EMPLOYMENT TRIBUNALS

Claimant: Mr Andrew Bailey

Respondents: ARH UK Limited (1)
Mr Ian Coll (2)

Heard at: Manchester **On:** 21 and 22 September 2022

Before: Employment Judge Humble
Dr H Vahramian
Mr J Flynn

REPRESENTATION:

Claimant: Ms J McCarthy, Solicitor
Respondents: Not in attendance

JUDGMENT having been given orally on 22 September 2022 and sent to the parties on 14 October 2022, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of procedure 2013, the following reasons are provided:

REASONS

The Hearing

1. The hearing took place on 21 and 22 September 2022. The claimant was represented by Ms J McCarthy, Solicitor, and there was no representation or attendance by either of the respondents. The non-attendance of the respondents requires some explanation of the background to these proceedings.

Background

2. The proceedings were commenced by way of a claim form submitted on 7 January 2021. ARH UK Limited, the first respondent, entered a notice of

appearance on 25 February 2021. There was a suggestion in subsequent correspondence that the first respondent was insolvent and was intending to appoint liquidators, but the first respondent remained registered with companies house as active up to and including the final hearing. Mr Ian Coll, the second respondent and chief executive of the first respondent, was joined to the proceedings at a preliminary hearing of 16 December 2021 following an application made by the claimant on 16 November 2021. There was no attendance for or on behalf of either respondent at that preliminary hearing. Following the hearing, the first respondent was given leave to submit an amended response to deal with some further particulars which the claimant was directed to provide, and it was further ordered: "If the second respondent wishes to defend the claim, he must provide a response form and the grounds of his response to the tribunal (copied to the other parties) by no later than 14 February 2022."

3. No response was received and the tribunal wrote to the second respondent on 1 March 2022 in the following terms: "You did not present a response to the claim. Under rule 21…because you have not entered a response, a judgement may now be issued. You are entitled to receive notice of any hearing but you may only participate in any hearing to the extent permitted by the Employment Judge who hears the case." A further letter from the tribunal to the second respondent was sent on 3 March 2022, which stated: "from your e-mail 1 March 2022, you appear to be stating that you have not received the claim form which was sent to you on 10 January 2022" which "followed the decision…at the primary hearing on 16 December 2021 to join you as a respondent to these proceedings. If you did not receive the claim form, it is open to you to apply for a reconsideration of the decision not to allow you to participate in the proceedings which was communicated to you by e-mail on 1 March 2022. If you wish to make such an application, it must be made within 14 days of that e-mail (by 15th March 2022), [you must] provide your explanation for the delay in providing a response and include a completed response form which you are asking to be accepted." No such application or response form was received and the tribunal wrote to the second respondent on 29 March 2022 stating that "as you have not made any application as directed by the tribunal in its letter of 3 March 2022 the position remains as set out in the tribunal's letter of 1 March 2022."

4. On 23 August 2022 the second respondent wrote to the tribunal and stated, "I have the above case due to start on 21 October 2021, my current solicitor is not able to carry on with this case and I have to look to find new representation. I will not be in the UK until October due to unforeseen circumstances so I'm asking the court for a postponement until I can get a new lawyer in place to represent myself and the company and also be present [at] the hearing." The tribunal responded seeking clarification as to whether the second respondent was referring to the hearing listed for 21 September 2022 and the second respondent replied on 31st August 2022 in the following terms, "sorry my mistake the date should be 21 September 2022. We are trying to engage with a lawyer to represent both [respondents] as the previous lawyer could not carry on with the case for us." Employment Judge Allen

replied to the second respondent on 15th September 2022 refusing the application to postpone the hearing listed for 21st September 2022 because, among other reasons, "[the second respondent] has not submitted a response on his own behalf and is therefore not entitled to take any part in the proceedings in any event (without leave of the Judge)", and "the hearing has been listed since 16 December 2021. Nothing in the application made explains why an application to postpone has only been made now. Such information as is provided is not sufficient to mean that a postponement should be granted."

5. The tribunal was copied into email correspondence between the claimant's representative and the second respondent which took place the day before the hearing, 20 September 2022. The claimant's representative sent a copy bundle of documents to the second respondent on the morning to which the second respondent replied by e-mail in the following terms: "Thank you apparently I am not allowed to attend from the document from the Court. So no I will not be there under their direction which I think is horrendous." The claimant's solicitor replied in the following terms, "It is my understanding that you are permitted to attend to represent the company ARH as the company submitted a defence to the claim against them; however, you are not permitted to make representations on behalf of the claim against yourself without permission from the judge as you did not submit a defence." The second respondent replied as follows, "Not what I've been informed by my lawyers so unfortunately I won't be there and it is all by phone I have heard."

6. At no point were either of the respondents informed that they were not permitted to attend the hearing. The second respondent was informed that he would only be entitled to take part in the proceedings to the extent permitted by the Judge and the correspondence to that effect was clear. The summary of the position provided by the claimant's representative to the second respondent on the evening before the hearing was a fair summary of the position. Nevertheless, neither of the respondents attended or sent a representative to attend on their behalf. No further application to postpone the hearing was made after the refusal of 15 September and the tribunal therefore proceeded with the hearing in the absence of the respondents.

<u>The final hearing</u>

7. At the hearing, the claimant provided a detailed witness statement and a bundle of documents which extended to 188 pages. On the first day of the hearing, after identifying the claims and reading the correspondence and papers, evidence in chief was taken from the claimant. The tribunal took submissions from the claimant and took account of the response form submitted by the first respondent before adjourning for deliberations. The tribunal reconvened on the morning when oral Judgment on liability was given followed by evidence on remedy, submissions, and the decision on remedy. Judgment on remedy was also given orally.

8. The Judgment was sent to the parties in writing on 14 October 2022, and a request for written reasons was received from Peninsula Business Services

on behalf of the respondents on 27 October 2022. Those reasons are now provided.

Claims and Issues

9. The tribunal took some time to discuss the claims and issues with the claimant. The claimant's principal claims were for sex discrimination, detriments which were said to have arisen from alleged protected disclosures and unfair dismissal in relation to the protected disclosure and an assertion of statutory rights. There were additional claims for unauthorised deductions from wages which pertained to three elements: unpaid wages during furlough, a bonus payment, and accrued holiday pay upon termination.

10. The claims and issues discussed and agreed with the claimant at the outset were based on those identified at the case management discussion of 17 December 2021, with some additions and amendments to that list which were made as a consequence of further particulars submitted on 17 January 2022 (at pages 25-28 of the bundle) and the tribunal's discussion with the claimant at the outset of the hearing and during the submissions when those issues were refined and some amendments were made. The significant points in terms of the additions or amendments were that only one protected disclosure was relied upon, the second disclosure contained in the further particulars was withdrawn; it was said during the course of the hearing that the claimant accepted he had difficulties with the section 103 unfair dismissal, and that was later withdrawn altogether. That claim was therefore dismissed on withdrawal. The itemised pay slips claim and section 104 unfair dismissal claims, insofar as they related to complaints by the claimant about a failure to issue itemised payslips, were not pursued. The issues agreed at the outset are therefore summarised as follows:

11. <u>Protected disclosure – Detriment s47 and Unfair Dismissal s103A ERA 1996</u>

11.1 Did the claimant make a qualifying disclosures as defined in sections 43A and 43B of the Employment Rights Act 1996? The tribunal shall decide: whether the claimant informed Mr Robinson, the first respondent's managing director, that he should not be working whilst on furlough during a telephone conversation at the end of May 2020. The tribunal shall determine:

a) Did he disclose information?

b) Did he believe the disclosure of information was made in the public interest?

c) Was that belief reasonable?

d) Did he believe it tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation?

e) Was that belief reasonable?

11.2 Did the first and/or the second respondent subject the claimant to the following alleged detriments on the ground that the claimant had made one or more protected disclosure:

a) Abusive messages to the claimant by the second respondent as summarised in the further particulars at page 14 of the bundle;

b) The first and/or second respondent imposing targets on the claimant;

c) Threatening to remove the claimant's company car; and

d) Asking the claimant to make a "business case" regarding his role.

11.3 Was the reason, or if more than one the principal reason, for the claimant's dismissal that he made a protected disclosure? The claimant contends that he resigned following a fundamental breach of the implied term of mutual trust and confidence in relation to the above detriments and was thereby constructively dismissed, and that the principal reason for the dismissal was the protected disclosure.

12 Automatic Unfair dismissal – asserting a statutory right s104 ERA 1996

12.1 Was the reason, or if more than one the principal reason, for the claimant's dismissal that he asserted a statutory right? The alleged assertions relied upon by the claimant are that:

a) throughout his employment, but in particular between February and August 2020, that there were unlawful deductions from his pay; and

b) Throughout his employment, but in particular between February and July 2020, that the first respondent was failing to provide the claimant with itemised payslips.

13 Direct discrimination on the grounds of sex (section 13 Equality Act 2010)

13.1 Did the first and/or second respondent treat the claimant less favourably because of his sex? The acts of less favourable treatment relied upon were not allowing flexibility in the claimant's working arrangements for childcare reasons during the Covid pandemic because the first/second respondent considered the claimant to be "the main breadwinner".

13.2 If so, has the claimant proven facts from which the Tribunal could conclude that the claimant was treated less favourably than a woman in the same material circumstances would have been treated? The claimant relies upon a hypothetical comparator.

13.3 If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of his sex?

13.4 If so, having regard to the reverse burden of proof provisions, has the respondent shown that there was no less favourable treatment because of sex?

13.5 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 19 August 2020 may not have been brought in time. Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010 (including whether it was part of conduct extending over a period and/or whether it would be just and equitable to extend time)?

14 Unauthorised deduction from wages (section 13 Employment Rights Act 1996)

14.1 Was the claimant contractually entitled to a bonus payable in February 2020, May 2020 and August 2020?

14.2 If so, did the first respondent fail to make bonus payments that were due to the claimant and how much is payable?

14.3 Did the respondent fail to pay the claimant full pay during the furlough period, from March to June 2020, when the claimant was required to work?

14.4 Did the first respondent fail to pay the claimant for accrued but untaken holiday due at the termination of his employment?

15 Failure to provide itemised payslips s8 ERA 1996

15.1 Was there a failure by the first respondent to provide the written itemised payslips to which the claimant was entitled between September 2019 and October 2020?

15.2 Did the first respondent provide any payslips at all to the claimant from February 2020 until the claimant's resignation in October 2020?

16 Remedy

16.1 What remedy is the claimant entitled to if he succeeds in any of his claims?

16.2 If the claimant is successful in respect of the discrimination claim or the claims for detriment on the grounds that he had made a public interest disclosure, should he be awarded injury to feelings and, if so, how much (taking account of the *Vento* guidelines)?

16.3 Is the claimant entitled to interest on any award made?

17. For the avoidance of doubt, the claimant brought the discrimination claim and the detriment claims against both respondents while the remaining claims were brought against the first respondent only.

The Law

18. In respect of the protected disclosure claim, the tribunal had reference to sections 43 and 47B ERA 1996 and, in respect of the burden of proof provisions, section 48(2). The tribunal had reference to Ibekwe v Sussex Partnership NHS Foundation Trust UKEAT/0072/14 and was also referred to Timis and anor v Osipov [2018], EWCA Civ 2321.

19. In respect of the discrimination claim, the Tribunal had reference to section 13 of the Equality Act 2010:

"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."

20. The burden of proof provisions are found in section 136 of the Act which provide that:

"*(2) If there are facts from which the court can decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

21. Guidance as to the application of the reverse burden of proof is provided in the cases of, among others, Shamoon v Chief Constable of the Royal Ulster Constabulary [2003[, ICR 337 HL, Hewage v Grampian Health Board [2012] IRLR 870, SC, Royal Mail Group Ltd v Efobi [2021], UKSC 33, Igen Limited v Wong [2005] IRLR 258, CA and Madarassy v Nomura International plc [2007] IRLR 246, CA. A comparator may be used by the tribunal to assist in assessing whether discrimination has occurred and in this case a hypothetical comparator was relied upon.

22. In relation to the unauthorised deduction from wages claim, the tribunal had reference to section 13 and 23 ERA 1996 and to Bear Scotland Ltd v Fulton and another UKEATS/0047/13 and, on remedy, to Vento v Chief Constable West Yorkshire [2003] IRLR 102, CA.

Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the tribunal did not make findings of fact on all of the evidence put before it, but only in respect of those matters which were material to the issues in dispute):

Background

The background facts can be very briefly summarised as follows:

23 The claimant was employed by the first respondent as a sales manager from 29 July 2019 to 9 October 2020. He reported directly to Ian Coll, the second respondent and Chief Executive of the first respondent. In March 2020 during the Covid pandemic the claimant was placed on furlough leave. The Tribunal accepted the claimant's evidence that he was required by the first and second respondents to work during the furlough period, which was contrary to the terms of the furlough scheme.

24 The claimant returned to his work place at the beginning of July 2020. The working relationship between the claimant and the second respondent deteriorated from the summer of 2020 onwards and ultimately the claimant submitted his resignation on 2 October 2020. The claimant's resignation was contained in an email of 2 October 2020 (pages 43-44 of the bundle), which sets out the reasons relied upon for the resignation at that time.

Protected Disclosure Claims

25 The protected disclosure relied upon by the claimant in support of both the detriment and unfair dismissal claims was made during a conversation between the claimant and Mr Robinson, the managing director of the first

respondent, which took place at the end of May 2020. At this point the claimant was in receipt of furlough pay but had been required to carry out some work on behalf of the first respondent. The conversation is set out at paragraph 15 of the claimant's witness statement and the tribunal accepted the claimant's evidence that this was an accurate account of what was said. The relevant part of the conversation arose from a question which the claimant put to Mr Robinson about Caroline, a colleague of the claimant who was also on furlough, when the claimant questioned why Caroline was not processing an order, as follows:

"Claimant:	"Why isn't Caroline doing this?"
Mr Robinson:	"She's furloughed isn't she, she won't work."
Claimant:	"Well I shouldn't be working either, should I?"
Mr Robinson:	"Yeah, but you know the score mate."
Claimant:	"Not right though, is it? Me working?"
Mr Robinson	"Just crack on, eh."

26 The impression given by that exchange, and by the evidence of the claimant before the tribunal, was that it was a low key conversation and the claimant confirmed that Mr Robinson was not agitated or upset. It was a calm and relatively brief discussion. The claimant did not make any statement which might be described as a formal complaint that the respondent was in breach of a legal obligation. Nevertheless, applying the relevant tests, the tribunal were satisfied that the claimant did disclose information by saying that he should not be working during furlough. The tribunal were satisfied there was a reasonable belief this was in the public interest: the claimant was aware that being required to work whilst on furlough was unlawful and that furlough payments were monies paid from the public purse and the information imparted did tend to show that the first respondent had failed to comply with a legal obligation. Mr Robinson was an officer of the company and the tribunal found therefore that the disclosure was a qualifying disclosure which was made in a prescribed manner to his employer. On that basis the tribunal find there was a protected disclosure for the purposes of section 43A ERA 1996.

Detriment

27 The tribunal accept that the abusive messages sent from the second respondent to the claimant from about 21 July 2020 onwards (pages 46-51 and 71-76 of the bundle) were sufficiently disparaging to amount to a detriment. The threat by the second respondent to remove the claimant's car from him, in August 2020, when he was under pressure to increase his level of sales was also held to be a detriment for the purposes of section 47B of the Act.

28 Between June and August 2020, the claimant was informed that he was required to meet sales targets and to make a business case for his role. This was in the context of a business that was under some financial pressure and had been adversely affected by the COVID pandemic and so it was not found to be unreasonable for the employer to introduce sales targets, even where they were not previously in place. However, the tribunal did find that the manner in which these sales targets were introduced and communicated amounted to a detriment. In making this finding, the tribunal had particular regard to the comments of the second respondent, in a text from 7 September 2020 (page 74), to the effect that the claimant was required to "work his bollocks off" and the assertion that he had "lost his hunger and drive".

29 It was these detriments which the claimant suggested caused a breach of contract, a breach of the implied term of mutual trust and confidence and led to his resignation on 2 October 2020. The question that troubled the tribunal was whether there was a causative link between the disclosure and the detriments. One of the main difficulties for the claimant was that all of these detriments were said to have been imposed by the second respondent and there was nothing in the pleadings or in the claimant's statement to the effect that the second respondent was even aware of the conversation which had taken place between the claimant and Mr Robinson, the only occasion relied upon by the claimant as a complaint about having to work during furlough and as a protected disclosure.

30 The claimant's representative in submissions sought to rely on section 48(2) of the Employment Rights Act 1996, and it was said that the burden was on the respondent to show the reason for the claimant's treatment given that both detriment and protected disclosure had been established. However, the tribunal still needed to be satisfied on the balance of probabilities that the protected disclosure was the reason for the detriment. The Tribunal had regard in this respect to the case of Ibekwe v Sussex Partnership NHS Foundation Trust UKEAT/0072/14. Paragraphs 20 and 21 of that decision confirm that, having regard to the burden of proof provisions, ultimately it is for the tribunal to consider the evidence as a whole and to make appropriate findings of fact. In this case, the tribunal were not persuaded that the second respondent was even aware of the conversation with Mr Robinson, for the following reasons. Firstly, the furthest the claimant went when questioned by the Tribunal was that he believed that Mr Robinson relayed everything to the second respondent and so assumed the second respondent would be aware of the conversation. However, he conceded that he had no evidence that the second respondent was aware of this specific conversation, there was nothing said by the second respondent or Mr Robinson to the effect that the claimant's comments had been relayed to the second respondent. Secondly, it was a brief, casual and low key conversation, and the claimant did not make any further complaint either to Mr Robinson or the second respondent. The tribunal took the view that it was probable that Mr Robinson did not attach any great significance to the conversation given that he was neither agitated nor upset, and the claimant did not to object to his instruction at the conclusion of the conversation to "just crack on". Thirdly, it was significant that there was no

text or email from the second respondent in reference to the claimant's comments since the second respondent was clearly not averse to sending colourful and disparaging emails to the claimant when he was displeased. Fourthly, there was a six week gap between the conversation with Mr Robinson and the first disparaging remark made by the second respondent to the claimant in a text which was relied upon by the claimant as a detriment. This is the remark in the text (at page 47) in which the second respondent referred to the claimant as "a lazy arse" and this was in relation to the claimant allegedly not entering information into a CRM system and had nothing to do with him working on furlough. Finally, it was noted that the alleged disclosure was not referenced at all in the claimant's resignation letter and it seemed likely to the tribunal, if the claimant believed that that it was an operative reason for his decision to resign, it would have been mentioned in that correspondence.

31 The tribunal find therefore that the second respondent was not aware of the protected disclosure. It follows that the detriments, which were said to have been imposed by him, cannot be because of that disclosure and that there is no causal link to the claimant's subsequent resignation. The tribunal's view, on the balance of probabilities, is that the detriments were caused by the breakdown in the working relationship between the second respondent and the claimant caused in part by financial pressure upon the respondent and reduced sales, and also due to the claimant's requests for flexible work which we deal with in our further findings in this Judgment. The protected disclosure detriment claims are therefore dismissed.

Unfair Dismissal

32 The section 103A claim was dismissed upon withdrawal by the claimant.

33 The section 104 automatic unfair dismissal claim relies upon the claimant showing that he asserted a statutory right by making complaints that the respondent had failed to pay him in full during a "furlough" period when he was in fact working, and bonuses. The tribunal find that complaints were made in that regard, including the conversation with Mr Robinson and the text messages of 31 July 2021 (page 49 of the bundle). This claim was not pursued with any vigour before the tribunal however and the tribunal were not persuaded that these complaints were the principal reason for the claimant's dismissal. In this case, the tribunal would need to find that the respondent treated the claimant in such a way as to fundamentally breach of the claimant's contract of employment because of these complaints *and* that this was a principal reason behind his decision to resign. While the failure to pay full pay during furlough was alluded to in his letter of resignation it was not said that he was treated to his detriment because of any complaint made to that effect.

34 While the assertion of a statutory right does not need to be the only reason for the dismissal, it needs to be a main or *principal* reason for the dismissal. This was not the finding of the tribunal, it was not held to be an operative reason

for his decision to resign. The tribunal's view on the balance of probabilities is that the detriments were caused by the breakdown in the working relationship between the second respondent and the claimant caused in part by financial pressure upon the respondent and reduced sales, and also due to the claimant's requests for flexible work which we outline in our further findings.

Sex Discrimination

35 The tribunal accepted the claimant's evidence in relation to the requests made by him for flexible work. These were set out in the witness evidence and further particulars and can be summarised as follows:

a) In September 2019 when the claimant's son was off ill, he asked the second respondent for some time off to care for his son as his wife was unavailable. The second respondent's response was: "You're joking, aren't you? She should be doing it, shouldn't she? It's her job."

b) In March 2020 the claimant asked for some flexibility to support his wife and assist with the childcare of his son following the death of his wife's brother. Although the second respondent was initially supportive, he complained about this subsequently, required the claimant to work whilst on furlough and on one occasion accused the claimant, and other employees, of thinking furlough was a "*fucking holiday*" (page 65).

c) On 7 July 2020, following the claimant's return to work from furlough, the claimant asked about flexible work and in particular asked if he could do his office based duties at home so he could "be there for his family". The second respondent again refused and made a remark that the claimant's wife should be doing that as "she's the mum".

d) The claimant made a further request for flexible work at about the time of the August Bank Holiday in 2020, verbally requesting of the second respondent that he be allowed one morning and one afternoon a week working from home. Again, the second respondent refused, saying words to the effect that working for the respondent was his job not looking after his son.

e) In early September 2020, the claimant made a final attempt to obtain some flexibility to assist with childcare arrangements when he asked the second respondent why he could not work from home more to which the second respondent replied, "just leave it".

36 The tribunal found that the second respondent held a traditional view as to the claimant's and his wife's respective roles to the effect that the claimant, as the man of the family, was obligated to focus on his work and it was his wife's role was to focus upon the childcare. This was borne out by a text message from the second respondent (page 65) in which he referred to the claimant as the "main breadwinner". The tribunal find that the refusal to consider the claimant for flexible work or home working, and the manner in which those requests were dismissed, amounts to less favourable treatment than that which would

have been afforded to a hypothetical woman in the same material circumstances and that the less favourable treatment was related the claimant's sex. In reaching that decision the tribunal applied the burden of proof provisions under section 136 EqA 2010. The claimant had proven facts from which the tribunal could conclude that the claimant was treated less favourably than a hypothetical woman in the same material circumstances was or would have been treated and proven facts from which the tribunal could conclude that the less favourable treatment was because of his sex. The respondent did not appear and did not present any evidence to show that there was no less favourable treatment because of the claimant's sex.

37 On that basis the tribunal find that there was sex discrimination and that part of the claim succeeds.

Unauthorised deduction from wages

38 The tribunal accepted the claimant's evidence that there was a shortfall in his pay in April, May and June 2020. This was the period when the claimant was supposed to be on furlough but was required to carry out work by the first respondent. He should therefore have been paid in full rather than at the 80% rate which he received.

39 The tribunal also accept that there was unpaid bonus in February 2020. The claimant had a contractual agreement with the respondent to the effect that he would receive 2.5% of the turnover of the respondent which was payable on a quarterly basis. These bonuses were not paid at all in May 2020 and August 2020. At this stage, however, the claimant has failed to quantify the amount of those bonuses and evidence will be required on that at the remedy stage.

40 The tribunal accept the claimant's evidence that he had accrued and untaken holiday pay which ought to have been paid upon the termination of his employment. This again will need to be quantified at the remedy stage.

41 There was a potential issue in relation to the timing of the unauthorised deduction from wages claims since the shortfall in the furlough pay was prima facie out of time. The last payment should have been made at the end of June 2020 and the ACAS conciliation notification was made on 18 November 2020.

42 The tribunal applied the principles in Bear Scotland Ltd v Fulton and another UKEATS/0047/13 and was satisfied that there was sufficient temporal and subject matter link that the shortfall in pay during the furlough period formed part of a series of deductions alongside the failure to make the bonus payments. The deductions arose from the same essential facts since the failure to pay full pay during the furlough period coincided with the decision to withhold bonus, because of the effects of the pandemic and downturn in work during the furlough period, and the failure to pay bonus in February, May and August overlapped the failure to pay the claimant in full in April, May and June. The last of the series of deductions was therefore made at the end of August with the failure to pay the last bonus and the claim was in time.

43 The final claim, in relation to the itemised payslips, fell away when the claimant decided not to pursue the matter, and that claim was therefore dismissed.

Conclusion

44 In summary, the unfair dismissal and detriment claims are dismissed.

45 The discrimination claims succeed against both respondents and the tribunal held that, given that the second respondent was the principal actor in respect of each discriminatory instance, both the first and second respondents are joint and severally liable. The unauthorised deductions from wages claims succeed against the first respondent only.

46 Quantification of those claims, including injury to feelings in relation to the sex discrimination claim, will need to be determined on remedy.

REMEDY

The tribunal convened a remedy hearing, which followed immediately after the judgment on liability. Having taken oral evidence from Mr Bailey on issues of remedy which were not covered in sufficient detail in the witness statement and brief submissions, the tribunal made the following findings of fact on the balance of probabilities:

47 In relation to the unauthorised deduction from wages for the quarterly bonus, the tribunal accepted the claimant's evidence that he was entitled to 2.5% of company turnover for the preceding three months. Turnover was £124,000 for the quarter preceding February 2020 and he should have received a bonus of £3,100 but no such payment was made. While no actual figures were available for the subsequent periods claimed, the tribunal accepted the claimant's estimates of turnover for those two quarters, which were £50,000 for the period February to April 2020 and £70,000 for the period May to July 2020. This appeared to be realistic given the trading circumstances of the business at that stage. While there was a substantial reduction during those periods due to the Covid pandemic and supply chain problems, there were ongoing contracts which the respondent continued to fulfil and during the earlier part of the first quarter there was no national lockdown while, during the later period of May to July, the business was recovering from the first period of national lockdown. Accordingly, the amounts payable under the bonus scheme based upon the 2½% of turnover were £1,250, payable at the end of May 2020 and £1,750 payable at the end of August 2020. The total unpaid bonus is therefore £6,100.

48 The tribunal accepted the claimant's evidence, which was borne out by the payslips (page 136), that he received only £2,500 gross in each of April, May and June 2020 and that in fact £3,666.67 should have been payable in each of those months since he continued to work throughout during that period.

£1,167.67 is the monthly shortfall, giving a total shortfall for the period of £3,500.

49 Turning to the holiday pay, there were 25 days' accrued holiday based on a weekly wage of £846 per week, a daily rate of £169.20. 25 days at £169.20 is a total of £4,230.

50 In respect of the unauthorised deduction from wages claim, the first respondent is ordered to pay the claimant the total of £13,830 gross.

51 Turning to the discrimination claim, the compensation sought was limited to an injury to feelings award. The tribunal found that the second respondent's discriminatory comments and actions were not isolated incidents but rather a pattern of behaviour which took place over a period of approximately 12 months between September 2019 and September 2020. They included the disparaging remarks set out in the liability judgment which the tribunal found was due, at least in part, to the claimant's requests for flexible work.

52 The tribunal was satisfied that the claimant was adversely impacted by the second respondent's actions. These were covered in part in his witness evidence and also in evidence before the tribunal when he have evidence that he suffered from sleeplessness, anxiety and palpitations, and that he was humiliated and upset by the actions of the second respondent. The symptoms which he described were consistent with those which were set out in his email of resignation (page 43).

53 It is difficult for the tribunal to disentangle the effect upon the claimant from discriminatory actions on the part of the second respondent and those actions of a disparaging and demeaning nature which were not related to that discrimination. Nevertheless, the tribunal was satisfied that the less favourable treatment in relation to the discriminatory actions had a significant impact upon the claimant. He was visibly upset when he gave evidence and said that his inability to assist with care provision adversely affected his relationship with his fiancé, with whom he was jointly required to care for his son.

54 For these reasons the tribunal concluded that this was a case which was at the top of the lower band or the bottom end of the middle band on the *Vento* scale, and therefore a figure was determined at £9,900.

55 The tribunal awarded interest which was calculated from the date of the first act of discrimination, which in this case was September 2019, up to the date of the remedy hearing, 22 September 2022. Accordingly, we calculate three years of interest at 8% which gives a figure of £2,376. The total figure payable in respect of the discrimination is therefore £12,276.

56 The first and second respondents are joint and severally liable to pay that award, the tribunal find that the second respondent was the sole perpetrator of the discriminatory acts and that the first respondent was vicariously liable.

57 The first and second respondents were therefore ordered to pay the claimant the sum of £12,276.

Employment Judge Humble

Date: 27th November 2022

REASONS SENT TO THE PARTIES ON

13 December 2022

FOR THE TRIBUNAL OFFICE