EMPLOYMENT TRIBUNALS

Claimant: Mr D Patton

Respondent: Heineken UK Limited

Heard at: Manchester **On:** 7-9 March 2023

Before: Employment Judge Phil Allen
Ms C Nield
Mr AJ Gill

REPRESENTATION:

Claimant: In person
Respondent: Mr D James, Advocate

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was subjected to unlawful harassment related to disability by comments made to him in a meeting on 27 August 2020. The claim for harassment in breach of section 26 of the Equality Act 2010 succeeds.

2. The claimant was not treated unfavourably because of something arising in consequence of his disability. The claim for discrimination arising from disability in breach of section 15 of the Equality Act 2010 does not succeed and is dismissed.

3. The respondent was not in breach of the duty to make reasonable adjustments. The claim for breach of the duty to make reasonable adjustments under sections 21 and 22 of the Equality Act 2010 does not succeed and is dismissed.

4. The Tribunal did have jurisdiction to consider the claimant's claims under sections 15, 21, 22 and 26 of the Equality Act 2010. For the claims brought under sections 15, 21 and 22 of the Equality Act 2010 for the second half of the bonus payment of 2020 paid in February 2021, the claims were brought within such further period as the Employment Tribunal thought just and equitable under section 123(1)(b) of the Equality Act 2010.

5. The respondent did not make an unauthorised deduction from the claimant's wages in breach of section 13 of the Employment Rights Act 1996. The claims for

unauthorised deductions from wages under sections 13 and 23 of the Employment Rights Act 1996 do not succeed and are dismissed.

6. The Tribunal did not have jurisdiction to consider the claimant's claim for unauthorised deduction from wages for the second half of the bonus payment of 2020 paid in February 2021, as the claim was not brought within the time required by section 23 of the Employment Rights Act 1996, and it was reasonably practicable for the claim to have been brought within the time required.

7. The claimant is awarded injury to feelings for the harassment found in the sum of **£1,000**, which must be paid to the claimant by the respondent.

8. The respondent must also pay the claimant interest on the injury to feelings award in the sum of **£202.52**.

REASONS

Introduction

1. The claimant is employed by the respondent as a Technician in its engineering team and has been since 24 November 2015. In periods during 2020 and 2021 the claimant was required to shield as a result of a disability and was placed on furlough. The claimant was paid 50% of a bonus paid in August 2020, when most other comparable colleagues were paid a 110% bonus. The claimant was paid a 60% bonus paid in February 2021, when most other comparable colleagues were paid 100%. The claimant alleged that he was subjected to discrimination arising from disability (section 15 of the Equality Act 2010) and breach of the duty to make reasonable adjustments (sections 21 and 22 of the Equality Act 2010) by being paid a lower bonus than comparable colleagues on the two occasions. He also alleged that the lower payments were an unauthorised deduction from wages. The claimant also claimed that he was subjected to unlawful harassment related to his disability by two comments he alleged were made by a senior manager during an informal grievance meeting on 27 August 2020. The respondent denied the claimant's claims.

Claims and Issues

2. A preliminary hearing (case management) was previously conducted in this case on 6 July 2021. At that hearing the issues to be determined were broadly identified and the parties were ordered to agree a list of issues in advance of this hearing.

3. A draft list of issues was provided by the respondent at the start of the hearing (initially a previous draft was provided, but an updated and more complete version was provided during the time taken for reading on the first morning). The claimant objected to paragraph 10 of the list of issues which he did not believe to be accurate. Aside from that one issue, the claimant confirmed that he otherwise had no objections to the list of issues. It was agreed that the objections to issue 10 would be considered as part of submissions. It was also agreed with the parties that they would address both liability and remedy issues at the same time during the hearing.

4. The agreed list of issues (including paragraph ten which was not agreed), is appended to this Judgment.

Procedure

5. The claimant represented himself at the hearing. Mr James, advocate, represented the respondent.

6. The hearing was conducted in-person with both parties and all witnesses in attendance at Manchester Employment Tribunal.

7. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to over 171 pages. Where reference is made in this Judgment to a number in brackets, that is a reference to the page number in the bundle. On the first morning the Tribunal read the witness statements which had been provided and the documents in the bundle which were referred to in those statements.

8. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal.

9. The following witnesses each gave evidence for the respondent, were cross examined by the claimant, and were asked questions by the Tribunal: Ms Jennifer Hayward, HR Business Partner; Mr Carl Goodwin, Engineering Manager; Mr Robert Henderson, Production Excellence Lead (previously, at the material time, Lead Brewing Manager in Manchester); and Mr Jonathan Redman, UK Supply Chain Support Manager (previously, at the material time, Brewing Director at Tadcaster).

10. After the evidence was heard, each of the parties was given the opportunity to make submissions. Each party provided a written document as part of their submissions. They then expanded upon that document in oral submissions. Submissions concluded at the end of the afternoon of the second day of hearing.

11. Judgment was reserved and a decision was considered and reached in chambers on the third day of the hearing (without the attendance of the parties on that day). The Tribunal provides this Judgment and reasons outlined below.

12. The Tribunal was grateful to the claimant and the respondent's representative for the way in which the hearing was conducted, which was entirely appropriate.

Facts

13. The claimant has been employed by the respondent since 24 November 2015. He works at the respondent's brewery in Manchester. The Tribunal was provided with a copy of his contract of employment (48). The claimant is a Technician and his day-to-day role involves the maintenance of the brewery and keeping production going.

14. The claimant's contract of employment made no reference to any contractual entitlement to a bonus scheme. In practice, the claimant had received a company bonus twice yearly in February and August throughout the time that he had been employed. The respondent's position was that the payment of the bonus was entirely discretionary.

15. Part of the workforce at the respondent's Manchester Brewery, known as the "negotiated staff", were represented by Unite for collective bargaining purposes. The remainder of the employees were non-negotiated staff. The Tribunal was provided with one page from the collectively agreed terms with the union, headed Performance Related Incentive, which expressly provided that the incentive scheme was non-contractual (47).

16. For each calendar year an incentive scheme was agreed with the trade unions which outlined the parameters which needed to be met for the bonus to be payable (170). The bonus scheme for each year was agreed as part of the respondent's PSG (Partnership Steering Group). In broad terms, the respondent's evidence was that certain site targets had to be met for a bonus to be payable, and based upon those targets the amount payable would be calculated. Each individual within the negotiated group was then also subject to personal review and appraisal. Those personal reviews and appraisals could result in five different grades, based upon which a proportion of the bonus otherwise payable to that individual would be paid as follows: unsatisfactory (0%); partially meets (50%); fully meets (100%); exceeds (125%) and outstanding (150%). It was the respondent's evidence that, in Manchester, an employee's attendance was taken into account in the way in which the individual was rated and therefore it impacted upon the bonus they received. The claimant's evidence was that he was unaware that it did so. This position differed from the respondent's other breweries in the UK where it was understood there were clear and tangible criteria for attendance in relation to the relevant bonus scheme.

17. In 2020 the first tranche of bonus was due to be paid in July for the period from January to June, and the second tranche would be paid in February 2021, for the period from July to December 2020. The process by which an individual grade was intended to be reached was supposed to be addressed in one-to-one meetings between an individual and their manager during the year. The claimant had constantly received a marking of three, that is meets the personal performance indicators, in previous years. During the period of January to March 2020 the claimant did not have any one-to-one meetings.

18. On or about 17 March 2020 the claimant received a call from his doctor who advised him not to attend work due to his reduced immune system and the risk to him if he was to catch Covid-19. The claimant was told that he would soon receive a letter about shielding as his doctor deemed him to be extremely vulnerable. The claimant immediately informed his manager and discussed this with him and agreed that he would stay at home. The claimant was away from work for this reason, having been placed on sick leave, from 23 March to 30 April 2020 and thereafter the respondent converted the claimant's shielding to furlough from May 2020. The claimant first returned to work from a period of furlough on or about 4 August 2020.

19. The claimant had previously received a diagnosis of polymyalgia rheumatic for which he was diagnosed methotrexate. It was not in dispute in this case that the claimant's condition amounted to a disability for the purposes of the definition in section 6 of the Equality Act 2010. The reason why the claimant was told to shield by his doctor was because of that disability and his vulnerability to infection resulting from his disability and the medication that he took. It is not necessary to reproduce in this Judgment a summary of the impact of Covid-19 at the outset of the pandemic. For the respondent the impact was potentially particularly serious because of the

impact that lockdown had on the requirement for beer kegs, particularly in pubs. There was no genuine dispute that there was a significant financial impact on the respondent as a result. However, in practice in the Manchester plant, there became a significantly increased need for production of alcohol for sale in other formats, which had increased significantly.

20. The evidence presented to the Tribunal was that the respondent business made the decision to cease all incentive schemes for 2020 in the light of the financial climate. That would have meant that no bonus was payable for 2020. However, following that group-wide decision, in fact the decision was made to pay certain specific local incentive payments. Accordingly, payment of a bonus was made to members of the negotiated group in Manchester as a result of a varied or resurrected scheme for 2020. Within the non-negotiated group, some staff were paid bonuses of £350 or £500 in 2020. The vast majority of non-negotiated staff were not paid any bonus whatsoever. The managers from whom the Tribunal heard evidence did not personally receive any bonus for 2020.

21. The Tribunal was shown an email sent by Mr Matt Callan, the Brewing and Operations Director for the respondent, to a number of recipients at least one of whom was a trade union officer, referring to an exceptional bonus, sent on 9 April 2020 (60). That explained that the flexibility and commitment from those in the breweries had seen the respondent deliver their highest ever off-trade sales. The email highlighted that the off-trade sales did not make up for the impact of the closure of the on-trade and pubs and bars (which was said to account for over 70% of the respondent's profit). What was stated was:

> *"In recognition of Brewery Ops colleagues attending work during this challenging time, I can confirm we will pay an exceptional discretionary bonus payment to colleagues who have attended work in the breweries during the Covid 19 pandemic. We intend to pay this bonus around mid-year. The Brewery Directors will manage the communication with you and to our colleagues locally."*

22. It was that announcement that resulted in the one-off bonus payments to non-negotiated colleagues outlined above. For the negotiated colleagues, that announcement led to a discussion with the PSG and subsequently the resurrection of the bonus payable to those staff.

23. The Tribunal was shown the furlough agreement which was sent to the claimant on 22 April 2020 (62). Within the text of that agreement was the following:

> *"You will not be entitled to any other payments including overtime, incentives and one-off/irregular payments (e.g. first aider payments) during furlough leave."*

24. A particularly important document in relation to the bonus was an email sent from Mr Stephen Moore, the Brewery Manager, to the Heads of Department on 11 June 2020 (72 and 74). That email was only sent to Heads of Department, albeit the respondent's witnesses explained that the Department Heads were expected to provide the information to others including the employees who reported to them. The Tribunal accepted the email as setting out clearly the thinking on the relevant bonus at that point in time. The email made it clear that what was set out followed a

meeting with most of the trade union representatives which had taken place on 11 June. Unfortunately, there were no minutes or records of the PSG meetings, something which the Tribunal was told was standard practice. The email started by addressing individual performance ratings and explained that any ratings that an individual had not met the required criteria would need to be evidenced, which might be difficult as few, if any, one to ones had taken place. The email confirmed that they would not be enhancing awards at all for those with unsatisfactory ratings. The awards to be paid to those with fully met, exceeded or outstanding ratings were increased. Most importantly those who fully met the criteria were to receive 110% of bonus "*to incorporate some recognition of good or great performance achieved in unprecedented times*".

25. The email went on to say at point 3:

> *"Colleagues that have been shielding or furloughed for a significant proportion of the reference period should be award partially meets. Positioning is vital here. This is not of the colleague's choice or within their control and they are not being penalised on the grounds of health. This is to recognise colleagues that have been here much more often and have been able to drive the results more directly from their efforts; there needs to be a point of difference. Any partially meets ratings on this ground alone, should be very clear; it is not a performance or behavioural issue and will not be used in performance improvement plans, even if the last 'normal' rating was partially meets."*

26. The email went on to say that colleagues that had needed to self-isolate for seven days or fourteen days should not be rated partially meets if their performance and behaviours had not warranted that score for other reasons. The email stated that, as always with bonuses, there were no perfect answers and it explained that there had been discussions at length of some of the merits of different scenarios, particularly around the impact on those furloughed as quoted above.

27. There was some confusion in the evidence heard about how the claimant was graded. As the Tribunal was addressing the issue of bonus and not the grading, those differences in evidence were not critical and did not need to be determined. The claimant's position was that he had been told by his manager and his manager's manager that he would be graded three, that is meets expectations, but that that grading was then recommended to be reduced to two by the respondent's HR Business Partner. The claimant was initially informed by the person due to hear his formal grievance that a met expectations grading (three) had not been implemented. As a result of the grievance, the grading was increased to met expectations (three).

28. On 11 August 2020, following his return to work, the claimant met with his manager, Rob Scholes, and Carl Goodwin. He was informed that they had assessed the claimant at three but that higher management had decided that he would be getting a two as he had been furloughed. The claimant was unsurprisingly unhappy about this. On 11 August 2020 he raised a formal grievance (88). The claimant was particularly aggrieved because he had had no prior indication of the reduced mark. The bonus paid to the claimant in August 2020 was based upon 50%.

29. The Tribunal heard evidence from Ms Heywood, HR Business Partner. Ms Heywood had only joined the respondent on 18 May 2020 and therefore had not been involved in the history of the bonus scheme. In her witness statement Ms

Heywood observed of the approach of defining those who had been on furlough as only partially meeting the objectives: *"it felt like the changes were being shoehorned into the existing scheme to avoid substantial change during the pandemic"*. The Tribunal was also provided with an email from Ms Heywood to Ms Harding of 12 August 2020 (95) in which Ms Heywood referred to there being three grievances from people in brewing engineering who were shielding about receiving the 50% payment and the partially meets accreditation. In that email Ms Heywood addressed a number of points that explained the respondent's position. These included that:

- Dealing with the impact of furlough and shielding on bonuses was new and the approach was agreed in the PSG;
- The bonus was calculated based on performance and she said that the relevant individuals had not been able to contribute to that whilst absent;
- The relevant individuals had been absent for 50% of the time to which bonus related in that period; and
- It was viewed by Ms Heywood that paying a fully meets bonus at 110% for the whole period would *"impact on morale of colleagues who attended work throughout the crisis"*.

30. On 27 August 2020 the claimant attended an informal grievance meeting. The meeting was also attended by Mr Goodwin, Mr Hulme from HR, and a Ms Colland, but not by a trade union representative. The claimant handed the other attendees a document he had prepared which explained the reasons for his grievance (101). The contents were discussed during the meeting.

31. It was the claimant's evidence that, during this meeting, Mr Goodwin said to him *"you could have come in", "you didn't have to shield, it was a choice"*. The claimant then explained that he did not believe he could have come in, based on his doctor's advice, and that he could have died if he had caught Covid. He confirmed that he had performed when he had been able to attend and had done everything that had been asked of him. After highlighting the lack of notice around the bonus and the fact that he thought it was unfair that he not been paid it, the claimant's evidence was that Mr Goodwin responded *"If you're not happy sue the Government".*

32. In his evidence to the Employment Tribunal in his witness statement, Mr Goodwin stated that he did not recall making comments to that effect. Mr Goodwin was asked about this during the hearing when the difference between not recalling something and stating something had not been said was explained, and he provided an answer which the Tribunal found to be him confirming that he was stating his recollection rather than stating with certainty that he had not made the comments.

33. Mr Henderson's evidence to the Tribunal was that, when he had conducted the formal grievance meeting (on 30 September 2020), Mr Hulme (the HR person who had attended both meetings) confirmed to Mr Henderson that comments along those lines had been made by Mr Goodwin. In his grievance decision Mr Henderson found that the comments had been made. The Tribunal did not hear evidence from Mr Hulme himself, but based upon the evidence of Mr Henderson it was clear that Mr

Hulme had confirmed at a later date that the comments Mr Goodwin was alleged to have said in 27 August meeting had in fact been made.

34. The claimant's evidence to the Tribunal was that he was "*shocked*" by what was said in the meeting. In submissions he contended that the comments had created a degrading environment and/or had created an offensive environment for him. The claimant did not raise his unhappiness formally in that meeting. As the respondent's representative emphasised, there was also no evidence that Mr Hulme stopped the meeting or objected to the comments at the time.

35. On 28 August the claimant asked that his grievance be considered at the formal stage in an email to Mr Goodwin (102). In that email he said:

> *"Although I am pleased to agree to the star review marking moving back to a 3, I would like to escalate the appeal against my bonus payment to the formal grievance stage."*

36. That email attached a document written by the claimant which made reference to the case of Land Registry v Houghton and explained in detail section 15 of the Equality Act 2010.

37. Mr Henderson wrote to the claimant about the grievance meeting on 24 September 2020 (105). There was some confusion in that the bundle included an earlier version of the same letter (171), but it was clear from both the claimant's evidence and that of Mr Henderson, that the earlier version was not sent.

38. When the claimant attended the formal grievance meeting, he produced an updated version of the document containing his grievance (106). Notably, that grievance included additional points about the conduct of the August meeting, including:

> *"During the informal grievance meeting, comments made by Carl that disability was an inconvenience or irritation to Heineken (given the forum of a grievance meeting) particular comments were 'you didn't have to shield it was a choice' and 'if you're not happy sue the government'."*

39. The formal grievance meeting took place on 30 September 2020 and was attended by the claimant, Mr Henderson who conducted the meeting, Mr Moloney (the respondent's Unite representative), and Mr Hulme (from HR as an observer). The Tribunal was provided with typed notes of that meeting (108). The claimant did not agree to one aspect of those notes but otherwise they appeared to be accurate. It was Mr Henderson's evidence that at the start of the meeting he had asked the claimant whether the complaint about the way in which he had been spoken to by Mr Goodwin during the informal meeting was to be considered as part of the grievance, and the claimant had said that was not the case. That was not recorded in the notes of the meeting. However, towards the end of the meeting notes it was recorded that Mr Henderson asked the claimant whether it would be sufficient if he fed back to Mr Goodwin about the comments made, and the claimant had replied that it would (111). Following the meeting Mr Henderson undertook some investigations as evidenced by emails sent to others.

40. On 15 October 2020 Mr Henderson provided the claimant with his grievance outcome. This was provided in a letter (122) attached to an email (121). Mr Henderson partially upheld the claimant's grievance. The claimant's rating was upgraded to "fully met expectations" and it was explained that had accorded with something agreed subsequently with the PSG. However, Mr Henderson did not uphold the grievance regarding the payment of the bonus itself. Mr Henderson concluded:

> *"It is my belief that the position adopted at the PSG is a reasonable approach to achieve the aim of rewarding those who had made a substantive contribution by being at work whilst, by taking this approach, we are not overlooking employees, such as yourself, who have been unable to work. We have provided recognition and enhanced pay support to this group, which we consider is proportionate in the circumstances. Consequently, I do not uphold your grievance in respect of the half year payment under the incentive scheme."*

41. In the letter Mr Henderson also informed the claimant that, as had been agreed, he had fed back to Mr Goodwin with regard to the points that he had raised about the comments in the meeting. Mr Henderson's evidence to the Tribunal was that he spoke to Mr Goodwin and made it clear that the comments were not appropriate and had not reflected the company's position on the bonus. Mr Goodwin denied that this conversation had taken place or that he had ever been told anything about the claimant's complaint about his conduct in the meeting. The Tribunal was accordingly unusually faced with a conflict of evidence between two of the respondent's witnesses. On this issue the Tribunal preferred Mr Henderson's evidence to that of Mr Goodwin. That there had been feedback was recorded in Mr Henderson's letter of 15 October 2020. The Tribunal could see no reason why Mr Henderson would say that the meeting with Mr Goodwin had taken place if it had not.

42. The claimant appealed against the grievance outcome. He did so in an email to Ms Heywood of 3 November 2020 (126). The appeal was heard by Mr Redman, at the time the Brewery Manager for a different brewery. The Tribunal was provided with notes of that meeting (130). Mr Redman provided the claimant with a detailed decision letter which did not uphold his grievance appeal. That letter was dated 1 December 2020 (133). The Tribunal found Mr Redman to be a witness who demonstrated a much greater understanding of the issue than Mr Henderson. His letter also provided significantly more detail about the background to the reasons for the payment of the bonus.

43. Mr Redman highlighted the exceptional circumstances in which the bonus had arisen (135). He explained:

> *"Whilst many people in the business either worked from home or were furloughed for whatever reason, those employees with 'front line' operational roles who could not work from home continued to attend work at our breweries throughout the lockdown as key essential workers. Not only did those attending the brewery maintain production but for a sustained period delivered record levels of performance and output in supporting the business to deliver unprecedented levels of demand and to remain functional during the*

crisis. The Heineken UK management team decided that this extraordinary contribution should be recognised and rewarded."

44. The letter also provided a detailed breakdown of relevant employees. It highlighted that 70% of employees were in the non-negotiated group. The letter incorrectly stated that none of those employees received incentive payments; in his verbal evidence Mr Redman corrected that part of his letter and confirmed that some employees had received the bonuses of £350 and £500 addressed above. The letter outlined that 711 of the UK employees were negotiated colleagues who on the whole made up front line workers. 23 of the colleagues who had been furloughed came from a group that participated in the same or a similar discretionary incentive scheme to the claimant. Of those 23, the letter set out that five were furloughed for the reason that the level of work had diminished due to business conditions, and 18 were furloughed as they were required to shield due to their clinical vulnerability (including the claimant). In his outcome Mr Redman went on to say the following (136):

"Discretionary bonus payments were paid to front line employees who had been furloughed. Following consideration of the purpose of the bonus and discussions with employee representatives it was decided that, although bonuses would be paid to this group, they would be paid at a reduced rate due to reflect their non-attendance at work for some or all of the initial lockdown period. No distinction was made on the level of pay-out between different reasons for being furloughed. They were treated equally and fairly irrespective of the reason for furlough. The incentive scheme that this group participate is a discretionary scheme.

It is therefore my decision that your grievance is not upheld. Whilst you have received less than you would have received had you been in attendance during the relevant period, I believe that you were not discriminated against. The bonus award is discretionary and the company has been forced to think about the purpose of the incentive during the time of the COVID-19 crisis. The decision reached by the company has been to use the available resources to reward those who have performed beyond expectations during the pandemic. I am of the reasonable belief that the approach of the company was fair and proportionate in how it administered application of its discretionary incentive schemes though this period of crisis."

45. The respondent revised the way in which the bonus scheme operated for the second half of 2020. It took the approach of reflecting more precisely the periods during which an employee attended work and for which they did not. This was assessed on a monthly basis. The claimant was absent from work for two further periods of furlough, including a period from 7 November 2020 which impacted upon his bonus for the second half of the year. In the light of those subsequent periods of furlough for the claimant, he received a bonus of 4/6ths of the relevant sum due for the period July to December, paid in February 2021. It does not appear that the revised approach was effectively communicated as the claimant had not appreciated that he received 4/6ths of the relevant bonus for the second half of 2020 rather than 50%, until the Tribunal bundle and hearing. The bonuses paid were not uplifted in the second half and therefore those who met expectations (but had not been on furlough for extended periods) received 100% of bonus (rather than the 110% they

had received for the first half). The claimant fully met expectations based on his performance during his attendance at work and was graded three.

46. The claimant also had a period of absence from work due to ill health (not shielding) in October 2020. That period of ill health was ignored for the calculation of the claimant's bonus in the second half of the year (that is, it was not reduced for that period, unlike the periods of furlough). That approach reflected the approach that the respondent took with other employees. It was clear from the evidence presented to the Tribunal, that for those employees in the negotiated group who were not on furlough or shielding but needed to isolate, either because they had tested positive for Covid-19 or had otherwise been required to isolate due to contact with others, those periods of absence were not taken as reducing the bonus paid or excluding the employee from receiving the bonus. Ms Heywood gave evidence that this approach was necessary because the company wished to ensure that those who should not attend work did not do so, where they were required to isolate. This had the effect of meaning that those who did not attend work for a period due to having Covid had that period of absence ignored for bonus purposes (that is it did not reduce the bonus), whereas those such as the claimant who were required to isolate so as not to catch Covid because of the risks of doing so, did not have those periods ignored and bonus was not paid in relation to those periods. When questioned about this, Ms Heywood highlighted that the absences for isolation were of a short-term duration, whereas shielding/furlough was for a more significant period.

47. The respondent operates an annualised hours system. In 2020 the claimant had accumulated a significant number of hours as a result of the hours that he had worked in the period whilst he worked. The annualised hours year did not reflect the bonus year; the period was different. In a normal year the respondent would endeavour to stand employees down from shifts, so that they did not have significant amounts of accumulated annualised hours at the end of the annualised hours year. That did not happen in the relevant year for the claimant, and the claimant was paid £3,200.19 for his annualised hours balance in November 2020. In submissions the respondent suggested that this in practice meant the claimant was better off than he would have been if he had attended work throughout the year, as it was suggested that many of those who had attended were stood down for periods during the pandemic. The claimant emphasised that the payment reflected the additional hours that he had in fact worked in the periods when he had been in work.

48. The evidence available to the Tribunal was that the claimant had continued to work professionally alongside his colleagues, including with Mr Goodwin even after Mr Goodwin had made the comments alleged to be harassment in the 27 August 2020 meeting. In answer to questions asked in cross examination, the claimant emphasised that he would act professionally in spite of what had been said.

49. The claimant entered his Employment Tribunal claim on 18 December 2020. The claimant accepted that he was aware of Employment Tribunals, referring to his son having been involved in a hearing previously. In any event it was clear from the documentation that the claimant had prepared for his grievance, that he had researched matters related to the law at the time, including being aware of the EHRC Code of Practice. The claim form entered on 18 December 2020 (after ACAS early conciliation between 30 October and 20 November 2020) raised only the payment of the first tranche of the 2020 bonus. On 6 July 2021 the claimant attended an

Employment Tribunal preliminary hearing (case management by telephone) in which he referred to the fact that his bonus payment in February 2021 had also been impacted. The claimant was granted permission to amend his claim to include the alleged underpayment of his February 2021 bonus at the preliminary hearing, but the order made clear that the amendment did not amount to a finding that he had raised his concern in time and that was an issue that needed to be determined (33). In his witness statement and in the evidence that he gave to the Tribunal, the claimant did not provide any reason why he had not made an application to amend (or entered a claim) in time for the second tranche of the bonus. In the written submissions which he produced, the claimant did refer to other reasons, but as he had not evidenced those reasons the Tribunal was unable to consider those matters which were unsupported by evidence.

50. In his first Schedule of Loss, the claimant had claimed the balance of a bonus of £1,000 for August 2020 and the balance of a bonus of £1,200 for February 2021. He also initially claimed £1,000 as being the injury to feelings award he was seeking, recognising that what he alleged came within the lower Vento band (42). In a revised Schedule of Loss prepared in February 2023, he increased the injury to feelings being sought to £3,000 (42A).

51. In his submissions document, the respondent's representative calculated that the difference between the payment which the claimant had actually received in August 2020 (£831.58) and the amount he would have received had he received 110% (£1,829.47) was £997.89. The claimant confirmed that figure was not in dispute. For the February 2021 bonus, the claimant received £1,231.97. In his closing submissions the respondent's representative contended that the 100% payment for the period would have been £1,847.95 and therefore the difference between the two was £615.98. The claimant did not dispute that figure, having accepted that he had misunderstood the amount which could have been paid as a result of thinking that he had received 50% of the relevant bonus when in fact he had received 4/6ths.

The Law

52. Section 15 of the Equality Act 2010 provides:

> **(1) A person (A) discriminates against a disabled person (B) if —**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**

53. For unfavourable treatment there is no need for a comparison, as there would be for direct discrimination. However, the treatment must be unfavourable, that is there must be something intrinsically disadvantageous to it.

54. **Pnaiser v NHS England [2016] IRLR 170** outlines the correct approach to be taken to such a claim:

> *"From these authorities, the proper approach can be summarised as follows:*

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

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises….

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

…(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed."

55. The respondent's representative in his submissions highlighted that treatment which is advantageous cannot be said to be unfavourable merely because it is

insufficiently advantageous. For a section 15 claim to succeed there must be unfavourable treatment. That submission was entirely right. He relied upon **McCue v Glasgow City Council** [2023] UKSC1, which followed the earlier well-known case of **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2018] IRLR 306.

56. **McCue** was a claim brought on behalf of an individual with Down's Syndrome contending that the Council should have exempted a greater amount of his expenditure (which was disability related) from the assessment of his available means, and by not doing so it had breached section 15 (discrimination arising from disability). The Supreme Court identified that the true nature of the complaint was that aspects of the claimant's treatment were not generous enough, although the treatment benefitted people with disabilities. The Supreme Court determined:

> "*the failure of the Council to apply* [the relevant section] *in a more generous way, beyond the favourable treatment for Mr McCue as a disabled person already built into its approach, does not constitute unfavourable treatment for the purposes of section 15(1)(a)"*

57. In **McCue**, Lord Sales (at paragraph 62) went on to add that he could envisage a potential claim where there was an overall policy or approach adopted by a respondent which might establish a normal standard of conferral of benefits, from which it was possible to identify a departure adverse to persons with a disability. That claim would apply even though the people with disabilities received benefits under the policy, so that it could be said that, in a certain sense, they were complaining that the policy itself was not favourable enough for them. The Supreme Court's decision would not preclude a valid claim where a basic comparative exercise identified that the treatment was unfavourable, such as where the Council had applied a stricter standard before allowing deductions for disability related expenditure than it applied before allowing deductions for other forms of expenditure which might be incurred by both those with disabilities and those without (but that was not the position in that case).

58. The **McCue** Judgment shows that the fact that what is being considered for a person with disabilities is in a general sense beneficial (such as that he received some bonus), does not preclude a valid claim that the failure to pay a greater amount was disability-related discrimination; provided that there was some adverse treatment of those with disabilities in comparison to those who do not have the disability.

59. In **Williams** what was under consideration was the application of a scheme allowing early retirement on grounds of ill health (with the payment of an enhanced pension) which was not intrinsically disadvantageous to those with disabilities, albeit there were arguments raised by the claimant that he should have been paid more (and therefore should have been placed at a greater advantage). The enhanced ill health pension/retirement was found to be advantageous treatment, and the greater payment sought was found to be a contention that he should have been treated in a more generous way, beyond the favourable treatment of someone with a disability already built into the approach.

60. Section 15(1)(b) provides that unfavourable treatment can be justified where it is a proportionate means of achieving a legitimate aim. That requires: identification of the aim; determination of whether it is a legitimate aim; and a decision about whether the treatment was a proportionate means of achieving that aim.

61. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the discriminatory effect, the more cogent must be the justification for it. It is for the Employment Tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no range of reasonable responses test in this context.

62. The respondent's representative submitted that to be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. He relied upon **Homer v Chief Constable of West Yorkshire** [2012] ICR 704. He said that the approach need not be the only option available. He also submitted that, in assessing proportionality, the Tribunal must weigh the reasonable needs of the employer against the effect of the treatment (**MacCulloch v Imperial Chemical Industries plc** [2008] IRLR 846).

63. The Tribunal took into account the Guidance in relation to objective justification contained in the EHRC Code of Practice on Employment 2011, as it highlighted to the parties it would. In particular, the Tribunal took into account what that says about what is proportionate at 4.30 and 4.31. It is for the respondent to justify the practice and it is up to the respondent to produce evidence to support its assertion that it is justified. The Tribunal must ask itself whether the aim is legal, non-discriminatory, and one that represents a real, objective consideration? The Tribunal must then ask itself whether the means of achieving the aim is proportionate?

> "*Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all relevant facts.*
>
> *… EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim. It is sufficient that the same aim could not be achieved by less discriminatory means"*

64. In his witness statement, in the documents he provided the respondent during the grievance process, and in his submissions, the claimant placed reliance upon **Houghton v Land Registry** UKEAT/0149/14. That was one of the cases referred to in the summary of the law quoted above from the case of **Pnaiser**. That was a case in which an Employment Tribunal found that non-payment of a bonus to some claimants who had been absent from work due to a disability had been discrimination arising from disability contrary to section 15 of the Equality Act 2010 and had not been justified. The Employment Appeal Tribunal found that there was no error in that Tribunal having done so.

65. The burden of proof in section 136 of the Equality Act 2010 also applies to discrimination arising from disability. Sections 136 says the following:

> **(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision.**

66. In short, a two-stage approach is envisaged:

i. at the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that he has been treated unfavourably; there must be something more.

ii. The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

67. Section 20 of the Equality Act 2010 provides:

> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**

68. Section 21 of the Equality Act 2010 provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

69. The matters a Tribunal must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of an employer;

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage suffered by the claimant.

70. The requirement can involve treating disabled people more favourably than those who are not disabled.

71. Whether something is a provision, criterion or practice should not be approached too restrictively or technically, it is intended that phrase should be construed widely. A one-off act can be a PCP, but it is not necessarily the case that it is. The respondent's representative relied upon **Fareham College Corporation v Walters** [2009] IRLR 991 as authority for the fact that the comparators will generally be identifiable from the PCP.

72. The respondent's representative also submitted that the proposed adjustment must be objectively reasonable; the focus is on practical outcomes (**Royal Bank of Scotland v Ashton** [2011] ICR 632). He emphasised that the burden of proof is on the claimant to demonstrate a prima facie case (that is, the basic case required) on every element of a reasonable adjustments claim (**Project Management Institute v Latif** [2007] IRLR 579).

73. Section 26 of the Equality Act 2010 says:

> **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.**
>
> **In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.**

74. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for him; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, the Employment Appeal Tribunal held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

75. The alternative bases in element (b) of purpose or effect must be considered so that, for example, a respondent can be liable for effects, even if they were not its purpose (and vice versa).

76. If the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

77. The respondent's representative emphasised what was said by Underhill LJ in the **Richmond Pharmacology** Judgment about it being important not to impose legal liability in respect of every unfortunate incident. In that Judgment what he said was (in that case in the context of harassment related to race, but what was said applies equally to harassment related to other protected characteristics):

> "*not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."*

78. The respondent's representative also read to the Tribunal during oral submissions the following passage from Langstaff LJ's Judgment in **Betsi Cadwaladr University Health Board v Hughes** UKEAT/0179/13. That passage followed Langstaff LJ emphasising that the words used in section 26 are "*significant words*", the significance of which should not be cheapened, and that they are "*an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*". After quoting the above passage from the **Richmond Pharmacology** Judgment he said the following:

> *"We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence"*

79. At the end of his submissions, the claimant was asked to confirm which parts of the section 26 definition it was which he said applied to the comments made to him. He identified that he was relying upon a contention that the words said created an environment for him which was degrading and/or which was offensive.

80. The conduct must also be related to the protected characteristic. The respondent's representative submitted that simply because conduct occurred in the context of a protected characteristic did not mean the two were related (**Private Medicine Intermediaries Ltd v Hodgkinson** UKEAT/0134/15). In that Judgment the Employment Appeal Tribunal state that "*related to*" is not a test of causation, the

circumstances might provide sufficient explanation as to the interrelationship required. Whether something is related to a protected characteristic is an objective test and the view of the claimant is not determinative.

81. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

82. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble** [1997] IRLR 336. Those factors are: the length of, and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the relevant respondent has cooperated with any request for information; the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action. Subsequent case law has said that those are factors which illuminate the task of reaching a decision but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. This has recently been reinforced by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 where it was emphasised that the best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, and that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** confirms that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases.

83. In a harassment claim, remedy is governed by section 124 of the Equality Act 2010. The Tribunal may order the respondent to pay compensation to the claimant. Where compensation for discrimination is awarded, it is on the basis that, as best as money can do it, the claimant must be put into the position he would have been in but for the unlawful conduct. **Vento v Chief Constable of West Yorkshire Police** [2003] IRLR 102 is the case which established the bands for injury to feelings awards, which have subsequently been modified and updated. The Court of Appeal suggested that the top band should apply to the most serious cases, such as where there had been a lengthy campaign of discriminatory harassment on the prohibited ground; the middle band should be used for serious cases which do not merit an award in the highest band; and the lower band would be appropriate for less serious

cases, such as where the act of discrimination is an isolated or one-off occurrence. When making an injury to feelings award, the Tribunal must keep in mind that the intention is to compensate, not punish. The Tribunal should not allow its award to be inflated by any feeling of indignation or outrage towards the respondent. Awards should not be set too low as that would diminish respect for the policy of the anti-discrimination legislation.

84. Part of the claim was one for unauthorised deductions from wages under section 23 of the Employment Rights Act 1996. Section 13 of the Employment Rights Act 1996 provides that:

> **An employer shall not make a deduction from the wages of a worker employed by him unless:**
>
> **(a) The action is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or**
>
> **(b) The worker has previously signified in writing his agreement or consent to the making of the deduction.**

85. Under section 27 "wages" includes any bonus or commission.

86. In order for an amount to be properly payable, the claimant must have a legal entitlement to receive the sum.

87. In practice the Tribunal therefore needed to determine: whether the claimant was contractually due, or otherwise legally entitled to, an amount or amounts which were not paid to him; whether the claimant was paid the same (or more than) he was entitled to in each payment of wages; and, if not, whether any deduction made from the payment of any wages, was otherwise authorised in one of the ways described and/or was reimbursement of an overpayment of wages.

88. The claimant in his submissions relied upon a decision made by Leeds Employment Tribunal in the case of **Mellor v Rosemead Limited trading as Whiterose Pharmacy** 1805574/2022. The Tribunal took account of what that decision said. It addressed the importance of a contractual clause which allowed for a deduction being precisely worded. In some circumstances that may be an important point, but the Tribunal did not find it to be helpful in the claimant's case. The defence to the claimant's claim was that he had no contractual entitlement to receive the bonus (or any bonus) as the scheme and the amount paid was entirely at the respondent's discretion, it was not that the respondent relied upon a provision which entitled it to make any particular deduction.

89. For the unlawful deduction from wages claim, different provisions apply to the question of time. The relevant provision is section 23 of the Employment Rights Act 1996 and, if the complaint is not brought within time, section 23(4) says that a complaint presented out of time can be considered where the Tribunal "is satisfied that it was not reasonably practicable" for the complaint to have been presented in time and "if it is presented within such further period as the tribunal considers reasonable". Another way of expressing the test of whether it is reasonably practicable is to ask whether it was reasonably feasible to present the claim in time,

as was explained in **Palmer v Southend-on-Sea Borough Council** [1984] IRLR 119, as the respondent's representative included in his written submissions.

Conclusions – applying the Law to the Facts

90. As is recorded in the List of Issues, it was agreed that, at the relevant time, the claimant was suffering from a disability. It was also accepted that the respondent knew that the claimant was suffering from a disability at the relevant time.

Discrimination arising from disability

91. Issues 3 and 4 recorded in the List of Issues were also things that were accepted. It was accepted that the respondent varied its discretionary bonus scheme to benefit those employees who had contributed to the success of the Manchester Brewery during the period of the coronavirus pandemic. It was accepted that this resulted in the claimant receiving a bonus which was lower than that he would have received had he not been absent. It was also accepted that the reduced bonus was due to the claimant's absence from the workplace and that this absence was due to him shielding, which was the result of his disability.

92. The first question the Tribunal actually needed to determine was whether the treatment of the claimant (by paying him a reduced bonus under the revised bonus scheme in August 2020 and February 2021) amounted to unfavourable treatment of the claimant?

93. In the legal section above, the Tribunal has set out a summary of the respondent's representative's submissions that the treatment was not unfavourable, but rather it was merely insufficient advantageous. The Tribunal has also addressed the key cases of **McCue** and **Williams** which it considered and applied.

94. In reaching its decision the Tribunal was clear that the fact that the claimant was claiming a bonus was not, of itself, enough for the treatment to be considered to fall into the category of insufficiently advantageous. Payment of a lower bonus could be unfavourable treatment in relevant circumstances. The Tribunal also did not find the evidence heard about annualised hours of assistance in determining whether the payment of the reduced bonus was unfavourable. Whilst the respondent's representative in his written submissions placed considerable onus upon the fact that he contended the claimant was better off over the year because of the payments he received as a result of annualised hours, the Tribunal consider that that was not comparing like with like. The claimant received annualised hours payments because he had worked hours in excess of the norm in the period which he worked, and the fact that that he received an annualised hours payment at the end of the year reflected the respondent's complex scheme for ensuring that such additional hours were rewarded.

95. What the Tribunal did focus on was the varied discretionary bonus scheme and what it was seeking to reward. As a result of the group-wide decision to cease all incentive schemes for 2020 in the light of the financial climate, the claimant would not have received a bonus at all had the decision not been made to implement a bonus for the unionised workforce at the Manchester Brewery to benefit those who had contributed to the success of the brewery during the period of the coronavirus pandemic. Looking at the bonus actually paid to the unionised staff and the reason

why it was paid, the Tribunal found that the claimant was not treated unfavourably by being paid the bonus which he received. In practice, the claimant and the other employees who were required to shield or were placed on furlough had not contributed to the success of the brewery during the period of the coronavirus pandemic (through no fault of their own). In those circumstances, the payment of any bonus to that group was advantageous. Most other employees at the Manchester brewery were not paid any bonus, and the few in the non-unionised group who were paid a bonus received a smaller bonus payment than the claimant. In practice the claimant did not (through no fault of his own) contribute to the ongoing operation of the brewery during the period of the coronavirus pandemic, being the reason why bonuses were paid to the staff for 2020 after the scheme was resurrected. As that was the basis upon which any bonus was paid, the Tribunal found that the claim for a payment of 100% or 110% of the bonus based upon that which others received, was a claim that the 50% bonus paid (or 2/3 bonus) was not sufficiently advantageous, rather than a claim that the claimant was treated unfavourably.

96. Issue 6 in the List of Issues was whether the respondent had shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The legitimate aim relied upon by the respondent was to reward the staff who had contributed to the success of the brewery during a difficult period. Whilst the decision reached on unfavourable treatment meant that it was not strictly necessary for the Tribunal to reach a finding on this issue, the Tribunal nonetheless did so.

97. The Tribunal considered whether the aim relied upon was a legitimate aim. In practice there was no genuine dispute about this. The Tribunal found that rewarding staff who had contributed to the success of the brewery during a difficult period was, clearly, an aim which was legitimate.

98. The key question was whether the payment to the claimant of a bonus of 50% for the first half of the period and 60% for the second half, was a proportionate means of achieving that legitimate aim. As emphasised in the legal section above, this required the Tribunal to strike an objective balance between the discriminatory effect of the measure and the needs of the respondent.

99. When undertaking this balancing exercise, the Tribunal considered that the following points, in particular, supported the argument that the approach was proportionate:

- The claimant was paid a 50% bonus for the relevant period (for the first bonus) and a 2/3 bonus for the relevant period (for the second period). The claimant and others were not denied a bonus altogether;

- There was clear evidence that the approach undertaken by the respondent for this group was agreed with the PSG. The Tribunal considered the fact that it was a collectively agreed approach for a group who were subject to collective bargaining, was a particularly important factor; and

- The aim relied upon was to reward (not to incentivise) and was to reward those staff who had worked at the brewery during what was a unique, exceptional, and difficult time. The Tribunal accepted the respondent's argument that payment of a full bonus to people who had been unable to

contribute during that difficult period, would mean that the payments made did not reward in accordance with the legitimate aim and might have had a negative impact upon the morale of those who had worked throughout the difficult period (having been able to do so).

100. In undertaking the balancing exercise, the particular factors which the Tribunal felt favoured the argument that the payments made were not a proportionate means of achieving the aim relied upon were:

- There was a discriminatory impact on the claimant (and others). The claimant effectively "lost" 50% of the first bonus and 1/3 of the second bonus through no fault of his own, as he was required to shield (and in practice be placed on furlough) because of his disability;

- There was an alternative potential approach, which would have been to pay the claimant (and others) 110% of bonus for the first bonus and 100% bonus for the second; and

- As was apparent from the evidence heard, there was a potential anomaly in the approach taken by the respondent. If an individual did not contribute to the brewery for a period as a result of having either tested positive for Covid or being required to isolate/stay away from work because of Covid, those periods were ignored and a bonus was paid irrespective (the claimant himself personally benefitted from this approach for the second tranche of bonus). Whilst rewarding those periods of absence, the claimant and others were not comparably rewarded for a period when they remained away from work to avoid catching Covid (as advised).

101. The Tribunal would emphasise that it entirely understood why the claimant considered that the approach taken was not a proportionate means of achieving a legitimate aim. The Tribunal was particularly concerned by the anomaly outlined above and the apparently inconsistent approach to those with Covid, as opposed to those unable to work in order to avoid catching Covid (because of the medical consequences of doing so). Nonetheless, taking account of the bonus payments that were made to the claimant and those in comparable circumstances, the fact that the approach was agreed with the PSG/consultation body, when allied with the fact that the aim that was endeavouring to be achieved was precisely to reward those who had continued to work during an exceptional period, the Tribunal concluded that the approach taken by the respondent was a proportionate one in order to achieve that legitimate aim. The Tribunal considers that the approach taken in both portions of the bonus (H1 and H2) was a proportionate means, albeit they differed slightly in detail.

102. Issues 7 and 8 addressed time and when the claim was entered at the Employment Tribunal. There was no issue that the claim for the H1 bonus was entered in time. The argument related to the H2 bonus. The H2 bonus was paid in February 2021. The claimant applied to amend his claim only on 6 July 2021, at the preliminary hearing. That application was not made within three months of the date of the alleged discrimination. The claim for the H2 payment was accordingly entered outside the primary time limit.

103. The Tribunal then considered the question of whether the claim was brought within such further period as the Tribunal thought just and equitable. The Tribunal applied the factors outlined above and took account of the case of **Robertson**. In this case there was no evidence (as opposed to submissions) of any genuine reason why the claimant had not made the application to amend (or entered a claim) within the time required. The claimant knew about Employment Tribunals and could accessed information. He could and should have entered his claim within time. However cases such as **Adedeji** have emphasised that it is always important to consider the balance of prejudice between the parties and, in particular, whether the delay has prejudiced the respondent by, for example, preventing or inhibiting it from investigating the claim while matters were fresh. In this case the respondent was fully aware that the relevant payments being made to the claimant (and others) were an issue of dispute, as the claimant had raised a grievance about the payment of the first instalment for the year and indeed had even issued a Tribunal claim. The respondent was fully able to defend the claim at the Tribunal hearing and call evidence. There was a prejudice to the respondent in that it needed to defend a claim which otherwise would have been out of time, but there was no other specific identifiable prejudice. The prejudice to the claimant would have been that a potentially meritorious claim would otherwise have been unable to be pursued and determined (albeit that the Tribunal has not in fact found for the claimant). The application to amend was made at a case management hearing when the case was still being prepared, and the respondent had attended this final hearing fully able to defend the issue on the facts. In those circumstances and even taking account of the lack of evidence about why the claimant did not enter the claim in time or make the application to amend at an earlier date, the Tribunal concluded that it was just and equitable to extend time for the claim for the H2 payment to be considered and determined.

Breach of the duty to make reasonable adjustments

104. Issue 9 was agreed. The respondent accepted that it had applied a provision, criterion, practice (“PCP”) by varying its discretionary bonus scheme to benefit those employees who had contributed to the success of the Manchester Brewery during the period of the coronavirus pandemic.

105. Issue 10 recorded that the respondent accepted that that provision, criterion or practice was applied to the claimant as well as being applied to other colleagues who did not suffer from his disability. This was something that the claimant contested, but in practice it was to his benefit that the respondent accepted that that part of the relevant test was not in dispute. The Tribunal accepted the evidence of Mr Redman and the statistics recorded in his letter determining the grievance appeal, which evidenced that the PCP was applied to others who did not suffer from a disability, as well as the claimant.

106. Issue 11 recorded that the respondent accepted that the claimant's bonus was reduced as a result of the provision, criterion or practice.

107. Issue 12 was whether the PCP put those with a disability at a substantial disadvantage? The answer to that was yes. The claimant and the others required to shield due to their disabilities did not receive the 110% bonus for H1 and the 100% bonus for H2, that those not required to shield received.

108. Whilst issue 13 was not recorded as accepted in the List of Issues, nonetheless in practice the respondent did not seek to argue that it did not know, nor ought it reasonably to have known, that the claimant was placed at the substantial disadvantage.

109. The key issue in relation to the duty to make reasonable adjustments, accordingly, was that at issue 14. The question was whether the adjustment sought was a reasonable one which the respondent was obliged to make. The relevant adjustment sought was to pay the claimant's bonus at the same level as his colleagues who had also received a performance review marking of three, despite his period of absence and shielding. That would have been a bonus of 110% for H1 and a bonus of 100% for H2.

110. The respondent's representative submitted that making such a payment would not have been a reasonable adjustment. He emphasised that those who had been shielding and furloughed were paid a pro rata bonus for the time that they had been able to work throughout the year, but they had not at the other times been able to contribute to the success of the Manchester Brewery during the pandemic (being the reason why the bonus was paid). He also emphasised that the approach was agreed with the PSG/trade unions.

111. The Tribunal found that it would not have been a reasonable adjustment for the claimant and others to have been paid 110% of bonus for H1 and 100% of bonus for H2, taking into account the PCP and the reason why the respondent paid the bonus (as resurrected following the group-wide decision to make no incentive payments). The reasons for determining that paying full bonus was not a reasonable adjustment which the respondent was required to make, in practice mirror the factors set out above when determining the issue of proportionality in the claim for discrimination arising from disability. The Tribunal has considered those factors carefully in determining whether the adjustment sought was reasonable and has concluded that it was not.

112. Issues 15 and 16 related to whether it was just and equitable to extend time for the claimant's claim for breach of the duty to make reasonable adjustments for the claim for the H2 bonus. The Tribunal concluded that it was just and equitable to extend time for the duty to make reasonable adjustments claim, for the same reasons as have already been set out in relation to the payment of the H2 bonus and the discrimination arising from disability claim.

Unlawful deduction from wages

113. The Tribunal did not follow the order of the list of issues and next considered the unlawful deduction from wages claim, as that related to the bonuses paid (unlike the harassment claim).

114. The Tribunal found that the bonus scheme which the respondent operated was discretionary. The scheme was not contractual. The page provided from the collectively agreed terms with the recognised trade union, expressly provided that the incentive scheme was non-contractual (47). There was no documentation shown or evidence heard that a bonus payment was contractual. For the claimant to succeed in his unauthorised deduction from wages claim, the wages must be properly payable. Anything more than the amounts actually paid to the claimant as

bonus, were not properly payable. On that basis the claimant did not succeed in his unauthorised deduction from wages claim.

115. For the H2 bonus paid in February 2021, applying the time/jurisdiction issue set out at issue 25, the Tribunal found that it was reasonably practicable for the claimant to have entered that claim within the time required. As confirmed above when considering the discrimination claim and the just and equitable test, the claim was not entered within the primary time limit. However, the provisions which apply where the claim is out of time are more stringent where the claim is brought under the Employment Rights Act 1996 as the question is one of whether it was not reasonably practicable, rather than just and equitable. The claimant did have knowledge about Employment Tribunal claims generally and he entered an Employment Tribunal claim in time for the H1 bonus. The Tribunal found that it was reasonably feasible or reasonably practicable for the claimant to have entered the H2 bonus claim within the time required. In those circumstances, the unauthorised deduction from wages claim for the H2 bonus was entered outside the time required and the Tribunal did not have jurisdiction to consider it in any event.

Harassment

116. The issues to be considered in relation to harassment were clearly set out in the List of Issues at issues 17-20. They related to the allegation that Carl Goodwin (during the informal grievance meeting which took place on 27 August 2020) said to the claimant *"you didn't have to shield, it was a choice"* and *"if you're not happy sue the Government"*. The Tribunal took the approach of considering the two comments together as it was not felt necessary or appropriate to consider them separately as two distinct allegations of harassment. They were part of the same alleged comments and clearly interrelated to each other.

117. There was a dispute of evidence about whether the alleged comments were made. The claimant stated in his evidence that they were made. Mr Goodwin denied that they were. Mr Henderson's evidence was that he determined at the end of the grievance meeting that the comments had been made by Mr Goodwin because Mr Hulme (who had also been present on 27 August at the meeting) had told him that the comments had been made.

118. The Tribunal accordingly needed to determine whether the comments were made. The Tribunal found the claimant to be a genuine and credible witness. The Tribunal also noted that the claimant did recite the alleged comments in the document which he prepared not long after the meeting, which he presented as the updated version of the document containing his grievance (106). In that document he recorded the very specific comments alleged. Whilst the Tribunal did not hear evidence from Mr Hulme himself, it was clearly evidence of some weight that one witness called by the respondent (Mr Henderson) evidenced that another employee of the respondent (Mr Hulme) had informed him in a formal hearing that the comments had been made by Mr Goodwin, and Mr Henderson had believed him.

119. In considering Mr Goodwin's contrary evidence, as explained above the Tribunal found his evidence to the Employment Tribunal to be only that he did not recall making comments to that effect, rather than stating with certainty that he had not made the comments. There was one other factor which the Tribunal considered to be important in assessing the credibility and truthfulness of Mr Goodwin's

evidence. Mr Henderson was very clear in his evidence that following the grievance meeting he had a discussion with Mr Goodwin and he made it clear to Mr Goodwin that the comments did not reflect the type of behaviour that would be expected from a role model in his position at the respondent. Mr Goodwin in his evidence denied that any such conversation had taken place. On that conflict the Tribunal accepted Mr Henderson's evidence as he was found to be a genuine and credible witness and the Tribunal could see no reason why one of the respondent's other witnesses would provide incorrect evidence about such a conversation. On that basis the Tribunal found Mr Goodwin's evidence to be unreliable.

120. Taking account of all of the above factors, the Tribunal found that Mr Goodwin did make the comments alleged to the claimant on 27 August 2020 as the claimant asserted in evidence (and as corroborated by what Mr Hulme told Ms Henderson).

121. Issue 18 asked whether the comments were related to the claimant's disability? The Tribunal found that the comment made that *"you didn't have to shield it was a choice"* clearly and unequivocally related to the claimant's disability. The claimant had been required to shield to accord with the advice given to protect his own health as a result of his disability. That shielding was not genuinely in any real sense a choice. The shielding arose directly and specifically from his disability. The Tribunal found that the comment clearly related to his disability. As the comments have been considered together, the Tribunal did not need to consider the second comment separately. It followed as part of the same conversation and was considered as part of the same allegation.

122. The next question which the Tribunal needed to consider (part of issue 19) was whether the comment had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. In the List of Issues this is worded in a way which suggests it is a question about the claimant's belief, but as that would be incorrect the Tribunal did not consider the issue on that basis. When giving evidence, the claimant did not genuinely pursue the contention that Mr Goodwin made the comments with the purpose of achieving the requisite effect. The Tribunal did not find that was Mr Goodwin's purpose when making the comments.

123. The Tribunal then needed to consider whether the comments made had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant in his submissions was asked which parts of the test he was relying upon. He contended that the comments made created a degrading environment for him or created an offensive environment for him. The Tribunal therefore restricted itself to considering those parts of the test. As confirmed in the legal section above, this test has both an objective element (which is part of issue 19) and a subjective element (which is issue 20). As explained in the previous paragraph, the Tribunal did not follow what was said in the list of issues about considering the claimant's belief. The Tribunal needed to determine whether the effect of the conduct from the claimant's point of view was that it created a degrading or offensive environment for him. It also needed to determine whether it was objectively reasonable for the conduct to have that effect.

124. The Tribunal accepted the claimant's evidence that the comments made created an offensive environment him in the circumstances. It was the claimant's

evidence that he was committed to his work and endeavoured to ensure that he could work whenever he was able. The claimant had not wanted to miss work due to shielding or furlough. The Tribunal accept the claimant's evidence that he was offended by the comments made, particularly by the suggestion that shielding had been a choice. The Tribunal found that the comments made by a senior manager in a meeting in fact had the effect for him of creating an offensive environment for him. Having concluded that the comments had the effect of creating an offensive environment, the Tribunal did not need to also consider whether they separately created a degrading environment for the claimant as that added nothing to the test which the claimant had already met. However, had it needed to do so, the Tribunal would not have found that the comments made did have the effect of creating what could genuinely be described as a degrading environment.

125. The final harassment issue the Tribunal needed to decide was whether it was objectively reasonable for the comments made, and in particular the comment *"you didn't have to shield it was a choice",* to the claimant by a senior manager in a meeting on 27 August 2020 to have had the effect of creating an offensive environment for the claimant. The Tribunal took into account the respondent's representative's submissions and what was said in **Richmond Pharmacology** and **Betsi Cadwaladr University Health Board** as addressed above. The Tribunal did not find the comments made to be only trivial or transitory. It considered the effects of the comments to be serious and marked. In circumstances where a manager senior to the claimant, in a meeting arranged under the grievance procedure after a period of shielding and furlough, effectively told the claimant that he had not had to shield, when he had been obliged to do so (or at least was obliged to do so if he wished to protect his health), the Tribunal found that such comments clearly could reasonably have the effect of creating an offensive environment for him. The seniority of the person making the comment and the fact that it was said in a meeting conducted as part of the grievance process (albeit an informal part) were relevant factors as to why it was found that it was reasonable for the comments made to have had that effect.

Remedy

126. As it was agreed it would do at the start of the hearing (if any claims were found), the Tribunal went on to determine the appropriate remedy based upon the finding made. The Tribunal found that the claimant was subjected to unlawful harassment related to his disability. There were no losses claimed which followed from that harassment (issue 22) and the question therefore was what injury to feelings award, if any, should be made to the claimant (issue 21)?

127. The Tribunal accepted the claimant's evidence that the comments made did have an adverse impact upon him, particularly when he later considered what had been said to him. As already addressed in determining that the comments amounted to harassment, the comments were made by a senior manager during an informal grievance meeting, and it was therefore unsurprising that there was some injury to the claimant's feelings as a result.

128. In the claimant's first Schedule of Loss the claimant had claimed £1,000 as the appropriate injury to feelings award (42). By the date of the hearing the claimant had revised what he was seeking and sought £3,000 as an appropriate injury to

feelings award (42A). There was no dispute that the relevant Vento band which applied was the lower band (and the Tribunal agreed that it was clearly a finding to which the lower band applied, as the finding related to comments made in one meeting on one occasion). At the relevant time for the claimant's claim, the lower Vento band was £900-£9,000.

129. The claimant raised the issue in his updated grievance document. He sought an apology from Mr Goodwin, which he did not receive. However, as far as the claimant was concerned, he had raised the matter and Mr Henderson had told him that it had been addressed. As we have recorded, the Tribunal found that Mr Goodwin was spoken to by Mr Henderson. The respondent's representative in his submissions emphasised that the claimant did not pursue the matter following the grievance hearing, after Mr Henderson had told the claimant that he would address the issue directly. The Tribunal accepted that the fact that he did not do so is one relevant factor for the Tribunal to consider when assessing the appropriate award for injury to feelings, as it reflected how he felt about it at the time.

130. In his submissions the claimant linked the figure he was seeking with his mental health and periods of depression. The Tribunal noted that there was no evidence that these comments triggered at the time any notable mental health reaction. Following the meeting on 27 August the claimant was in work and continued to work for a period of time. The more notable periods of the claimant's ill health occurred later, when other matters such as further periods of shielding would in all likelihood have had an impact.

131. The Tribunal determined that the claimant did suffer injury to his feelings, but found that injury was limited, and therefore decided that the appropriate award (taking into account what was found) would be one at the lower end of the lower Vento band. Taking account of what the claimant himself had initially asserted when assessing the relevant award, the Tribunal concluded that the appropriate award for injury to feelings was £1,000.

132. The claimant is also entitled to interest on the award made. That interest is at the rate of 8%. The date of the harassment was 27 August 2020. The period between that date and the last day of the hearing, 9 March 2023, was 924 days. Multiplying the £1,000 award by 924 and dividing it by 365, before calculating 8%, resulted in an interest payment of £202.52.

Summary

133. For the reasons explained above, the Tribunal has found that the claimant was subjected to unlawful harassment related to his disability and has awarded him £1,000 injury to feelings and £202.52 interest.

134. The Tribunal has not found for the claimant in his claims for discrimination arising from disability, breach of the duty to make reasonable adjustments, or unauthorised deduction from wages.

135. The Tribunal would add that it fully understood why the claimant brought his claim arising from the bonus payments and why he felt aggrieved by the fact that needing to shield (through no fault of his own) resulted in him receiving a lesser bonus than his colleagues who had worked that period. Nonetheless for the reasons

explained, the Tribunal does not find that the respondent acted unlawfully by making the bonus payments that it did or that the non-payment of the full bonus for the two periods was an unauthorised deduction from wages.

Employment Judge Phil Allen

Date: 31 March 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
5 April 2023

FOR THE TRIBUNAL OFFICE

Appendix
List of Issues

Disability Discrimination

1. It is agreed that, at the relevant times, the claimant was suffering from a disability as defined by section 6 Equality Act 2010.

2. It is accepted that the respondent knew that the claimant was suffering from a disability at the relevant times.

Discrimination arising from Disability (section 15 Equality Act 2010)

3. It is accepted that the respondent varied its discretionary bonus scheme to benefit those employees who had contributed to the success of the Manchester Brewery ("Brewery") during the period of the coronavirus pandemic. It is accepted that this resulted in the claimant receiving a reduced bonus than that which he would have received had he not been absent.

4. It is accepted that the reduced bonus was due the to the claimant's absence from the workplace and that this was due to him shielding, which was the result of his disability.

5. Did the treatment of the claimant by paying him a reduced bonus under the revised bonus scheme in August 2020 and February 2021 amount to unfavourable treatment of the claimant?

6. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The legitimate aim relied upon by the respondent is to reward the staff who had contributed to the success of the Brewery during a difficult period.

7. In respect of the claimant's claim for the bonus paid for H2 of 2020, which was paid on 20 February 2-21, has the claim been brought in time under section 123 Equality Act 2010?

8. If the claim for the H2 paid in February 20-21 is out of time, is it just and equitable in the circumstances to allow the claim to proceed?

Failure to make Reasonable Adjustments (section 21 Equality Act 2010)

9. It is acknowledged that the respondent has applied a provision, criterion or practice ("PCP") by varying its discretionary bonus scheme to benefit those employees who had contributed to the success of the Brewery during the period of the coronavirus pandemic.

10. It is accepted that the PCP was applied to the claimant and other colleagues who do not suffer from a disability.

11. It is accepted that the claimant's bonus was reduced as a result of the PCP.

12. Did the PCP put those with a disability at a substantial disadvantage?

13. If so, did the respondent know, or ought it reasonably to have known, that the claimant was placed at that substantial disadvantage?

14. Given the size and resources available to the respondent, would it have been reasonable for the respondent to pay the claimant's bonus at the same level as his colleagues who received a performance review marking of 3 despite his period of absence due to shielding?

15. In respect of the claimant's claim for the bonus paid for H2 of 2020, which was paid on 20 February 2021, has the claim been brought in time under section 123 EqA?

16. Is it just and equitable in the circumstances, given the mattes in dispute are the same, to allow the claim for H2 (February 2020) bonus to be allowed to proceed?

Harassment (section 26 Equality Act 2010)

17. Were the following comments made to the claimant by Carl Goodwin during the informal grievance meeting which took place on or around 27 August 2020:

    17.1 *"You didn't have to shield it was a choice";* and/or

    17.2 *"If you're not happy sue the Government".*

18. If the comments are found to have been made to the claimant, were they related to his disability?

19. If so, did the claimant believe that they had the purpose or effect of:

    19.1 Violating the claimant's dignity; or

    19.2 Creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

20. If so, was it reasonable for the comments to have had that effect given the circumstances of the case?

Remedy

21. To what extent, if any, has the claimant suffered an injury to feelings as a result of any discrimination suffered?

22. What, if any, losses has the claimant experienced as a result of any discrimination suffered?

Unlawful Deduction from Wages

23. It is accepted that the bonus in question amounted to *"wages"* for the purposes of section 27 Employment Rights Act 1996.

24. Were the sums sought by the claimant *"wages properly payable"* insofar as they related to a discretionary bonus scheme which had been amended by the respondent?

25. In respect of the claimant's claim for the bonus paid for H2 in 2020, which was paid on 20 February 2021, has the claim been brought in time under section 23 Employment Rights Act 1996?

26. What, if any, sum is due to the claimant?

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2420066/2020**

Name of case: **Mr D Patton** v **Heineken UK Limited**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 5 April 2023

the calculation day in this case is: 6 April 2023

the stipulated rate of interest is: **8% per annum**.

For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.