so, in what amount?

9. **Remedy**

9.1 How much should the claimant be awarded?

9.2 What financial losses has the discrimination caused the claimant?

9.3 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

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

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

9.6 Is it just and equitable to increase or decrease any award payable to the claimant?

9.7 By what proportion, up to 25%?

Schedule 5 Employment Act 2002 cases:

9.8 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

9.9 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

9.10 Would it be just and equitable to award four weeks' pay?