Case Nos: 1406565/2020 and 1400877/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr. R Howells

Respondent: Bud Systems Limited

Heard at: Southampton Employment Tribunal

On: 2nd, 3rd, 4th and 5th May 2023

Before: Employment Judge Lang, **and Members:** Ms. A Sinclair
Mr. L Wakeman

Representation

Claimant: Mr. Howells in person

Respondent: Ms. G Hicks, Counsel

1. Judgment having been sent to the parties and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013.

Written Reasons

Introduction

1. We are considering two claims brought by the Claimant, Mr. Ryan Howells, against his former employer Bud Systems Limited who is the Respondent. The first claim was received by the tribunal on 16th December 2020. The second was

received on 7th March 2022, and followed Mr. Howells' dismissal from the Respondent. Both those claims are resisted by way of ET3s and grounds of resistance. The matter came before us on 2nd, 3rd, 4th and 5th May 2023. Oral reasons were given on the 5th May 2023 and these written reasons are prepared following the Respondent's request in writing to the Tribunal.

2. The case has been subject to two preliminary hearings, the latest of which took place in October 2021. At that hearing Employment Judge Midgley set out the directions to move the case forward to this final hearing. For reasons we do not need to go into at this stage, it is accepted that the Claimant has failed to comply with many of the directions. The case was listed before us, initially for liability and remedy as appropriate, however, the listing was subsequently changed to liability only.

3. At the start of this hearing the Claimant applied to postpone the hearing because he did not consider that the Respondent had provided a fair and balanced bundle, submitting that many of his 1000 pages of disclosure had been omitted. The Respondent noted that that the Claimant's disclosure was extremely late only having been sent on 3rd April this year when originally it was ordered for December 2022. However, they provided a separate bundle of what was considered the relevant disclosure for us. For reasons which we gave at the start of the hearing, and for which written reasons have not been requested, we refused that application. We did however make various adjustments to the hearing to ensure that the Claimant was able to participate fully and to ensure we were able to hear his case. Those adjustments were agreed by the Respondent and were as follows:
    a. We gave the Claimant an opportunity to provide the further relevant documents which he said were missing.
    b. We changed the order of the witnesses from the witness template so the Respondent would go first to allow the Claimant more time to provide his statement.
    c. We allowed the Claimant to provide his statement after the hearing had started and at the end of the Respondent's case. In the alternative we would have given him the opportunity to give evidence in chief with his Claim form forming the basis of it.
    d. We delayed the start of the hearing until the morning of day 2, the 3rd May, so to enable the Claimant the remainder of the afternoon of day 1 to re-read the statements and formulate the questions he wished to ask.

e. We agreed for his witnesses to attend remotely, if they were available.

4. Whilst on both his ET1s the Claimant does not indicate he has a disability; it is clear to us from the evidence he does and that is accepted by the Respondent. Therefore, to ensure fair participation by the Claimant we proposed at the start of the hearing having breaks during the hearing at least every hour, and that was something which could take place more frequently or less frequently depending on how he felt. We also explained that if he wished to have any further breaks, he just needed to ask us. When asked if there were any further adjustments which he required, the Claimant commented that there may be times where he becomes overwhelmed and teary. We explained that if he is aware of becoming teary in advance, he should just let us know, if he does not have that warning and it happens we would simply take a break. Those adjustments were all agreed.

5. During the Respondent's evidence the Claimant was able to proceed for about 90 minutes before needing a break, however, during his own evidence he, understandably, needed breaks more frequently and they took place approximately every 45 minutes.

6. We heard oral evidence from the following individuals from the Respondent:
    a. Mr. Owen Thomas
    b. Mr. Ben Garfitt
    c. Ms. Heather Frankham

    We also heard evidence from the Claimant. Each of those witnesses provided written statements which we read. In addition, we have read three further witness statements from Mr. Brad Tombling for the Respondent, and Mr. Rhys Wallace and Mr. Simon Cummins for the Claimant. Given the issues we had to decide there was no need for us to hear oral evidence from Mr. Tombling or Mr. Wallace. The Claimant was unable to contact Mr. Cummins.

7. We have had the benefit of a hearing bundle which is 557 pages long, a further bundle called Claimant's Disclosure running to 251 pages, a video provided to us by the Respondent from Twitter (that was of the Claimant being interviewed on a boat in Dubai in November 2021) and we have been provided with a further 22

pages of documents from the Claimant during the course of the hearing which we permitted him to rely on.

8. We should say at this stage, despite the Claimant's application for a postponement, he was well prepared. He put his case to the witnesses, and he referred them to the necessary documentation. He also provided a detailed witness statement, and those points not covered, and which were relevant to the list of issues, such as time limits, we asked him about. We are grateful to him for how he presented his case. We are also grateful, as was the Claimant, for the Respondent Counsel's flexibility in her approach to this hearing so that the Claimant could provide the information he wished to rely on and also how she adjusted her cross examination so that he would not become overly distressed.

Issues

9. On the afternoon of day 1, having considered the preliminary application, we took the time to go through the list of issues as set out within the order of EJ Midgley. Those issues were clarified and agreed. We do however, record that the Claimant sought to include a further allegation at paragraph 8.2. below (9.2. on the original list) that application was refused given the time it was made and the prejudice to the Respondent. Oral reasons were given in relation to that application. The list of issues of what we need to determine as follows:

1. Time Limits

1.1. Given the date the claim forms were presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction.

1.2. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide:

1.2.1 was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 if not, was there conduct extending over a period?

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

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

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

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

2. Unfair Dismissal

2.1. It is admitted that the Claimant was dismissed.

2.2. What was the reason for dismissal? The Respondent asserts that it was a reason related to capability, which is a potentially fair reason for dismissal under s.98 (2) of the Employment Rights Act 1996.

2.3 Did the Respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss the claimant? The Tribunal will usually decide whether:

2.3.1. the Respondent genuinely believed the Claimant was no longer capable of performing their duties;

2.3.2. the Respondent adequately consulted the claimant;

2.3.3. the Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

2.3.4 the Respondent could reasonably be expected to wait longer before dismissing the claimant;

2.3.5 dismissal was within the range of reasonable responses.

2.4 Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in the following respects:

2.4.1 the Claimant alleges that the Respondent failed to have appropriate regard to occupational health advice that he would be fit to return to work in the near future and/ or failed to make reasonable adjustments as to secure his return to work at an earlier date.

2.5. If it did not use a fair procedure, what is the percentage chance that the Claimant would have been dismissed in any event and, if so, when would that have occurred?

2.6. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant committed the misconduct alleged.

3. Direct disability discrimination (Equality Act 2010 section 13)

3.1. Did the Respondent do the following things:

> 3.1.1 on 6th July 2020 did Ben Garfitt, Owen Thomas, Heather Frankham, David Foster discuss and/or discuss and agree a means of removing the Claimant from his position as quickly as possible;
>
> 3.1.2. on 24th November 2021 it is accepted that Heather Frankham made the decision to dismiss the Claimant with six weeks unpaid notice.

3.2. Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse that someone else was treated. There must be no material difference between their circumstances and those of the claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether the Claimant was treated worse than someone else would have been treated. The Claimant has not named anyone who they say was treated better than they were and therefore relies on a hypothetical nondisabled comparator.

3.3. If so, was it because of the Claimant's disability, namely a mental health condition?

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1. Did the Respondent treat the Claimant unfavourably by dismissing him with six weeks' notice on 24th November 2021.

4.2. Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that:

> 4.2.1 he required sick leave in order to manage the symptoms and effects of his anxiety and depression;
>
> 4.2.2 when he was able to attend work, he had an impaired cognitive function that affected his ability to fulfil his job responsibilities.

4.3. Did the Respondent dismiss the Claimant because of that sickness absence or concerns about his future performance?

4.4. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were, running the business in a proportionate and cost-effective manner.

4.5. The tribunal will decide in particular:

4.5.1 Was the treatment appropriate and reasonably necessary way to achieve those aims?

4.5.2 Could something less discriminatory have been done instead?

4.5.3 How should the needs of the Claimant and the Respondent be balanced?

4.6. It is accepted that the Respondent had knowledge of the disability from November 2020.

5. Reasonable Adjustments (Equality Act ss.20 and 21)

5.1. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? From what date?

5.2. A “PCP” is a provision criterion or practice. Did the Respondent have the following PCPs:

5.2.1 the practice or policy of subjecting employees whose performance was regarded as poor to performance improvement plans;

5.2.2 the practice or policy of requiring an employee on a performance improvement programme to work in the office;

5.2.3. the practice or policy of requiring employees on performance improvement plans to work between 9AM and 5PM during their working days;

5.2.4. the practice of expecting employees to manage a workload which was high or overly demanding with or without support.

5.3. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability in that:

5.3.1 PCP1 the Claimant was more likely to perform poorly as a consequence of his disability and was therefore more likely to be subject to a performance improvement plan and sanctions as a consequence of it;

5.3.2 PCP2 the Claimant's depression and anxiety made it more difficult for him to attend the office regularly or at all when his symptoms were acute;

5.3.3. PCP3 the Claimant's depression and anxiety made it more difficult for him to attend the office between 9AM and 5PM when his symptoms were acute; and

5.3.4 PCP4 when the Claimant is put under pressure he has difficulty concentrating as a consequence of his disability which makes him less able to deal with the high levels of work and particular affects his performance.

5.4. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at those disadvantages?

5.5. What steps (the 'adjustments') could have been taken to avoid the disadvantage?

The Claimant suggests:

5.5.1 not requiring the Claimant to work in the office;

5.5.2 permitting the Claimant to work from home;

5.5.3 permitting the Claimant to work flexible hours or reduced hours;

5.5.4 reducing the Claimant's workload;

5.5.5 amending or adjusting the Claimant's targets;

5.5.6 clarifying or amending the Claimant's role and duties;

5.5.7 providing greater assistance with tasks by providing supervision rather than scrutiny;

5.5.8 providing the Claimant with greater assistance to enable him to better perform his duties as an alternative to a performance improvement plan within which such support may be provided but also which presented a risk of sanction.

5.6. Was it reasonable for the Respondent to have taken those steps and when?

5.7. Did the Respondent fail to take those steps?

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

6.1. Did the Respondent do the following things:

6.1.1. in May 2020 did Ben Garfitt tell the Claimant that he “had to do his bit like the rest of the team?”

6.1.2. In May 2020 did Ben Garfitt and Owen Thomas discuss the Claimant's mental health and its impact upon his performance?

6.2. If so, was that unwanted conduct?

6.3. Did it relate to the Claimant's protected characteristic, namely disability?

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

6.5. If not, did it have that effect? The Tribunal will consider the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

7. Unauthorised deductions (Part II of the Employment Rights Act 1996)

7.1. Were the wages paid to the Claimant whilst he was absent on sick leave less than the wages he should have been paid?

7.2. Was any deduction required or authorised by statute?

7.3. Was any deduction required or authorised by a written term of the contract?

7.4. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

7.5 Did the Claimant agree in writing to the deduction before it was made?

7.6 How much is the Claimant owed?

8. Breach of Contact (Extension of Jurisdiction Order 1994)

8.1. Did this claim arise or was it outstanding when the Claimant's employment ended?

8.2. Did the Respondent do the following:

8.2.1 Failed to pay the Claimant full pay whilst he was absent on sick leave in breach of its obligation contained in the company sick pay policy?

8.2.2. Alternatively, failed to exercise its discretion to pay full pay to an employee absent on sick leave?

8.2.3. Failed to pay the Claimant for his six week notice period? [The Respondent accepts that the Claimant was not paid but avers that he had exhausted his rights to sick pay at the point that notice was given].

8.3. Was that a breach of contract?

8.4. How much should the Claimant be awarded as damages?

Findings of Fact

10. The Claimant was employed by the Respondent as a Business Analyst (this has often been referred to as a Product Owner throughout the hearing) [148] however, during his employment his role changed and there was a degree of fluidity in it. He was at times asked to perform additional or alternative tasks as and when he was required. His employment commenced on 9th November 2017. His employment was subsequently terminated on 24th November 2021 with six weeks' notice, giving his effective date of termination as 5th January 2022. When his employment started the Claimant was never asked about whether or not he had a disability.

11. The Respondent is an early business which was formed in 2016, operating in the technology field with a focus on software for apprenticeships which was operated by training providers and professional training. We accept the evidence of Mr. Thomas that the business had not been profitable, and resources were tight. At the relevant time they employed around 50 individuals.

12. It is accepted that at the relevant times the Claimant was a disabled period for the purpose of the Equality Act 2010 due to his Mental Health, namely his anxiety and his depression.

13. The Claimant passed his probation and his 2018 appraisal, which we have been provided with, was positive. The Respondent alleged that starting in early 2019

there were performance issues with the Claimant. This was initially challenged by the Claimant when he was asking questions of Mr. Thomas however, from the evidence we have heard and read we accept there were performance concerns. This was accepted by the Claimant during cross examination and is also borne out by the email dated 21st January 2019 in which those concerns were recorded. He was asked about the content of that email, and his struggles on the "*backlog management and looking at the users being central to delivering a good solution*" and whether that was because he was *not interested in the tasks* he agreed and said it was *"the same for any job"*.

14. It is accepted that there were some tasks which the Claimant performed well at and there were no concerns with his performance for periods of time, and this was reflected in the inflationary pay rise which he received in February 2019 [171]. Whilst there was some improvement in his performance, there remained some concerns as demonstrated by the email from Mr. Garfitt to Mr. Thomas dated 21st May 2019.

15. We accept Mr Garfitt's evidence that it was at this time in May 2019 he made the comment to the Claimant that he "had to do his bit like the rest of the team" and this related to the Claimant's performance and was not in connection with the Claimant's absence.

16. Later in 2019 the Claimant started to undertake increasing work on the ISO27001 certification. This continued until November 2019 and Mr. Thomas described the work undertaken by the Claimant on this task as "*fantastic*" and he received a bonus for it. That security work formed part of the Claimant's specialism at university, and it is clear to us that he was very enthusiastic about that element of his work.

17. At the end of this project the Claimant returned to the Product Owner Role in November 2019. We find that he asked to do the security information role full-time, and he considered that the Respondent required someone to perform that role full-time. They did not agree, however, they did propose amending the Claimant's role to include some additional information security work for one day a week and that was emailed to the Claimant on 19th March 2020. The Claimant

denies that he accepted that role, however, we find that he did accept it and he was doing that role.

18. Between November 2019 and March 2020, it is accepted that the Claimant undertook additional tasks at various stages including those on the Data Warehouse. We accept that because this involved work which the Claimant did not enjoy as much as information security, there was a drop in his performance, and again the Respondent raised these performance issues with him. This is evidenced by the evidence we have heard from the Respondent but also the emails sent at the time including 25th February 2020 [189] and 6th March 2020 [192]. The Claimant also accepted in his evidence there were issues with his performance between January and April 2020.

19. The way in which the Respondent operated is that once the product went live, queries from clients were referred to the customer service desk, initially as L1 (level one) and were then escalated if appropriate to L2 (level two). The Claimant contends that until March 2020 the L2 tickets, were not part of his role. We accept the evidence of the Respondent that once the product went live, and the business started having queries from the users, that dealing with L2 tickets was part of his role. We accept the evidence of Ben Garfitt that he requested the same of the Claimant and in any event, we consider that that would form part of his role to undertake additional tasks reasonably required of him, as specified in his contract of employment. The Claimant states that the job description given to him in March 2020 meant that he was solely responsible for the L2 tickets as it stated, *"Act as the main intermediary between level 1 support and the delivery team".* We do not accept that he was responsible for all of the tasks, being a main intermediary is not the same as being the only intermediary and we heard consistent evidence from Mr. Thomas and Mr. Garfitt that both Mr. Garfitt and Mr Leamon (a colleague of the Claimant) would undertake those L2 referrals. We accept that evidence.

20. In March 2020 the country went into the national coronavirus pandemic lockdown. This meant that the Respondent's employees, including the Claimant, worked from home. Again, during this period there remained issues with the Claimant's performance. For example, the email sent on 16th April 2020 in which Mr. Garfitt reminds the Claimant of tasks which he needs to prioritise and complete. The summary of the board actions from 20th May 2020, which looked

back at April 2020 noted the continued concerns over the Claimant's performance including L2 tickets, but we note the entry starts "*there are no specific performance issues to be raised in April."*

21. On 7th May 2020 [204] Mr. Garfitt emailed the Claimant noting the continued need for support on the L2 bugs as well as going on to set out recommendations to assist the Claimant with his work focus during the day. That included working hours and making arrangements at home such as where and when he is working so to try and assist both the Claimant and the Respondent.

22. On 14th May 2020 [205] the Claimant sent an email to Mr. Garfitt in that he states *"I've been a bit broken the last few days and I don't think I'm OK to talk about it. Can I ask that we avoid talking about how I'm feeling please as I won't be able to discuss it and just keep the catchup work focused"* he goes on to state "*if my current performance is not acceptable and nothing changes to help, then I'll have to visit a doctor to get the required sick notes as I don't think I'll cope well with anything to do with performance plan at present"* he ends the email with *"I don't want to go on sick/ annual leave as I don't think it would help me, or Bud as I realise everyone is stretched, which is why I've got to send this note across to try and mitigate the issue".*

23. On 14th May 2020 Mr. Garfitt then responds thanking the Claimant for his email, that it was useful to know, and the meeting would be kept to work matters. Whilst he goes on to note that he continues to have concerns with the Claimant's performance he also signposts him to the company vitality health plan that the Claimant has access to as well as suggesting a break from work or going for a walk to clear his head and help him sleep.

24. The evidence of both Mr. Thomas and Mr. Garfitt which we accept is that they took the Claimant's comments to relate to the impact of the national lockdown. They described how other staff members were having difficulty with it from mental health struggles to the practicalities of working from home such as having the right equipment or having childcare issues.

25. We find, as the Claimant accepted, that this email on the 14th May 2020 was the first time he alluded to having difficulties with his mental health. We have considered whether the Respondent should have made further enquiries at this stage however, given the Claimant said he did not want to talk about it within his email, the Claimant's own evidence of not wanting to talk about it or share it, and the unprecedented circumstances of the pandemic, all lead us to find that the approach taken by the Respondent was reasonable and that there were no further enquiries that could reasonably be made. The contemporaneous evidence of Mr. Garfitt by way of the email dated 21st December 2020 supports he did not know about the disability in May 2020.

26. We heard evidence from the Claimant that the Respondent should have known there was more to his mental health because he would regularly cry during the remote 'stand up' meetings. They were daily meetings which took place between staff members, before lockdown in person and post lockdown virtually, and which lasted approximately 10 minutes. However, we were also told by the Claimant that during these meetings he would face his camera on his forehead so no one would see him. The evidence of both Mr. Thomas and Mr. Garfitt was they were unaware of him crying during these meetings and we accept that evidence.

27. On the 14th May 2020 Mr. Garfitt sent the Claimant a list of tasks which needed to be completed and this followed their discussion. We have considered whether the motivation for this email was to put further pressure on the Claimant, whilst we accept that with hindsight the timing may not have been right, we find that Mr. Garfitt was a compassionate and caring individual who sought to support the Claimant as evidenced by points we will turn to in due course, and we therefore do not consider this was an attempt to put pressure on the Claimant but was an attempt to support him with tasks which were outstanding. We do observe at this stage that on 20th November 2020 he encouraged the Claimant to access counselling [331] and also has offered to go on walks with him.

28. The second concern the Claimant raises about this email is that it was an excessive workload. We do not find it was. The evidence of both Mr. Garfitt and Mr. Thomas was that these tasks were not excessive, and it formed only part of the role with Mr. Garfitt and Mr. Leamon undertaking more tasks and part of the Claimant's workload. The evidence of Ms. Frankham was that the Respondent

could not take any more tasks away from the claimant. We accept all that evidence.

29. On 15th May 2020 Mr. Garfitt emailed Mr. Thomas management notes which included the following:

"Ryan's wellbeing, he is not mentally feeling well, which is affecting his performance. We have discussed who he can chat with to help out and some things he can do to help focus his work and improve performance. The work he is doing going forwards I am going to peer review his stories to help out."

He goes on in that email to state *"Ryan would be the one who would benefit most from being in the office, so if he wanted to be in daily, I don't have a problem with it"*

We find that exchange demonstrates Mr Garfitt was seeking to support the Claimant.

30. We have been provided with a spreadsheet of comments which arise from a subject access request which the Claimant made. The following are of note (for the avoidance of doubt the comments in square brackets are our clarification):

1st April board report *"There are two individuals who are under performing at the moment. Both [redacted] and Ryan are being set tight short-term targets on a weekly basis. It is likely that both will move onto..."*

12th May *"Ryan's wellbeing impacting performance. Discussed with him about support available".*

17th May *"Ryan is still not performing well".*

20th May (board meeting minutes) *"OT [Owen Thomas] is going to have a conversation with BG [Ben Garfitt] as to how to move forward with Ryan."*

20th May (Completed board actions) records concern in respect of performance for the Claimant.

24th May "*Ryan continuing to under deliver. Need to remove the concerns about metal well-being and then introduce PIP".*

6th June "*Ryan continues to underperform and has been granted access back to the office. Prioritise Ryan PIP*."

16 June *"Ryan continues to underperform and has been granted access back to the office."*

22nd June *"Ryan PIP now in place, patience in support team is wearing thin and is placing an increased load across the team.*

Alternate approaches to removing Ryan quicker are being investigated as there is no improvement."

31. Save for the comment on the 22nd June we are not aware as to who the author is of those comments. The comments made on the 22nd June in particular *Alternate approaches to removing Ryan quicker are being investigated as there is no improvement, we* find were made by Owen Thomas, as was accepted by him and as was accepted by Ms. Frankham. We accept her evidence that this related to the Claimant's employment, we accept her evidence that it was a comment made in the heat of the moment with some frustration and as soon as it was made David Foster intervened as was reinforced by the email later sent on 28th July 2020 [274 and 262] which set out the enquiries to be made of the Claimant.

32. We do not however, find that this comment was made in respect of the Claimant's disability, or his mental health struggles as Mr. Thomas or the Respondent, understood them at that time. All of the Respondent's witnesses came across as individuals who wanted to help and support those who they worked with. The comments above related to the Claimant's performance, not his disability and we find as Mr. Thomas stated if he had known the Claimant was disabled he would have taken a different and better approach in dealing with him in general. We find that Mr. Thomas became frustrated with the Claimant's performance, knowing he had the ability to perform when he was doing tasks which he enjoyed such as the ISO certification, and the Claimant was not performing as he should. That was the reason for the comments made.

33. It is suggested by the Claimant that on the 24th May 2020 he sent an email to the Respondent stating he was suffering from anxiety and depression. We do not have an email of that date and the Respondent denied that allegation, there is however, the email from the 14th May referred to above, although that does not say that he has anxiety and depression. Further, in his evidence the Claimant

stated it was that email (I.e., the email of the 14th May 2020) in which the Respondent was informed of his condition and should have known about his disability.

34. On the 14th July 2020 the Claimant was placed on a performance improvement plan (a PIP). Part of the requirements of that plan were for him to attend the office in person, to work from 9 – 5 and undertake his workload. There was a meeting on the 14th July 2020, it is accepted by the Claimant that he did not in that meeting raise any concerns about those conditions. He stated that he was upset during the meeting, which we accept, but not to the extent that it would reasonably have led to the conclusion of there being an underlying mental health condition.

35. We find that PIPs were there to encourage and support staff and were not used to force them out, we accept the evidence of both Mr. Thomas and Mr Garfitt in relation to this. We are not assisted by how Claimants witness felt about his own PIP. However, we do observe that the warning of consequences provided in the PIP letter was firm and could be interpreted negatively by the Claimant. However, we accept that there is a need to warn within it, we would have thought the use of "may" would have been better placed than "will".

36. The Claimant then emailed on the 15th July 2020 stating he was going to the doctor. He goes on to set out that he disagrees with the plan and the recommendations, and he makes reference, we find, for the first time about his anxiety depression and considered he was being discriminated against for being ill.

37. On the 17th July 2020 Mr Garfitt messaged the Claimant about his sick leave, asking what the doctor had said and stating *"based on this we will put the performance plan on hold as we do not want to worsen any condition. I will keep in touch every couple of days to see how you are and how your recovery is progressing."* He specifically asks what the causes are and what adjustments are needed. These comments were also included in the email of the same date [265-266].

38. The Claimant was placed on sick leave and never returned to the Respondent. He was paid for 3 weeks sick pay, which was a discretionary payment that was made as the company usually operates a no sick pay policy. He then moved on to statutory sick pay. He had to be continually chased for those FIT notes.

39. On 25th August 2020 the Claimant emailed the Respondent to say that he was due to start new medication which would take approximately 3 weeks to take effect and he hoped that he would be in a position to return to work.

40. During his period of sick leave, the Claimant did travel abroad, we accept that he was entitled to do so, although the challenge was not that he was abroad but that he did not keep the Respondent informed about this, and he posted pictures on social media some of which some employees referred back to the management. The Claimant alleged that this was harassment, we do not find that was.

41. On 2nd November 2020 the Claimant commenced the ACAS process for his first claim.

42. On 17th November 2020 the Occupational Health report of Dr Irons was received. That report sets out the Claimant's diagnosis of anxiety and depression as well as his history which includes significant self-harming episodes. His view was *"I do not think work tasks themselves have contributed to the problem although Mr. Howells' perception of the current situation with regard to his job certainly has. There are also external factors which have impacted upon his mental wellbeing.*" His prognosis was that talking therapies would be beneficial and that he was hopeful that there would be a return to work possible *in the near future*, with a phased return recommended... he states, *"I would expect that a return to work could be considered within the next few weeks"*.

43. On 2nd December 2020 the Respondent writes to the Claimant to state they are considering Dr Irons' plan for a phased return in a few weeks.

44. On the 11th December 2020 there was a meeting with the Claimant, Mr. Thomas and Mr Garfitt, it is accepted in that meeting the Claimant asked about a

redundancy payment having thought that was the intention of the Respondent. We accept that redundancy was not the intention of the Respondent as they needed the role.

45. On 15th December 2020 the Claimant was diagnosed with an adjustment disorder and with anxiety and depression.

46. On 16th December 2020 the first ET1 was received.

47. On 12th February 2021 the Claimant's entitlement to statutory sick pay was exhausted.

48. On 23rd July 2021 the Respondent wrote to the Claimant asking about his sick leave, if there was an update from him, and inviting him to a meeting with Occupational Health. Before then they had repeatedly chased the Claimant for sick notes.

49. On 4th August 2021 the Respondent sought to re-refer the Claimant to Occupational Health. On 19th August 2021 that meeting was due to take place remotely because the Claimant reported he had covid-19 (although he accepts, he did not and he used that as an excuse to avoid social contact) he did, however, attend on 28th September 2021 and we have the report of Dr King. In that report it states:

In my opinion, although overall Ryan has a good prognosis and he can expect to make a good recovery from the symptoms he is experiencing, he is not currently fit for work. He is unlikely to achieve a return to the workplace where he is able to meet the whole of his usual remit, cope with the demands upon him, and be able to provide reliable efficient service until such time as he has accessed therapy to help him improve and control his current symptoms. The wait time for this is unknown and as a result it is not possible to give an accurate prognosis of when a return to work may be achievable for Ryan. In the meantime, with ongoing self-care and engagement with previously learned psychotherapeutic strategies, Ryan can expect to continue to gradually improve as already and in the coming weeks a partial return to work may become possible.

50. The Claimant had access to the company Vitality healthcare plan which included talking therapies. He told us that he has used his entitlement of talking therapies, however, we accept the Respondent's evidence that he at no stage informed them of this. He was on an NHS waiting list for talking therapies, however, did not know how long that list was, or when he would conclude treatment. In fact, he said he was still waiting now. When asked how long the Respondent should have waited for him to return, he did not give an answer.

51. The Claimant was invited by Ms. Frankham to a meeting on 8th November 2021 to discuss the report and return to work. That was originally scheduled for 15th November 2021 however he did not attend. The second invitation was sent on 16th November with the Claimant responding that he would not attend as "*if I could attend a meeting in person then I would be able to attend work. Maybe you guys need to google my illness because you simply have not understood since the start!!"*. A meeting was scheduled on 22nd November 2021, and he did not attend. All though it is right that he did not confirm his attendance for either date.

52. The Claimant told us he did not want anything more to do with the Respondent, he told us that had the meeting been in the *next building* he would *not have gone*. He was abroad at the time in Dubai working on a project to do with a Non-Fungible Token (an NFT), although he stated this did not take up much time and he stated that he was abroad for leisure. We find that he had no intention of attending any meetings with the Respondent, or returning to work with them, regardless of the state of his heath. He did not make any request for a remote meeting and Ms. Frankham said she would have accommodated one if he had asked for it.

53. On 24th November 2021 the Claimant was given notice of termination of his employment by Ms Frankham. Whilst her letter refers to other matters such as the Claimant operating businesses in the background, we find that the reason for dismissal was capability. He did not appeal that decision. When asked why not he stated that he was in hospital in Dubai at the time due to his condition, and when asked why he did not do so afterwards he stated because he chose to accept it and forget it.

54. On 4th January 2022 the Claimant commenced the second ACAS process, with the ET1 being received on the 1st April 2022. It was not until the case management hearing on 4th August 2022 that the allegations from May 2020 and July 2020 were raised. At the time his first claim form was received he had legal representation, he had received the subject access request at the end of 2020 as he told us and whilst he clearly has continued difficulties with his mental health, we are satisfied there is no good reason why he could not have brought those claims prior to August 2022.

55. Throughout his employment the Claimant had undertaken various business opportunities including Bush Box and the Rare Antiquities Token (RAT as it has been referred to throughout). The evidence of Mr. Thomas was that he knew about the existence of Bush Box, and he was content for that to take place as long as it did not impact on the Claimant's duties. These ventures do not assist us in our findings save that they, particularly the RAT, and in the absence of any evidence to the contrary, show that the Claimant could have attended a meeting with the Respondent in November 2021. The video of the Claimant from Dubai also does not assist us.

56. It is accepted that at the relevant times the Claimant was a disabled person for the purpose of the Equality Act 2010 due to his Mental Health, namely his anxiety and his depression.

57. For the avoidance of doubt, we have considered the emails the Claimant drew our attention to where reference is made to him suffering with metal health, however, this has not changed our findings or conclusions.

The Law

Introductory Points

58. Within her closing submissions Ms Hicks has provided a comprehensive summary of the relevant legal provisions which we have had regard to.

59. When making reference to the burden of proof, the standard which applies is the balance of probabilities, which means what is more likely than not.

60. The Claimant's claims include those for discrimination, which arise pursuant to the Equality Act 2010. Section 4 sets out the protected characteristics, the characteristic which Mr Howells' relies on is disability. Section 6 sets out the legal definition of disability and we have had regard to it, however, it is accepted that the Claimant is a disabled person for the purpose of the Equality Act 2010 by virtue of his mental health, specifically anxiety and depression.

61. The Equality and Human Rights Commission's statutory code of Practice on Employment applies (hereafter the Code), and we have had regard to that guidance.

Time Limits

62. Section 123 of the Equality Act 2010 sets out the time limits for when a claim is to be presented to the Tribunal, section 123 provides as follows:

> *123 Time limits*
>
> *(1) [Subject to [section 140B]2 proceedings]1 on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *(2) Proceedings may not be brought in reliance on section 121(1) after the end of—*
>
> *(a) the period of 6 months starting with the date of the act to which the proceedings relate, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

63. In essence the time for when a claim should be presented to the Tribunal is three months from the date of which the complaint relates. In the event there is conduct which extends over a period of time, for the purpose of this section an act is taken as being done at the end of that period.

64. When we are considering whether to extend time because it is just and equitable it is necessary to consider why the time limit has not been met and secondly why after it expired it was not brought sooner. We are also reminded by Counsel that assistance can be drawn from the factors set out at section 33 of the Limitation Act 1980.

65. The test as to whether there is a continuing act is set out in **Hendricks v Metropolitan Police Comr [2003] IRLR 96** and involves the Claimant showing that the incidents are linked to each other and that there is evidence of a continuing state of affairs.

Burden of Proof

66. For those claims brought under the Equality Act 2010 section 136 sets out the provisions concerning the burden of proof:

136 Burden of proof

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

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

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

(c) the Special Immigration Appeals Commission;

(d) the First-tier Tribunal;

(e) the [Education Tribunal for Wales];

(f) [the First-tier Tribunal for Scotland Health and Education Chamber].

67. The provisions as at section 136 have been subject to numerous appeal authorities and the Guidance in **Wong v Igen Ltd [2005] EWCA 142** is settled law.

Direct Discrimination

68. Section 13 of the Equality Act 2010 defines direct discrimination as follows:

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

69. Section 23(1) of the Equality Act 2010 goes on to set out that on a comparison of cases there must be no material differences between the circumstances.

70. At paragraph 11 of **Shamoon v Royal Ulster Constabulary [2003] UKHL 11** Lord Nicholls sets out that at times Employment Tribunals *may sometimes avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it*

on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others. Lord Nicholls goes on at paragraph 12 to outlined that *there will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant.*

71. The case of **Nagarajan v London Regional Transport [1999] IRLR 572** highlights the need for us to consider the "mental processes" of the alleged discriminator, known as the motivation. However, we remind ourselves that is not the same as motive and as shown in **Amnesty International v. Ahmed UKEAT 0447/08** a well meaning employer can still discriminate.

72. In accordance with section 136 of the Equality Act 2010 the burden is on the Claimant to prove the facts from which we could conclude, in the absence of any other explanation, that an employer has committed an act of direct discrimination, we are obliged to uphold the claim unless the employer can show it did not discriminate.

73. The test of less favourable treatment is an objective one. Further, as per Lord Scott in **Chief Constable of West Yorkshire Police v Khan ICR 1065** different treatment is not the same in less favourable treatment.

Discrimination arising from disability.

74. Section 15 Equality Act 2010 provides as follows:

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

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

75. Mrs Justice Simler in **Pnasier v NHS England and anor [2016[IRLR 170 EAT** at paragraph 31 set out the proper approach to considering claims for claims for discrimination arising from disability:

"(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 section 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 [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(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 section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 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 UKEAT/0149/14 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.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a

particular consequence for a Claimant that leads to 'something' that caused the unfavourable treatment."

76. The Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2018] UKSC 65**, outlined that "i*t is to the section itself, interpreted in accordance with ordinary principles that we must look for the applicable tests in the present case*". That underlines the importance of following the statutory wording at all stages. Namely that there was unfavourable treatment causing a detriment, because of something, and that something arises in consequences of the Claimant's disability.

77. There are two defences to the allegation, the first that the unfavourable treatment is a proportionate means of achieving a legitimate aim. The second is that the Respondent did not know and could not reasonably have known that the Claimant had the disability.

78. The Code provides us guidance for example at paragraph 5.14 it states:

> *"Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"*

Paragraph 6.19 goes on to note:

> *"The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend upon the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.*

79. The initial burden rests upon the Claimant, and if it is proved that there are facts which would enable us to conclude that there was discrimination in accordance with section 15, the burden shifts to the Respondent to prove a non-discriminatory explanation, or to justify the treatment.

80. In considering whether there was a proportionate means of achieving a legitimate aim consideration should be given as to whether a lesser measure could have been achieved the legitimate aim. This is reiterated at paragraph 4.31 of the Code. Additionally, paragraph 5.21 of the code states "I*f an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.*"

81. There is no need for a comparator.

Failure to make Reasonable Adjustments

82. Section 20 of the Equality Act 2010 sets out the duty to make reasonable adjustments. Subsections 3 – 5 set out the three elements of the duty as follows:

> *(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.*
>
> *(4) The second requirement is a requirement, where a physical feature 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.*
>
> *(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.*

83. The remaining subsections go on to set out the additional provisions required in making reasonable adjustments.

84. Section 21 of the Equality Act 2010 goes on to state:

> *(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

85. Section 22 then goes on to outline the Regulations which apply, with Schedule 8 of the Act applying.

86. Part 3 of Schedule 8 sets out:

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

87. Chapter 6 of the Code applies. We note that at paragraph 6.28 the factors relevant to whether an adjustment or reasonable or not are set out.

88. The Court of Appeal in **Newham Sixth Form College v Sanders [2014] EWCA Civ 734** emphasised the need to take a stepped approach when considering the elements as to whether there has been a breach of the duty to make reasonable adjustments.

89. There is a need for the term PCP to be broadly interpreted, paragraph 6.10 of the code stating:

"It should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions".

That was emphasised by the EAT in **Lamb v The Business Academy Bexley EAT 0226/15**. Whilst the code notes that one off decisions and actions can be included in a PCP Langstaff J, in **Nottingham City Transport Ltd v Harvey [2013] All ER (D) 267 (Feb,** outlined at paragraph 18 that Practice has *something of an element of repetition about it.*

90. Simler LJ in **Ishola v Transport for London [2020] ICR 1204** at paragraph 38 states:

all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.

91. Section 212 of the Equality Act 2010 defined "substantial" as meaning "more than minor or trivial".

92. The question of whether the duty has been breached is an objective test.

93. The burden of proof is on the Claimant to establish that they are a disabled person before shifting to the Respondent to prove that they had no knowledge (either actual or constructive). If they had, or should have had knowledge, the Claimant must prove facts from which it could be reasonably inferred, absence any explanation that the duty has been breached. The burden then shifts to the Respondent to show that it had no knowledge of the substantial disadvantage or by showing the proposed adjustment was not reasonable.

Harassment

94. Section 26 of the Equality Act 2010 sets out as follows:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

Subsection 4 goes on to state:

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

(a) the perception of B;

(b) the other circumstances of the case;

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

95. We remind ourselves that harassment cannot also be a detriment pursuant to section 212 of the Equality Act.

96. There is no need for a comparator when considering claims for harassment.

97. Again, the Code applies and at paragraph 7.7 it is stated harassment can include:

a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

98. Counsel reminds us that we need to consider the context of the conduct as set out in **Nazir and Aslam v Asim [2010] ICR 1225, [2010] EqLR 142** at 68-71. Further, whilst unwanted conduct will often arise from a series of events a single

incident can amount to unwanted conduct as set out within the Code and various authorities.

Unfair Dismissal

99. As with any unfair dismissal the starting point is section 94(1) of the Employment Rights Act 1996. That provides that "a*n employee has the right not to be unfairly dismissed by his employer*."

100. Pursuant to section 98 (1) Employment Rights Act 1996 it is for the employer to show:

(a) the reason (or if more than one, the principle reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held

101. Section 98 (2) provides that a reason falls within the subsection if:

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

[(ba) . . .]

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

With section 98 (3) going on to state:

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

102. The Employment Appeal Authorities of **Spencer v Paragon Wallpapers Limited [1976] IRLR 373** and **East Lindsey District Council v Daubney [1997] IRLR 181** are the leading authorities. In summary we must consider a) whether it is reasonable for the Respondent to wait any longer for the employee to return to work, (b) that a reasonably employer will consult with the employee as to his views and (c) an employer acting reasonably obtains medical advice.

Beach of contact/ unlawful deduction in wages

103. Pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 the tribunal had jurisdiction to consider claims for a breach of contract. We must consider what the term of the contact is before considering where there has been a breach of that term.

104. A breach of contract claim may include a breach for failing to pay wages owed. Alternatively, we can consider this claim pursuant to section 13(1) Employment Right Act 1996, which provides the right of a deduction not to be suffered coupled with section 23 of the act which gives the worker the right to present the claim. **Bear Scotland v Fulton [2015] IRLR 15** provides that there must be a "sufficient frequency of repetition" for any series of deductions to be made in accordance with a claim pursuant to section 23 (3) Employment Rights Act 1996.

105. The time period for bringing such a claim is three months from the date of breach or when payment is owed in accordance with section 23 Employment Rights Act 1996 unless the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months. The section goes on to provide that the tribunal may consider the complaint if it is presented within such a further period as the tribunal considers reasonable. The same test applies in respect of considering the claim as a breach of contract pursuant to Article 7 of the Extension of Jurisdiction Order.

106. Section 87 of the Employment Rights Act provides:

87 Rights of employee in period of notice

(1) If an employer gives notice to terminate the contract of employment of a person who has been continuously employed for one month or more, the

provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86(1).

(2) If an employee who has been continuously employed for one month or more gives notice to terminate his contract of employment, the provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86(2).

(3) In sections 88 to 91 "period of notice" means—

(a) where notice is given by an employer, the period of notice required by section 86(1), and

(b) where notice is given by an employee, the period of notice required by section 86(2).

(4) This section does not apply in relation to a notice given by the employer or the employee if the notice to be given by the employer to terminate the contract must be at least one week more than the notice required by section 86(1).

Conclusions

107. We turn to our conclusions having regards to the law, the findings of fact which we have made and the issues which need to be determined. Whilst these have been addressed below as they were set out in the list of issues, we have considered them out of this order to ensure that case law has been complied with.

1. Time Limits

1.1. Given the date the claim forms were presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction.

1.2. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide:

1.2.1 was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 if not, was there conduct extending over a period?

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

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

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

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

108. The first claim was received on 16th December 2020, with the period for early consolidation being from 2nd November to 16th December 2020. That means that the claims prior to September 2020 are potentially out of time. The second claim was presented on 7th March 2022 with the ACAS period being from 4th January 2022 to 14th February 2022.

109. We accept, as found and admitted, that the Claimant is a disabled person for the purpose of the Equality Act and he has had periods of time where his mental health is low, causing him to require treatment including hospitalisation. In those circumstances consider that it is just and equitable to present the claims brought within the first claim and that are prior to September 2020 i.e., the claim for failure to make reasonable adjustments, unauthorised deductions from wages and breach of contract. We note he has presented those claims within a very short period after that and sought legal advice.

110. However, we do not agree that the claims with allegations from May 2020 and July 2020, namely the direct discrimination from July 2020, and the harassment claims from May 2020, are in time or that it is just and equitable to extend time. The Claimant was legally represented at the time he presented his first ET1 on 16th December 2020 and his second on 7th March 2022. There was a preliminary hearing in 2021 (at which the Claimant was represented) and there was no mention of the allegations, the first mention was the preliminary hearing in August 2022. The subject access request had been received by the end of 2020. Whilst now a lay individual, he was earlier represented. He has not given any good reason for him not bringing those claims earlier and therefore we do not consider that it is not just and equitable to extend time for them.

111. Nor do we consider that there was any continuing act, there being significant delays from May 2020 and June 2020 and the time of dismissal and no continuing course of events.

2. Unfair Dismissal

2.1. It is admitted that the Claimant was dismissed.

2.2. What was the reason for dismissal? The Respondent asserts that it was a reason related to capability, which is a potentially fair reason for dismissal under s.98 (2) of the Employment Rights Act 1996.

112. We have found that the reason for the Claimant's dismissal was capability. That was the clear evidence provided, including that of Ms. Frankham the decision maker, whose evidence we have accepted. Whilst we note that there were other concerns which the Respondent had, including the other ventures which the Claimant has explored, we are satisfied the reason for dismissal was capability.

113. We have considered the comments made by Mr Thomas on the 22nd June 2020 and whether that was indicative of the Respondent trying to find a way for the Claimant to be dismissed however we do not agree. Whilst those comments are unfortunate, Mr Foster intervened. No action was taken, the Claimant was not subject to any dismissal process at this time and Ms Frankham was the decision maker at the time of the dismissal, not Mr Thomas. There was no evidence to indicate he was involved with that decision making,

2.3 Did the Respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss the claimant? The Tribunal will usually decide whether:

2.3.1. the Respondent genuinely believed the Claimant was no longer capable of performing their duties;

2.3.2. the Respondent adequately consulted the Claimant;

2.3.3. The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

2.3.4 the Respondent could reasonably be expected to wait longer before dismissing the Claimant;

2.3.5 dismissal was within the range of reasonable responses.

114. We consider that the Respondent did act reasonably in all of the circumstances in treating capability as the reason to dismiss the Claimant. We consider that there was a genuine belief. Whilst there was a report from Occupational Health which outlined the Claimant may be able to return there was no timescale on this and was contingent on therapy. That therapy is still awaited. The Respondent attempted throughout to keep in contact with the Claimant, making attempts to obtain updates from him, and sought the input of Occupational Health. The Claimant did not engage with the Respondent. The Respondent took several steps in respect of investigating the medical reason and finding out the up-to-date medical position, that including obtaining two Occupational Health reports and writing and inviting the Claimant to meetings. We do not consider that they could have waited any longer. They had waited 16 months, covering work was having an effect on other colleagues, there was no prognosis for treatment and no engagement by the Claimant with the Respondent. When we consider all of the circumstances as outlined above, we consider that the dismissal did fall within the band of reasonable responses.

2.4 Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in the following respects;

2.4.1 the Claimant alleges that the Respondent failed to have appropriate regard to occupational health advice that he would be fit to return to work in the near future and/ or failed to make reasonable adjustments as to secure his return to work at an earlier date.

115. The Claimant has not challenged the procedure which was followed. The Respondent sought Occupational Health advice, they invited the Claimant to discuss the outcome of that report and sought to consult with him on more than one occasion. He did not cooperate with that. We consider that the procedure was fair and that steps taken were reasonable and do not consider there was anything else he could have done. We deal with reasonable adjustments below and do not consider they breached their duty to make such adjustments.

2.5. If it did not use a fair procedure, what is the percentage chance that the Claimant would have been dismissed in any event and, if so, when would that have occurred?

2.6. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant committed the misconduct alleged.

116. Given our conclusions on procedure neither of these factors fall to be determined.

3. Direct disability discrimination (Equality Act 2010 section 13)

3.1. Did the Respondent do the following things:

3.1.1 on 6th July 2020 did Ben Garfitt, Owen Thomas, Heather Frankham, David Foster discuss and/or discuss and agree a means of removing the Claimant from his position as quickly as possible;

3.1.2. on 24th November 2021 it is accepted that Heather Frankham made the decision to dismiss the Claimant with six weeks unpaid notice.

117. Despite our conclusion on time, we have considered the issue at 3.1.1. We have found that on the 6th July 2020 Mr Thomas made the comment "*Alternate approaches to removing Ryan quicker are being investigated as there is no improvement"* as part of the weekly executives meeting. There is no evidence that Ben Garfitt was involved or at that meeting. We accept the evidence of Heather Frankham that she and David Foster closed down those discussions and offered support to the Claimant.

118. It is accepted that Heather Frankham dismissed the Claimant with six weeks' notice which was unpaid because he was on statutory sick pay at the time and that had been exhausted.

3.2. Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse that someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the

Tribunal will decide whether the Claimant was treated worse than someone else would have been treated. The Claimant has not named anyone who they say was treated better than they were and therefore relies on a hypothetical nondisabled comparator.

3.3. If so, was it because of the Claimant's disability, namely a mental health condition?

119. We can deal with these issues together, and in accordance with **Shamoon** by considering why the Claimant was treated in that way. Dealing with each of the allegations separately, we have found that the reason why Mr. Thomas made the comment he did on 6th July 2020 was not because of the Claimant's disability but was because he was frustrated with the Claimant's performance. Therefore, even were his claim in time we do not consider it would have succeeded. The dismissal took place not because of the Claimant's disability but because he could not return in a reasonable period, and whilst capability was the reason for the dismissal, we note there were wider concerns about the Claimant failing to keep the Respondent updated and he was undertaking his business ventures. Whilst the Claimant relied on a hypothetical comparator, we are not in any event satisfied that there was less favourable treatment compared to a hypothetical nondisabled comparator.

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1. Did the Respondent treat the Claimant unfavourably by dismissing him with six weeks' notice on 24th November 2021.

120. We are satisfied that dismissing the Claimant with notice is unfavourable treatment.

4.2. Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that:

4.2.1 he required sick leave in order to manage the symptoms and effects of his anxiety and depression;

4.2.2 when he was able to attend work, he had an impaired cognitive function that affected his ability to fulfil his job responsibilities.

121. We agree that the Claimant required sick leave in order to manage the symptoms of his anxiety and depression and that arises as a result of his disability.

122. We do not agree that when he was able to work the Claimant had an impaired cognitive function which affected his ability to fulfil his job responsibilities. The Occupational Health reports show that with support he is able to undertake his role. All of the evidence indicates that when the Claimant was doing tasks which he enjoyed he was able to perform well with them. We have also seen that he has built his own website, launched the RAT venture, as part of which he has met other individuals and has attended expositions in Dubai.

4.3. Did the Respondent dismiss the Claimant because of that sickness absence or concerns about his future performance.

123. Yes, the Claimant was dismissed because of his sickness absence and not knowing when he would be able to return.

4.4. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were, running the business in a proportionate and cost-effective manner.

4.5. The tribunal will decide in particular:

4.5.1 Was the treatment appropriate and reasonably necessary way to achieve those aims?

4.5.2 Could something less discriminatory have been done instead?

4.5.3 How should the needs of the Claimant and the Respondent be balanced?

124. Yes, we consider that the dismissal was a proportionate means of achieving a legitimate aim, namely running the business an effective and efficient manner. There was no evidence at the time, nor now, as to when the Claimant would be able to return to work. He had a period of 16 months where he was off work, and he was not engaging with the Respondent. He has to be chased for sick notes, he did not attend meetings and he has since said that he would not have gone back to the Respondent. In considering the wider factors he had a relatively short period of service at the Respondent, they were an early business which was

growing and had limited resources. The workload of the Claimant had to be covered by others which was having an impact on them. The Respondent had its own responsibilities to their clients and the Respondent needed to know where it would stand.

125. Therefore, when we factor in all of these considerations, we consider that the treatment was appropriate and reasonably necessary to achieve the aim of running the business in an effective and efficient manner. We do not consider that there was anything else which could have been done, the Claimant's workload could not have been reduced further as it already had been reduced and others were covering his work.

126. It is accepted that the Respondent had knowledge of the disability from November 2020.

5. Reasonable Adjustments (Equality Act ss.20 and 21)

5.1. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability? From what date?

127. The Respondent had knowledge that the Claimant had a disability from November 2020. That is in accordance with the findings of fact which we have made. Whilst we note that in the earlier email mention was made to his mental health, we are satisfied that they did not know he was disabled. That accords with the evidence we have heard and the contemporaneous email from Mr. Garfitt.

128. We have considered whether the Respondent could have reasonably been expected to know that the Claimant had a disability. However, given the pandemic, the findings we have made on the content of the email from May 2020 specifically that he did not want to discuss it, the wider comments he has made on not wanting to discuss or disclose it we do not consider that they could reasonably have been expected to know. We have rejected the contention that Mr Garfitt and Mr Thomas saw him crying in meeting because of the placement of the camera. They took steps on checking on the wellbeing of staff by taking a

holistic approach including running virtual events and making sure cameras were on so that they could see what was happening and check in on people.

129. Until November 2020, when the Occupational Health report was received, there was no evidence to suggest that the Respondent knew that the Claimant had a disability at that stage, not being aware of his background and within that report the Claimant commented that he had not told them about it.

130. Notwithstanding our conclusion on the Respondent's knowledge, we have for completeness considered the remaining issues.

5.2. A "PCP" is a provision criterion or practice. Did the Respondent have the following PCPs:

5.2.1 the practice or policy of subjecting employees whose performance was regarded as poor to performance improvement plans;

5.2.2 the practice or policy of requiring an employee on a performance improvement programme to work in the office;

5.2.3. the practice or policy of requiring employees on performance improvement plans to work between 9AM and 5PM during their working days;

5.2.4. the practice of expecting employees to manage a workload which was high or overly demanding with or without support.

131. It is accepted that placing employees whose performance is poor on a performance improvement plan is a PCP. Whilst the Respondent argues that the policy of working in the office, working set hours and managing a workload were not PCPs we do not agree. Having had regard to the guidance that it can be more limited policies, the requirement to attend the office and working the set ours was a PCP that would have occurred over time involving an element of repetition and could have and been more than a one off.

132. Furthermore, whilst the Claimant's workload was not high or overly demanding there were others who we heard about, for example Mr Garfitt, and therefore we consider that this was a PCP.

5.3. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability in that:

5.3.1 PCP1 the Claimant was more likely to perform poorly as a consequence of his disability and was therefore more likely to be subject to a performance improvement plan and sanctions as a consequence of it;

5.3.2 PCP2 the Claimant's depression and anxiety made it more difficult for him to attend the office regularly or at all when his symptoms were acute;

5.3.3. PCP3 the Claimant's depression and anxiety made it more difficult for him to attend the office between 9Am and 5PM when his symptoms were acute; and

5.3.4 PCP4 when the Claimant is put under pressure he has difficulty concentrating as a consequence of his disability which makes him less able to deal with the high levels of work and particular affects his performance.

133. In relation to PCP1 whilst the Claimant could perform well when he enjoyed the task, as shown with the ISO certification and previous tasks being completed at a high level, we accept that his condition was likely to impact on his performance due to concertation and time to complete tasks and as a result more likely to be placed on PIP and therefore placed at a substantial disadvantage compared to someone without the Claimant's disability.

134. In respect of the second PCP, we accept that the Claimant's condition is likely to make it more difficult for him to attend regularly when his symptoms were acute and therefore, we accept that requiring him to attend for set office regularly when his symptoms were acute would place him at a substantial disadvantage compared to someone without anxiety and depression.

135. Turning to the third PCP we consider that making him work 9-5 would have placed him at a disadvantage when his symptoms were acute. We heard evidence of his poor sleeping habits, how he would work late in the evening or early hours of the morning, how his poor sleep would impact on him and how he would also avoid being around people. Therefore, we consider that requiring him

to work set hours of 9-5 would place the Claimant at a substantial disadvantage compared to a non-disabled colleague.

136. Turning to the fourth PCP, overall, we consider that this would place the Claimant at a substantial disadvantage, as when his symptoms were acute, there was an impact on his concentration, and this would impact on his performance impacting the levels of workload and performance.

5.4. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at those disadvantages?

137. We consider that from November 2020 the Respondent had knowledge about the Claimant being placed at a disadvantage. We do not consider that they would have known, or reasonably have been expected to know prior to then. There was a lack of information provided to them by the Claimant. There were repeated requests by the Respondent to the Claimant asking what adjustments he needed them to make, and what the GP had recommended to assist him. They received no response. Therefore, we do not consider that the Respondent knew or reasonably ought to have known that the PCPs placed the Claimant at a disadvantage until November 2020, and at those points the PCPs were not applied.

138. Therefore, even if we were wrong on knowledge of disability the Claimant's claim would not succeed given, we are satisfied that the respondent did not have knowledge of the substantial impairment.

5.5. What steps (the 'adjustments') could have been taken to avoid the disadvantage?

The Claimant suggests:

5.5.1 not requiring the Claimant to work in the office;

5.5.2 permitting the Claimant to work from home;

5.5.3 permitting the Claimant to work flexible hours or reduced hours;

5.5.4 reducing the Claimant's workload;

5.5.5 amending or adjusting the Claimant's targets;

5.5.6 clarifying or amending the Claimant's role and duties;

5.5.7 providing greater assistance with tasks by providing supervision rather than scrutiny;

5.5.8 providing the Claimant with greater assistance to enable him to better perform his duties as an alternative to a performance improvement plan within which such support may be provided but also which presented a risk of sanction.

139. As the Claimant accepted in his evidence there was nothing which the Respondent could have done which would have enabled him to return to work. We also note that within 3 days of the PIP being implemented it was suspended which was an adjustment that removed the disadvantages.

140. In considering the steps suggested by the Claimant. In considering the adjustment to not require the Claimant to work in the office and permitting him to work at home. That could remove the disadvantage; however, the Respondent never made the Claimant go into the office although it was suggested as part of the PIP. If the Claimant had asked for that to be varied, they would have agreed to it. They asked him what was suggested by the doctor, and he did not respond. Further, the evidence was that until the PIP, the Claimant was working from home.

141. Again, when considering flexible hours or reduced hours, again this could remove the disadvantage caused. Again prior to the PIP we heard how the Claimant would work at times during the day and at night. The PIP suggestion on working set hours was a suggestion to help with what the Respondent understood the Claimant's difficulties to be, it was not mandatory and was designed to be corrective not coercive.

142. Reducing the Claimant's workload could also assist; however, we do not consider that it would. The Respondent already reduced the workload, Mr Garfitt and Mr Leamon were already covering his workload to the point that Ms Frankham was concerned about Mr Garfitt’s wellbeing.

143. Amending targets would assist in reducing pressure on the Claimant, however, they were constantly reviewed and had previously been adjusted.

144. Clarifying or amending the Claimant's role would not have made a difference to the PCPs, however, they had already included elements of information security within his role.

145. In terms providing greater assistance with tasks by providing supervision rather than scrutiny. We do not consider that any further assistance would have made any difference. The Respondent was already providing a great deal of support from Mr Garfitt. We do not consider that there is any evidence that the Claimant was subject to scrutiny but rather just the normal functions of management.

146. In respect of the final suggestion of the Claimant, to give him greater assistance to enable him to better perform his duties as an alternative to the performance improvement plan and did not have a risk of sanction. We do not consider that this would have made a difference, we do not consider that any further assistance could have assisted and consider that the purpose of the PCP was one of support.

5.6. Was it reasonable for the Respondent to have taken those steps and when?

147. We have already found that the Respondent did not have knowledge of the Claimant's disability, or the impairment. However, notwithstanding that, the Respondent suspended the PIP which had the effect of making the adjustments to working from home and not having set hours. That was done within 3 days of the Claimant being signed off, and we consider that they could not have implemented any further adjustments as outlined as the role would not be fulfilled. There would be an impact on the business, clients and other members of staff from the role not being fulfilled and therefore we do not consider that it would have been reasonable to implement any of the adjustments such as removing further tasks, and they were already providing a great deal of support.

5.7. Did the Respondent fail to take those steps?

148. Again, notwithstanding the fact that the Respondent did not have knowledge of the disability, nor the disadvantage the Respondent took the steps we would consider reasonable.

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

6.1. Did the Respondent do the following things:

6.1.1. in May 2020 did Ben Garfitt tell the Claimant that he "had to do his bit like the rest of the team?"

6.1.2. In May 2020 did Ben Garfitt and Owen Thomas discuss the Claimant's mental health and its impact upon his performance.

149. Whilst we consider these claims are out of time, we have considered them for completeness.

150. We have found that in March 2019 Mr Garfitt told the Claimant that he "had to do his bit like the rest of the team?" We do not find that it took place in 2020 as the Claimant alleges. We accept Mr Garfitt's evidence over the Claimants that the comment was made in connection with the Claimant's performance and not the time he had taken off work.

151. In May 2020 Mr Garfitt and Mr Thomas did discuss the concerns they had over the Claimant's performance and spoke about his presentation at the time. Whilst reference was made to his mental health, we did not consider that it related to his disability but the lockdown restrictions and circumstances around that. Further the Respondent only had knowledge from November 2020.

6.2. If so, was that unwanted conduct?

152. We do not consider that this amounted to unwanted conduct.

6.3. Did it relate to the Claimant's protected characteristic, namely disability?

153. We do not consider that either comment was made in respect of the Claimant's disability. The comment made by Mr Garfitt on the Claimant doing his bit related to his performance not his disability. The discussion which took place between

Mr Garfitt and Mr Thomas related to his performance and his presentation, not the Claimant's disability.

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

154. We do not consider that either of the alleged incidents had the purpose of violating the Claimant's dignity or creating an intimidating, hostile or humiliating or offensive environment. In fact, we found the opposite true of the Respondent and the support they had given.

6.5. If not, did it have that effect? The Tribunal will consider the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

155. We do not consider it was reasonable for the Claimant to consider that it had the effect of violating his dignity or creating an intimidating, hostile or degrading or offensive environment. We consider that the Claimant either knew or ought to have known that the comments made both related to his performance.

7. Unauthorised deductions (Part II of the Employment Rights Act 1996) or breach of contract

7.1. Were the wages paid to the Claimant whilst he was absent on sick leave less than the wages he should have been paid?

7.2. Was any deduction required or authorised by statute?

7.3. Was any deduction required or authorised by a written term of the contract?

7.4. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

7.5 Did the Claimant agree in writing to the deduction before it was made?

7.6 How much is the Claimant owed?

8. Breach of Contact (Extension of Jurisdiction Order 1994)

8.1. Did this claim arise or was it outstanding when the Claimant's employment ended?

8.2. Did the Respondent do the following:

8.2.1 Failed to pay the Claimant full pay whilst he was absent on sick leave in breach of its obligation contained in the company sick pay policy?

8.2.2. Alternatively, failed to exercise its discretion to pay full pay to an employee absent on sick leave?

8.2.3. Failed to pay the Claimant for his six-week notice period? [The Respondent accepts that the Claimant was not paid but avers that he had exhausted his rights to sick pay at the point that notice was given].

8.3. Was that a breach of contract?

8.4. How much should the Claimant be awarded as damages?

156. We can deal with both of these elements together and comparatively briefly as the Claimant has not particularly argued this point.

157. The Claimant was not paid full pay whilst on sick leave, and they did not exercise their discretion to pay him full pay (beyond an initial 3-week period) and the Claimant was not paid during his notice period.

158. However, we are satisfied having had regard to the employment contract that the Respondent was entitled to place the Claimant on Statutory sick pay, and the Claimant subsequently exhausted his entitlement to statutory sick pay. There is no evidence to suggest that the Respondent has made any deduction from the Claimant's wages. The sums paid were those he was entitled to.

159. Further we note that pursuant to section 87(4) of the Employment Rights Act, as the Respondent has given longer than the statutory notice period, he would not be entitled to notice pay under the Employment Rights Act. He had during his notice period exhausted his statutory sick pay.

Conclusion

160. We therefore consider that each of the Claimant's claims fail, some at various stages of the tests which we have had to apply which we have considered in full notwithstanding that it would have failed at an earlier stage for the reasons outlined. We therefore have dismissed all the Claimant's claims.

Employment Judge Lang
Date 1st June 2023
Reasons sent to the parties on 13 June 2023

For the Tribunal Office