EMPLOYMENT TRIBUNALS

Claimant: **Mr M Dargouth**

Respondent: **Stephenson Hotel Limited**

HELD AT: **Newcastle ET**

ON: **19, 20, 21, 22, 23 June 2023 & in chambers on 3 July 2023**

BEFORE: **Employment Judge McCluskey, Mr T Euers & Mrs S Don**

REPRESENTATION

Claimant: **Represented by Mr D Robson, Solicitor**
Respondent: **Represented by Ms L Halsall, Counsel**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's complaint of direct race discrimination is not well founded and is dismissed.
2. The claimant's complaint of failure to make reasonable adjustments is not well founded and is dismissed.
3. The claimant's complaint of unauthorised deductions from wages is not well founded and is dismissed.
4. The claimant's complaint of breach of contract is not well founded and is dismissed.
5. In accordance with Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Rule 50, the identity of the members of staff of the respondent who were named as comparators by the claimant in the direct race discrimination complaint and who did not give evidence in this hearing, should not be disclosed to the public and should be referred to by their initials and not by their full names.

REASONS

Introduction

1. The claimant is making the following complaints: direct race discrimination, failure to make reasonable adjustments, breach of contract and unlawful deduction from wages.

2. Prior to the final hearing the respondent accepted that the claimant was disabled as defined by section 6 Equality Act 2006 at the time of the events that the claim is about. The respondent does not accept that they had knowledge of the disability at the relevant time. The claimant's disability is stress anxiety and depression.

3. Parties had prepared and exchanged witness statements prior to the final hearing.

4. There was a joint bundle of documents extending to 246 pages. Additional documents were lodged by the claimant and by the respondent during evidence and were numbered pages 247 – 256. At the outset of the hearing we told representatives that only documents in the bundle which were referred to in evidence would be read by us. The claimant's witness statement did not refer to documents in the bundle. The claimant's representative took the claimant to the relevant documents in the bundle which supported his witness statement and the relevant page numbers were noted by us as part of the claimant's evidence in chief.

5. The claimant gave evidence on his own behalf. Ms Laura Stowe – former Finance Assistant also gave evidence on behalf of the claimant. Douglas McAllister – former Employee Relations Manager, Lorna Reid- Human Resources VP, Daniel Kemp – Regional Director of Finance and Paul Borg – General Manager gave evidence on behalf of the respondent.

6. At the beginning of the second day, before the respondent had led any evidence, the respondent's representative Ms Halsall advised us that the respondent's first witness, Mr McAllister was appointed as a lay member in the Employment Tribunals (Scotland). She had been made aware of this by the witness that morning. I am appointed as an Employment Judge in Scotland as well as in England & Wales. I confirmed that I had not sat with Mr McAllister in Scotland and that I did not know Mr McAllister. The claimant's representative Mr Robson, after taking instructions, confirmed that he had no objection to the hearing continuing with me as the Employment Judge. I discussed matters with both parties neither of whom, having taken instructions from their respective clients, objected to the hearing continuing with me as the Employment Judge. Having regard to the test in **Porter v Magill [2002] AC 357** and taking account of **Locabail UK Limited v Bayfield Properties Limited [2000] IRLR 96,** I determined that I did not require to recuse myself and that the hearing could continue.

7. In evidence in chief and cross examination the parties referred to a meeting between the claimant, Mr Kemp and Ms Reid on 3 January 2020 and a settlement agreement which was offered to the claimant at that meeting. The parties agreed that matters discussed at the meeting were not on a without prejudice basis and could be referred to in evidence. The terms of the settlement agreement were not, however, referred to.

8. The claimant relied on several comparators for his complaint of direct race discrimination. On conclusion of this hearing Ms Halsall made an application for an order under Rule 50 to anonymise the comparators who had not given evidence in this hearing, by referring to them in the judgment by their initials rather than their full names. Mr Robson did not oppose this application. We considered that it was within the terms of Rule 50 and the overriding objective to do so. Those comparators are accordingly referred to by their initials and not their full names.

Issues

9. Case management orders had been issued following a case management preliminary hearing on 2 September 2020. The orders required the claimant to file further and better particulars as follows: (i) In relation to his complaint of race discrimination, to set out details of what the respondent did or failed to do; who did or failed to do something and when and comparators; (ii) In relation to his complaint of failure to make reasonable adjustments to provide details of the PCPs relied upon and how the PCPs put the claimant at a substantial disadvantage. There were also case management orders in relation to the breach of contract and unlawful deduction from wages complaints.

10. The claimant filed further and better particulars in response to the orders. Prior to the final hearing the respondent prepared a draft list of issues for determination by us at this final hearing. A copy was sent to the claimant's representative and to the Tribunal. The claimant's representative had not had an opportunity to consider the draft list of issues in advance of this hearing. A hard copy was provided to him at the outset of this hearing, and he was given time to consider the draft list and to take instructions. The draft list of issues mirrored the further and better particulars which had been filed by the claimant.

11. Having taken instructions Mr Robson proposed a second adjustment which he said the respondent was under a duty to take and which had not been included in his further and better particulars. This was that the appeal hearing should have been dealt with by the respondent on the papers. He relied on the PCP already pled, namely "strict adherence to its formal management process" and the same substantial disadvantage already pled namely "the claimant being unable to substantively take part in the process leaving his views unaddressed and depriving him of an opportunity to challenge". After an initial opposition to the proposed addition of this second reasonable adjustment, the respondent agreed that it could be added. There was some further minor clarification by the claimant to the issues, which were then agreed as the final issues for

determination by us. The final issues agreed at the outset of the hearing are set out in Appendix 1.

Findings in fact

12. We have only made findings in fact necessary to determine the issues. All references to page numbers are to the paginated joint bundle of documents provided to us.

13. The claimant was employed by the respondent from 17 November 2018 until 6 March 2020 when he was dismissed. The claimant is Lebanese / Asian. At the time of his dismissal, he was employed as the Director of Finance. The respondent is Stephenson Hotel Limited which trades as the Crown Plaza Newcastle.

14. The claimant is a disabled person for the purposes of the Equality Act 2010.

15. The claimant signed a contract of employment on 9 January 2019 containing his terms and conditions of employment as Director of Finance ("2019 contract").

16. The respondent is owned by Mr David Clouston. In around March 2019 Mr Clouston appointed the third-party management company Interstate Hotels ("Interstate") to take over the management of the respondent. Interstate took over from the previous third-party management company IHG.

17. From around March 2019 the claimant reported to the central finance team of Interstate. Mr Matt Stone of Interstate dealt with operational financial matters and Mr Dan Kemp of Interstate oversaw the finance function at the respondent hotel. Interstate finance team worked out of central offices, supporting the finance functions across around forty hotels managed by them. Mr Stone and Mr Kemp were not based at the respondent but attended there from time to time.

18. The claimant also reported to the General Manager of the respondent who was based at the hotel. The General Manager was the claimant's line manager. The previous General Manager, with whom the claimant had a good relationship, left in around August 2019. Mr Paul Borg was appointed as the new General Manager. Mr Borg began working at the hotel on 6 November 2019. Prior to that Mr Borg had been present at the hotel for a couple of days in October 2019. There was a gap of around 3 months between the previous General Manager leaving and Mr Borg starting.

Refusing attendance at monthly financial reviews

19. Each month Mr Coulston the owner had a meeting with those involved in running the hotel. There would be employees from Interstate, employees from Hamilton Hotels who were a third-party company managing the respondent's assets and employees from the respondent hotel. The meeting lasted for around two – four hours. The meeting covered all aspects of the operation of the hotel. Finance was one part of that the operation but there were many other aspects as well. It was not a financial review meeting.

20. The meetings to which the claimant referred as monthly financial reviews, and to which he said his attendance had been refused by Mr Kemp, were the monthly meetings with the owner and other parties as set out above.

21. Mr Kemp would often attend such meetings with owners of hotels managed by Interstate without the local finance head being present. Mr Kemp told the claimant that he did not need to attend these monthly meetings if he had other work he wished to prioritise. Mr Kemp was aware of the claimant's workload. Mr Kemp did not tell the claimant that he could not attend these monthly meetings.

Refusing attendance at owner meeting November 2019

22. Mr Borg met with the owner of the respondent Mr Clouston around ten to fifteen times per month. As the General Manager Mr Borg had overall responsibility for the running of the respondent hotel. Mr Borg reported to Mr Clouston. Mr Borg did not set the invitee list for these meetings or decide who could attend.

23. On 19 November 2019 Mr Clouston sent an email to Mr Borg and the claimant. Mr Clouston asked for a meeting that day with Mr Borg and the claimant to discuss the potential for growing the meetings and events business at the hotel (page 208).

24. Mr Borg told the claimant that he could not attend the meeting with Mr Clouston on 19 November 2019. As General Manager, Mr Borg had responsibility for the entire hotel. He took the view that the matter to be discussed was a hotel wide matter and not a finance matter, that only he should attend. The claimant made his apologies to Mr Coulston.

Not inviting to calls about payroll issues / challenges

25. There were no calls about payroll issues and challenges which took place between Ms Reid and Mr Borg and to which the claimant was excluded by Mr Borg. In the period between Mr Borg starting at the hotel on 6 November 2019

and around the end of 2019, after which the claimant was not at work, Mr Borg had had limited contact with Ms Reid.

Being told by Mr Kemp he cannot trust the claimant

26. On 3 January 2020 the claimant was invited to a meeting with Mr Kemp and Ms Reid. At the meeting the claimant was offered a settlement agreement. The claimant was given an opportunity to consider the terms of the settlement agreement and obtain legal advice. The claimant was not required to attend work during that time.

27. At the meeting on 3 January 2020 Mr Kemp told the claimant there was a significant gap between the claimant's current level of performance and what was expected of him. Mr Kemp told the clamant he did not have confidence in the claimant's ability to bridge the gap and that is why the settlement agreement was being offered to him (page 247).

28. In the meeting on 3 January 2020 between the claimant, Mr Kemp and Ms Reid, Mr Kemp did not say to the claimant "I don't trust you".

Negotiating intently for compassionate leave

29. On 7 January 2020 whilst the claimant was considering the settlement agreement offer, he messaged Ms Reid and said, "*My grandmother just passed away and I need to know where I stand in my current situation if I need to go home for a few days*". Ms Reid replied by message the same day and said she would call the following day. The claimant replied to say his flight was early the next morning. The claimant had issues with his phone and Ms Reid could not call him. Ms Reid got in touch with Mr Borg, as the General Manager of the hotel, to tell him about the death in the claimant's family. Ms Reid did not have any other involvement in the claimant's compassionate leave. Ms Reid cannot authorise any kind of leave for a hotel. It is for individual hotels to manage leave, including compassionate leave, with employees directly. Mr Borg authorised the compassionate leave. The claimant did not have to negotiate intently with Ms Reid to obtain compassionate leave.

(Not paying) lieu hours

30. The claimant's contract of employment as Director of Finance (the "2019 contract") stated "*Your normal hours of work will be 160 hours worked over 4 weeks excluding breaks and you may be required to work such hours as the requirements of your work dictate*". Clause 5.2 of the 2019 contract stated "Before *working any overtime, permission must be given in writing by your Manager....In some circumstances time off in lieu may be given. Payments for overtime can only be made through the usual payroll mechanisms....The Company operates a balancing period of one month in accordance with the*

payroll period" (page 69). The claimant did not obtain permission to work overtime.

31. In the meeting on 3 January 2020 the claimant asked Ms Reid about payment for hours worked in lieu. Ms Reid agreed to look into the lieu hours once the claimant had provided evidence. The claimant did not provide any further details in the meeting. Ms Reid did not agree that payment for all lieu hours worked would be paid to the claimant. Ms Reid did not have authority to approve payroll payments for the hotel or any other hotels managed by Intestate. She did not have authority to authorise payment of the claimant's lieu hours.

32. The claimant kept his own records of hours worked. The claimant checked his records after the meeting on 3 January 2020. He calculated that since January 2019 he had worked around 379 hours more than the 40 hours per week referred to in the 2019 contract. He asked the respondent for payment of the 379 hours based on his calculation.

33. Mr McAllister looked at the claimant's calculation and the 2019 contract. Mr McAllister decided that that the claimant had no contractual entitlement to be paid for lieu hours. Mr McAllister calculated that the claimant had worked 3.5 hours of overtime in December 2020 and that as a goodwill gesture the claimant would be paid for these.

34. Mr Borg wrote to the claimant by letter (undated). He referred to the claimant's claim for lieu hours. He based his decision on the calculation carried out by Mr McAllister. He referred to the wording of clause 5.2 of the 2019 contract. He said "...*we do not accept your claim for 379.2 hours. The claim is not contractually entitled. As a good-will gesture, in accordance with the principle of balancing any lieu-time earned within the month accrued, we will make payment of the 3.5 excess hours earned in December*" (page 129).

Investigating the claimant

35. On or around 17 December 2019 Ms Reeves, an external consultant appointed by Interstate, attended at the respondent hotel to carry out some work with the claimant as Interstate had concerns about the claimant's capability in his role.

36. The claimant attended an investigation meeting on 19 December 2019. The meeting was chaired by Mr Stone. Mr McAllister attended in the capacity of note taker and HR support.

37. At the investigation meeting Mr Stone raised a number of concerns which he had about the claimant's management of financial matters at the hotel. One of these was an overpayment to N Power of £164,000, around a time when the hotel had had cash flow problems. The claimant accepted the error in not taking

sufficient steps to recover the money. He said he had chased it but had then been busy with other things. He stated "*Yes, it is a big amount I know, but is slipped my mind. Busy with other things I missed it.*" In the claimant's subsequent grounds of appeal against dismissal he stated that he had *"repeatedly accepted my part in the errors as detailed in point one [N Power overpayment] …*" (page 110).

38. Following the meeting Mr McAllister prepared an investigation report dated 19 December 2019 on the instruction of Mr Stone. The report identified six areas of concern with the claimant's performance, which covered a range of financial matters which adversely impacted upon finances of the respondent hotel. One of these was the overpayment to N Power of £164,000. The investigation report concluded "*The evidence of non-adherence to processes and failure to deliver an efficient accounting process is well documented and factual. It is not suggested that MD [the claimant] has gained personally- financially or otherwise as a result of the issues in question. There is also no evidence of any deliberate misconduct. In that regard it is concluded that a misconduct disciplinary hearing would not be appropriate. The question remains however over the degree to which MD is himself responsible for the failings, whether he might reasonably have been expected to prevent them from happening, or whether he has sufficiently mitigated his responsibility. On the majority of issues, MD suggests that a lack of support has given rise to the current inaccuracies / problems.... While I do agree that these issues have had an impact, I also consider that MD, who carries a very senior role with a high level of remuneration, has significant authority which he is not using or is not capable of doing so, to deliver the required standards of compliance across the hotel.....It is recommended that this issue is dealt with as a capability matter. Consideration should be given as to whether, with additional support, a satisfactory level of job performance as DoF can be achieve*d" (pages 88-89).

Dismissing the claimant / reasonable adjustments

39. A meeting was held on or around 3 January 2020 where a settlement agreement was offered to the claimant as set out above. The parties did not conclude the terms of the settlement agreement offered. At around the beginning of February 2020 the respondent told the claimant that he was to return to work and that on doing so a formal capability process would commence.

40. The respondent had a capability procedure (pages 49 -51) which applied to the claimant. The procedure was not contractual. It provided for an informal approach in the first instance. It stated that "I*f performance concerns remain, the formal performance management procedure will apply".* It set out three stages to the formal procedure and that "*the Company reserves the right to initiate the procedure at any stage (including dismissal)*". It set out the

arrangements for appeal against any decision reached. It contained a section headed "colleagues with short service" which stated "*The Company reserves the right at its sole discretion not to follow this performance management SOP in the case of a colleague with less than two years' service*".

41. The respondent was not required to begin the formal performance management procedure at the informal stage. The respondent could initiate the procedure at any stage including dismissal.

42. On 4 February 2020 the claimant emailed the local HR team (page 91). He said "*Due to the extremely stressful situation that Interstate and Mr Kemp have put me in since the beginning of the year I am now suffering from significant depression... I will potentially be placed under performance management immediately on my return.... This is highly likely to aggravate my already significant work related stress and depression and I am therefore unable to return to work at this time due to ill health...My GP has commenced me on treatment for this work related depression and has signed me off work for 4 weeks. Please find attached my sick note for your records*".

43. Mr McAllister received the email and fit note on the morning of 5 February 2020 (page 90). On the same date Mr McAllister sent a letter dated 5 February 2020 to the claimant inviting him to a capability hearing (page 92). The letter stated that it was an invite to a formal meeting in accordance with the Performance Capability Procedure. The capability hearing was scheduled to take place on 12 February 2020. The letter referred to the investigation meeting on 19 December 2019 and listed the six areas of concern about the claimant's performance which had been discussed at the investigation meeting, including the overpayment to N Power which had not been recouped. The letter enclosed a copy of the investigation report prepared after the investigation meeting. The letter stated that the performance concerns were sufficiently serious that dismissal was a potential outcome from the hearing.

44. On 8 February 2020 Mr McAllister sent the claimant an email reminder about the capability hearing scheduled for 12 February 2020 as he had not heard from the claimant (page 95).

45. The claimant replied to the email on 9 February 2020 and stated "*Due to the extreme stress this situation has caused me, I am currently in no mental condition to attend this meeting or to represent myself.... I politely request that you stop contacting me regarding the capability proceedings until I am in a position with my mental health to cope with the process*" (page 94).

46. The hearing arranged for 12 February 2020 was postponed by Mr McAllister. Thereafter Mr McAllister wrote to the claimant on 20 February 2020 (page 96). The letter states "*This meeting is rescheduled on your advice that you would*

be unable to attend on 12 February 2020 due to health reasons. Please note that there is insufficient evidence that your health situation would prevent you from attending a meeting of this nature. We consider that protracting this process may have a detrimental effect on your health. Should you be unable to attend the rescheduled hearing then it will be undertaken in your absence. If you prefer to make written submissions then you may do so- ensuring that any written submissions are received by Paul Borg in advance of the hearing". The hearing was rescheduled for 2 March 2020.

47. The claimant responded to the letter dated 20 February 2020, by email dated 1 March 2020 (page 98). The email attached a letter from the claimant's GP (page 97). The claimant's email stated "*I am currently unable to attend any meetings due to the significant mental health problems I am experiencing largely caused by the severely stressful work situation you have put me in.....*"

48. The GP letter dated 25 February 2020 accompanying the claimant's email said "T*his gentleman has attended the surgery recently with symptoms of stress, anxiety and panic attacks which have been further exacerbated by work related circumstances and the receiving of communications from the employer. Unfortunately, these symptoms are not enabling him to function in the manner to attend work or any other meetings. His current symptoms presentation are significant and hence he is not able to attend work at least until these symptoms are stabilised with medication and support*" (page 97).

49. Mr McAllister replied on 2 March 2020 in the morning. He said "*It is Paul Borg's responsibility as your line manager to deal with these matters. You will be aware that there is a right of appeal against any formal decision made regards your employment situation....I note your comments on the stressfulness of the situation however I do not feel that allowing the current situation to fester any longer would be helpful or appropriate. I believe that further delays could have a greater impact on your stress levels if proceedings are postponed further. The meeting will proceed this afternoon as arranged. If you would like to present any information prior to the hearing, please forward it to me by 1pm today and I will ensure that this is presented*" (page 102).

50. On 2 March 2020 in the afternoon the claimant's partner emailed Mr McAllister and Mr Borg. She said as a direct result of the respondent's actions the claimant was on maximum strength of Fluoxetine, Omeprazole and Diazepam and *"is currently being treated by mental health specialists for anxiety and depression"*. The email referred to his "*current disability caused by the stress you are causing him*" and said that the claimant "*again requests that this unfounded action against him be discontinued until he has regained his mental health*" (page 101 – 102).

51. The capability hearing went ahead in the claimant's absence in the afternoon of 2 March 2020 (page 103 – 104). Mr Borg considered the investigation report which set out the six matters of concern about the claimant's performance. Mr Borg considered the six areas of concern referred to in the investigation report. Each of the concerns were about matters which pre-dated Mr Borg's arrival at the hotel on 6 November 2020 or which were ongoing. Thereafter he adjourned the meeting.

52. On 3 March 2020 Mr Borg considered matters further. Mr Borg relied on the expertise of his financial colleagues, Mr Stone, Mr Kemp and Ms Reeves on financial matters together with his own experience as a General Manager in reaching the decision to dismiss by reason of capability.

53. The claimant obtained a second fit note dated 3 March 2020. This signed the claimant off with "*anxiety, depression and work-related stress*" until 31 March 2020 (page 174).

54. Mr Borg wrote to the claimant by letter dated 5 March 2020 terminating his employment with effect from 6 March 2020 (page 106). Mr Borg relied on the findings from the six areas of concern about the claimant's performance in the investigation report. Mr Borg concluded his letter by stating "*In summary I am of the view that while you may not be purely or singly responsible for all of the issues arising, the responsibility, generally, for the smooth and accurate operation of the finance department lies with the Director of Finance....*".

55. The claimant submitted written grounds of appeal against his dismissal on 12 March 2020 (pages 109 – 110). The grounds of appeal addressed in some detail each of the six areas of concern about his performance, which had been referred to in the dismissal letter. The claimant explained for each of the six areas why the financial issue had arisen and why he considered that it was not due to lack of capability on his part. The claimant did not make reference to his mental ill health in his grounds of appeal.

56. Mr McAllister wrote to the claimant on 16 March 2020 acknowledging his grounds of appeal. He notified the claimant that an appeal hearing would take place on 23 March 2020, chaired by Mr Robert Dodwell, VP of Operations.

57. On 21 March 2020 the claimant's partner emailed the respondent on his behalf. The email stated that the claimant remained in very poor mental health with ongoing anxiety attacks. It stated that the claimant remained unable to represent himself effectively and would be unable to participate in the appeal procedure on 23 March 2020. The email stated that the appeal hearing "*should be postponed until he has the mental capacity to represent himself appropriately*" (page 118).

58. On 24 March 2020 Mr McAllister emailed and asked whether the claimant "*would be able to attend a conference call in the near future to resolve this matter...*" and stating that it is "*...in the interests of all parties that we try as best we can to resolve this situation within a reasonable timeframe*" (page 117)

59. On 31 March 2020 the claimant's partner emailed stating that the claimant's mental health remained very poor. She stated "*It is not possible at this stage for Maher [the claimant] to provide a date at which point he will be well enough to represent himself in the appeal process*" (page 116).

60. On 31 March 2020 Mr McAllister replied to the claimant's partner email of the same date and stated "*I note your concerns with regard to Maher feeling unable to participate in an appeal process right now. On that basis we agree to hold this in abeyance*" (page 115).

61. On 1 April 2020 Mr McAllister emailed the claimant again. In relation to the appeal, he stated "*...we have no issue with allowing you to delay the appeal. As soon as you are ready to proceed, we will ensure that this takes place as soon as possible*" (page 114). The claimant did not say he was ready to proceed with an appeal hearing and no appeal hearing took place.

62. The claimant did not want the respondent to deal with the appeal hearing on the papers. He wanted the appeal hearing to be delayed until he was fit to attend.

Bonus

63. The claimant received a letter from the hotel's previous General Manager on 31 May 2019. The letter stated that the claimant was entitled to participate in the 2019 Management Bonus Scheme operated by Interstate. The letter set out the financial target to be achieved by the hotel for the bonus to operate as follows "*The scheme is based on over delivery of the hotel's EBITDA full 2019 budget" (*page 120).

64. The accompanying terms and conditions of the 2019 Management Bonus Scheme stated "*This bonus plan does not form part of any member's contractual entitlement...Bonus payments will be paid upon satisfactory external audit confirming the year end results and will likely be 4 months after the year end. This is usually when the accounts have been audited. Scheme members must still be employed at the time of payout to be eligible for the payout under the scheme" and* "*subject to discretion... no bonus payment will be made to eligible members who at the time of payment is... not performing in line with their objectives or departmental balanced scorecards*" (page 123).

65. The claimant's bonus scheme terms were those of the 2019 Management Bonus Scheme. The claimant was not participating in any other bonus scheme operated by the respondent.

66. No bonus was paid to others in the respondent hotel under the 2019 Management Bonus Scheme as the financial target to be achieved by the hotel for the bonus to operate was not met.

Observations on the evidence

67. We have only made findings of fact in relation to matters which are relevant to the legal issues to be decided. Given the passage of time it is inevitable that memories will have faded on certain aspects and the contemporaneous documentary evidence to which we were referred in the bundle has therefore been of assistance to us in making our findings of fact.

68. In relation to the material facts as found, there were a number of areas of dispute between the parties.

69. One area of dispute was whether Mr Kemp told the claimant that he could not attend monthly financial review meetings. Mr Kemp's evidence was that these meetings were not financial review meetings but rather large meetings with many parties covering all operations of the hotel. The claimant said he did not know who attended the meetings or what was discussed, as he did not attend. He did not lead evidence about any other meetings to which he was referring and to which he alleged he had been excluded, apart from a specific owner's meeting in November 2019 which is dealt with separately. We concluded that the meetings referred to by Mr Kemp were the meetings in question. We preferred the evidence of Mr Kemp that the claimant had not been told by Mr Kemp that he could not attend these meetings. We formed the view that if the claimant had wanted to attend these meetings, but was being specifically excluded by Mr Kemp, this is something which the claimant is likely to have raised at the time. The claimant's evidence was that he did not raise the matter.

70. In Mr Robson's closing submissions, he said that the claimant now withdrew the complaint that Mr Kemp's refusal for the claimant to attend these meetings was direct race discrimination. We did not understand the claimant to withdraw his assertion that there had been a refusal by Mr Kemp for the claimant to attend the meetings. Only that the refusal was not less favourable treatment on the grounds of him being Lebanese. We noted the withdrawal. In any event we preferred the evidence of Mr Kemp, for the reasons given above, that he had not refused the claimant's attendance at these monthly meetings.

71. The claimant asserted that he was not invited to calls about payroll issues and challenges which took place between Ms Reid and Mr Borg. He asserted that Mr Borg invited Ms Reid to these calls and excluded the claimant. The claimant did not lead evidence on the date or dates which he asserted these calls took place. He did not lead evidence on the nature of the payroll issues and challenges which he asserted were discussed on the calls. Ms Reid and Mr Borg both said that they did not know what the calls were to which the claimant referred. We concluded that we had no evidence to make any findings that there were calls about payroll issues and challenges between Mr Borg and Ms Reid, to which the claimant was excluded by Mr Borg, also noting that Mr Borg said he had had limited involvement with Ms Reid and that he had only been at the hotel since 6 November 2019. We concluded that it was unlikely that such calls had taken place. In closing submissions Mr Robson said that the claimant now withdrew his complaint that Ms Reid's treatment of the claimant in relation to these calls was direct discrimination. We did not understand the claimant to withdraw his assertion that he had been excluded from such calls. We noted the withdrawal. In any event, we concluded that no calls had taken place between Ms Reid and Mr Borg about payroll issues and challenges for the reasons given above.

72. Another area of dispute was whether Mr Kemp said to the claimant at the meeting on 3 January 2020 that he did not trust him. The evidence of Mr Kemp and Ms Reid, who both attended the meeting, was that this was not said. The evidence of Mr Kemp was that he had had an outline script of the meeting on 3 January 2020 which he had prepared (page 247). The script referred to the gap between the claimant's current level of performance and what was expected, and that Mr Kemp did not have confidence that the claimant could bridge that gap. We accepted the evidence of Mr Kemp and Ms Reid and the contents of the outline script itself, which were all consistent. The explanation for offering the settlement agreement was clear in the outline script and it did not appear to us that Mr Kemp would need to expand on that explanation or change the explanation in the meeting. It was consistent with the findings of the investigation report which were that there were concerns about the claimant's capability in the role of Director of Finance. The claimant challenged the veracity of the outline script and alleged that it had been changed by Mr Kemp since the meeting on 3 January 2020 and could not be relied on. We were satisfied that the meta data print out of the document supported that it had not been amended or changed in any way. The claimant asserted that Mr Kemp had not used an outline script in the meeting as he had not seen any such document in the meeting. Mr Kemp explained that it was on his laptop. That is an entirely probable explanation, and it is also likely that Mr Kemp would have used an outline script for this meeting. Separately, it was not clear to us in what way the claimant asserted that the document had been changed or if he asserted that the words "*I don't trust you*" had been removed. In any event we thought it unlikely that an outline script would contain the words "I don't trust

you" in the first place. For the reasons given we were satisfied that Mr Kemp did not say those words and did use the wording in the outline script.

73. The claimant asserted that he had to negotiate intently with Ms Reid to obtain compassionate leave. We found that this was not borne out by the evidence. The exchange of texts produced in the bundle showed that the claimant messaged Ms Reid on 7 January 2020 about compassionate leave and Ms Reid replied the same day to say she would call him the following day. The messages showed the claimant then had issues with his phone reception over the next few days and Ms Reid was unable to reach him. We accepted this documentary evidence. Ms Reid then got in touch with Mr Borg to tell him about the death in the claimant's family. Thereafter Mr Borg authorised the leave. We accepted Ms Reid's evidence that she could not authorise compassionate leave which accorded with Mr Borg's evidence that he was responsible for authorising the leave. Accordingly, we found that the claimant did not have to negotiate intently with Ms Reid to obtain compassionate leave.

74. There was an area of dispute in relation to the claimant's entitlement to be paid for lieu hours worked and, if so, how many. The claimant's evidence was that in the meeting with Ms Reid and Mr Kemp on 3 January 2020, Ms Reid had assured him that his lieu hours would all be paid in full. He did not know in the meeting how many lieu hours he had worked and did not provide any details. Ms Reid's evidence was that she had said that once he had provided evidence of lieu hours worked it would be looked into. She said that she did not give any assurance that any lieu hours would be paid as she did not have authority to do so. We preferred the evidence of Ms Reid that no assurances were given by Ms Reid that any lieu hours would be paid. We accepted that she did not have authority to do so as payroll all payments must be authorised by the hotel. It also seemed unlikely to us that she would have agreed to make payment for all lieu hours without having any evidence of the hours or the amount of money being claimed.

75. The claimant said that in the investigation meeting on 19 December 2019 he had raised concerns about Mr Borg and his treatment by Mr Borg in preventing him from carrying out his role as Director of Finance but these were not recorded in the notes of the meeting taken by Mr McAllister (pages 77-86) or in the investigation report which had been prepared by Mr McAllister on the instruction of Mr Stone. The claimant said that the notes of the meeting were inaccurate in this regard. The claimant did not say that he had raised concerns that he was being treated differently by Mr Borg on the grounds of the claimant's race.

76. The claimant had not raised with the respondent that he considered the notes were inaccurate when he had been sent a copy of them. Mr McAllister's evidence was that the notes were not a verbatim account of all that had been

said. The notes covered all matters which were material in relation to the discussion and Mr Stone's concerns about the claimant's capability over a range of financial matters. He could not recall the clamant having raised concerns about Mr Borg in the investigation meeting. We found on balance that the claimant had not raised concerns about Mr Borg and his treatment by Mr Borg in preventing or hindering him from carrying out his role as Director of Finance in the investigation meeting. We concluded that if he had done so, that would have been recorded in the notes of the meeting. The notes of the meeting did record in some detail the explanation given by the claimant about each of the financial matters which were raised with him by Mr Stone. If the claimant had raised concerns about Mr Borg's involvement in the financial issues raised with the claimant, we considered that it was likely that those would have been recorded in the notes. We also concluded that it was likely that when the claimant did read the notes of the meeting, if there had been omissions which he considered where important in relation to the explanation he had given about his capacity to do his job, he would have raised them with the respondent straight away. He did not do so until February 2020. Further, we noted that Mr Borg had only been in the business since 6 November 2019, around 6 weeks, yet the financial concerns raised with the claimant dated back over a number of months, since Interstate had been appointed by the respondent in around March 2019.

77. There was an area of dispute in relation to which bonus scheme was applicable to the claimant. The respondent's evidence was that the relevant bonus scheme was contained in the letter to him dated 31 May 2019. The claimant's evidence was that this was not the scheme in which he participated but rather a different bonus scheme which had been issued to him by letter prior to 31 May 2019. The claimant did not have a copy of the letter or any evidence of the earlier scheme upon which he relied. We preferred the evidence of the respondent that the relevant bonus scheme was that provided to him by the previous General Manager dated 31 May 2019. The claimant did not present any evidence to allow us to consider whether a different bonus scheme was relevant to him.

78. The respondent's evidence was that nobody from the respondent was paid a bonus from the 2019 Management Bonus Scheme as the hotel did not hit the financial targets. The respondent's evidence was also that at other Interstate hotels where targets were reached bonuses were not paid due to covid. The claimant did not present evidence that others at the hotel had been paid bonus from the 2019 Management Bonus Scheme or that the hotel had hit the financial targets set. We preferred the evidence of the respondent that the hotel did not hit the financial targets. In any event the claimant's position was that this bonus scheme was not applicable to him and that a different bonus scheme applied to him as set out above.

Relevant law

79. Section 13 EqA provides as follows: *13 Direct Discrimination (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.*

80. Sections 20 and 21 EqA provide as follows: "*20 Duty to make adjustments(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.(2)The duty comprises the following three requirements.(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage....*"

81. *"21 Failure to comply with duty (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...."*

82. Section 39 EqA provides as follows: "39 *Employees and applicants … (2) An employer (A) must not discriminate against an employee of A's (B)— (a) as to B's terms of employment; (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; (c) by dismissing B; (d) by subjecting B to any other detriment. …*"

83. Section 123 (1) EqA provides as follows: "*Subject to section 140B proceedings 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*". For the purposes of this section (a) conduct extending over a period is to be treated as done at the end of the period.

84. Section 136 EqA provides as follows: "1*36 Burden of proof If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision*."

85. Section 212 EqA provides as follows: ""*212 General Interpretation In this Act - ….'substantial' means more than minor or trivia*l".

86. Schedule 8 EqA paragraph 20 provides as follows: "*Part 3 Limitations on the Duty 20 Lack of knowledge of disability, etc.(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—... (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. Guidance on a complaint as to reasonable adjustments was provided by the EAT in **Royal Bank of Scotland v Ashton [2011] ICR 632** and in **Newham Sixth Form College v Sanders [2014] EWCA Civ 734**, and **Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220** both at the Court of Appeal. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in **Muzi-Mabaso v HMRC UKEAT/0353/14**. The guidance given in Environment Agency v Rowan [2008] IRLR 20 remains valid, being that to make a finding of failure to make reasonable adjustments there must be identification of, relevant for the present case: (a) the provision, criteria or practice applied by or on behalf of the respondent; and (b) the nature and extent of the substantial disadvantage suffered by the claimant.

88. Mr Justice Laws in **Saunders** added: "*the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP*."

89. The nature of the duty under sections 20 and 21 was explained by the EAT in **Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43** as follows: "*The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability: section 15 of the Act. The second is the duty to make adjustments: sections 20–21 of the Act. The focus of these provisions is different…… Sections 20–21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage*."

90. There is a two-stage process in applying the burden of proof provisions in discrimination cases, which may be relevant to the issue of whether the respondents applied a PCP to the claimant, as explained in the authorities of **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura International Plc [2007] IRLR 246**, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If he does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it

is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

91. The application of the burden of proof is not as clear as in a claim of direct discrimination. In **Project Management Institute v Latif [2007] IRLR 579**, Mr Justice Elias, as he then was, said this: "53 ……It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable adjustment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable adjustment has been identified. 54 In our opinion the paragraph in the code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. 55 We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

92. **Jennings v Barts and the London NHS Trust UKEAT/0056/12** held that **Latif** did not require the application of the concept of shifting burdens of proof, which '*in this context*' added '*unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided*' as to whether the adjustment contended for would have been a reasonable one.

93. The EAT emphasised the importance of Tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them in **Newcastle City Council v Spires UKEAT/0034/10**. The importance of identifying the step that the respondent is said not to have taken which amounts to the reasonable adjustment required in law of it was stressed in **HM Prison Service v Johnson [2007] IRLR 951**. Setting out what the step or steps that comprise the reasonable adjustments are, before the evidence is heard, was however referred to in **Secretary of State v Prospere EAT 0412/14**. **General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43** highlighted the importance of identifying precisely what

constituted the step which could remove the substantial disadvantage complained of.

94. The adjustment proposed can nevertheless be one contended for, for the first time, before the ET, as was the case in **The Home Office (UK Visas and Immigration) v Kuranchie UKEAT/0202/16**. Information of which the employer was unaware at the time of a decision might be taken into account by a tribunal, even if it also emerges for the first time at a hearing – **HM Land 25 Registry v Wakefield [2009] All ER (D) 205**.

95. The reasonableness of a step for these purposes is assessed objectively, as confirmed in **Smith v Churchill [2006] ICR 524**. The need to focus on the practical result of the step proposed was referred to in **Royal Bank of Scotland plc v Ashton [2011] ICR 632**.

96. Where a respondent argues that it could not reasonably have been expected to know of the claimant's disability, the onus falls on the respondent to establish that, and the issue is one of fact and evaluation – **Donelien v Liberata UK Ltd [2018] IRLR 535**. The matter, in the context of a claim under section 15 EqA, was examined in **A Ltd v Z UKEAT/0273/18** where it was held that the assessment included what the respondent might reasonably have been expected to know after making having made appropriate enquiries.

97. We also considered the terms of the Equality and Human Rights Commission Code of Practice on Employment, the following provisions in particular:

98. Knowledge 6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. 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 on 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. Example: A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements.

99. Substantial disadvantage 6.15 The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact and is assessed on an objective basis.

100. Section 13 Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker. In terms of s13(3) ERA, a deduction of wages arises in circumstances where the total amount of wages paid by an employer to a worker on any occasion is less than the total amount of wages properly payable on that occasion.

101. The Tribunal was given the power to hear breach of contract claims by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

Submissions

102. Mr Robson made oral submissions. Ms Halsall provided written submissions to us and to Mr Robson. She made brief oral submissions in support of the written submissions. We carefully considered the submissions of both parties during its deliberations and has dealt with the points made in submissions, where relevant, when setting out the facts, the law and the application of the law to those facts. It should not be taken that a submission was not considered because it is not part of the discussion and decision recorded.

Discussion and decision

Direct race discrimination

Time limits

103. The claimant submitted his claim to the Tribunal on 12th June 2020 with early conciliation between 11 March and 2 April 2020. Ms Halsall submitted that the allegations of less favourable treatment at 2a, b, c, d, e and g in the list of issues ought to fail for want of jurisdiction. She submitted it would not be just and equitable to extend time for each of the allegations as the claimant's explanation as to why he did not bring his claim in time was that he was unaware of time limits and he could have brought the claims in time had he known. She submitted that the allegations do not form a continuing course of conduct but are isolated incidents.

104. We had regard to the test set out in **Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA,** as approved by the Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA**. In **Lyfar** the Court of Appeal clarified that the correct test in determining whether there is a continuing act of discrimination is that set out in **Hendricks**. Thus, tribunals should look at the substance of the

complaints in question to determine whether they can be said to be part of one continuing act by the respondent.

105. We did not accept that there was no continuing course of conduct. The substance of the relevant allegations (except for e. about compassionate leave), were all about the claimant's capability in as Director of Finance. Albeit the allegations involved several individuals responsible for the management of the respondent the substance of the allegations was about capability in his finance role. We therefore we concluded that, except for the allegation about compassionate leave there was a continuing course of conduct.

106. Regarding the allegation about compassionate leave, we concluded that it was out of time having taken place on 7 January 2020. However, having heard evidence in respect of this alleged conduct, we considered that it was just and equitable to go on to consider the matter.

(a)Refusing attendance at monthly financial reviews

107. The claimant asserted in the agreed list of issues that he suffered less favourable treatment as Mr Kemp refused the claimant's attendance at monthly financial reviews every month. He relied on MK – director of revenue, LB – director of sales and MB – director of operations as comparators. In closing submissions Mr Robson said that the claimant now withdrew the allegation that Mr Kemp's refusal for the claimant to attend these meetings was direct race discrimination. We have therefore not considered this allegation further.

(b)Refusing attendance at owner meeting November 2019

108. The claimant asserted that he had suffered less favourable treatment by Mr Borg refusing his attendance at an owner meeting on 19 November 2019. He relied on Mr Borg as a comparator.

109. In this regard, we first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the claimant had been refused attendance at an owner meeting on 19 November 2019 because he is Lebanese / Asian. We found that he did not therefore the burden of proof does not shift to the respondent.

110. Our reason is that the explanation given by Mr Borg was that the matter to be discussed was a hotel wide matter and therefore only he should attend. We accepted that explanation. The matter to be discussed, namely the potential to grow the meetings and events business at the hotel was documented in the email invitation from Mr Clouston. We were satisfied that growing the meetings and events business was not a matter related only to finance but would span

across all operations of the hotel. In this regard it is credible and plausible that Mr Borg, as General Manager with overall responsibility for the hotel, would wish to attend this meeting on his own.

111. In these circumstances, it could not be said the claimant was treated "less favourably". Ms Halsall submitted that the named comparator of Mr Borg was not appropriate and invited us to consider a hypothetical comparator. We agree Mr Borg is not an appropriate comparator. There must be no material difference between the circumstances of the named comparator and the claimant apart from race. That was not the case for Mr Borg. We then considered a hypothetical comparator – a non-Lebanese/Asian working in the respondent hotel as the Director of Finance. For the reasons given above we concluded a hypothetical comparator would have been treated the same way.

(c)Not inviting to calls about payroll issues / challenges

112. The claimant asserted in the agreed list of issues that he had suffered less favourable treatment by Ms Reid and Mr Borg not inviting the claimant to calls relating to payroll issues and challenges from October 2019 until termination of his employment. He did not specify the dates of those calls. He had no named comparators and relied on a hypothetical comparator. In closing submissions Mr Robson said that the claimant now withdrew the allegation in relation to these calls in so far as it was directed against Ms Reid. He maintained the allegation against Mr Borg.

113. In this regard, we first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the claimant had not been invited by Mr Borg to calls about payroll issues/challenges he had with Ms Reid because the claimant is Lebanese / Asian. We found that he did not therefore the burden of proof does not shift to the respondent.

114. Our reason is that we found that there had not been calls between Mr Borg and Ms Reid about payroll issues/challenges, as set out in our observations on the evidence section above. Both Mr Borg and Ms Reid said that they did not know what the calls were to which the claimant referred. Mr Borg said that he had limited involvement with Ms Reid. We concluded that we had no evidence to make any findings that there were calls about payroll issues and challenges between Mr Borg and Ms Reid, and we concluded that no such calls had taken place. Having found that allegation did not happen we did not go on to consider comparators.

(d)Being told by Mr Kemp he cannot trust the claimant

115. The claimant asserted that he has suffered less favourable treatment by being told by Mr Kemp that he cannot trust him in a meeting on 3 January 2020. He has no named comparators and relies on a hypothetical comparator.

116. In this regard, we first considered whether the claimant had proved facts from which, if unexplained, we could conclude that Mr Kemp told the claimant on 3 January 2020 in a meeting that he cannot trust him, because the claimant is Lebanese / Asian. We found that he did not therefore the burden of proof does not shift to the respondent.

117. Our reason is that we found that Mr Kemp had not told the claimant that he cannot trust him in a meeting on 3 January 2020, as set out in our observations on the evidence section above. The evidence of Mr Kemp and Ms Reid who were both in the meeting was that this was not said. Mr Kemp had an outline script which set out the reason why the settlement agreement was being offered to the claimant in that meeting. We accepted that was the reason given by Mr Kemp and not that Mr Kemp did not trust the claimant. Having found that allegation did not happen we did not go on to consider comparators.

(e)Negotiating intently for compassionate leave

118. The claimant asserted that he has suffered less favourable treatment by having to negotiate intently with Ms Reid to have one week of compassionate leave in January 2020. He relies on LB – director of sales and MB – director of operations as comparators.

119. In this regard, we first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the claimant had to negotiate intently with Ms Reid for compassionate leave, because the claimant is Lebanese / Asian. We found that he did not therefore the burden of proof does not shift to the respondent.

120. Our reason is that we found that the claimant did not have to negotiate intently with Ms Reid for compassionate leave, as set out in our observations on the evidence section above. Having found that allegation did not happen we did not go on to consider comparators.

(f)Not paying lieu hours

121. The claimant asserted that he has suffered less favourable treatment by Ms Reid and Mr Borg not paying the claimant lieu hours in March 2020. He relies on MK – director of revenue, MB – director of operations, LB – director of sales, Mr Borg, KL – job title unknown and JL – job title unknown as comparators.

122. In this regard, we first considered whether the claimant had proved facts from which, if unexplained, we could conclude that Ms Reid or Mr Borg had not paid lieu hours to the claimant, because the claimant is Lebanese / Asian. We found that he did not therefore the burden of proof does not shift to the respondent.

123. Our reason in relation to Ms Reid is that we accepted that she was not the decision maker in relation to payroll payments to employees in the hotel, including the claimant. Our reason in relation to Mr Borg is that his explanation was that there was no entitlement to be paid for lieu hours in his contract, as set out in our observations on the evidence section above. In this regard it is credible and plausible that Mr Borg would reach this decision based on what was written in the claimant's contract of employment.

124. In these circumstances, it could not be said the claimant was treated "less favourably". Ms Halsall submitted that the named comparators of MK – Director of Revenue, LB – Director of Sales, MB– Director of Operations; KL – job title unknown, JL – job title unknown and Mr Borg were not appropriate and invited us to consider a hypothetical comparator. We agree these named comparators are not appropriate. There must be no material difference between the circumstances of the named comparators and the claimant apart from race. That was not the case for the named comparators. Some carried out entirely different jobs from the claimant. For others there was no evidence about their job roles, but it was clear none of them were also Director of Finance. No evidence was led about those individuals being paid lieu hours or whether they had left the respondent's employment. We then considered a hypothetical comparator – a non-Lebanese/Asian working in the respondent hotel as the Director of Finance. For the reasons given above we concluded a hypothetical comparator would have been treated the same way.

(g)Investigating the claimant

125. The claimant asserted that he has suffered less favourable treatment by being subjected to investigation on 19 December 2019. He relies on MB – director of operations and Paul Borg as comparators.

126. In this regard, we first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the respondent had subjected the claimant to an investigation on 19 December 2019, because the claimant is Lebanese / Asian. We found that he did not therefore the burden of proof does not shift to the respondent.

127. Our reason is that at the investigation meeting on 19 December 2019 Mr Stone raised six different areas of concern about the claimant's capability which were then recorded in an investigation report prepared by Mr McAllister. Mr Stone, of Interstate, dealt with operational finance matters at the respondent hotel,

along with operational finance for other hotels managed by Interstate. He reported to Mr Kemp who oversaw the finance function at the hotel, on behalf of Interstate. Both had been involved with the claimant and his finance team since Interstate's involvement in the respondent hotel in around March 2019. They had also asked external consultants, including Ms Reeves, to carry out work in the finance team at the hotel. In this regard it is credible and plausible that the capability concerns raised by Mr Stone at the investigation meeting and the subsequent investigation report were based on genuine concerns held by Mr Stone.

128. In these circumstances, it could not be said the claimant was treated "less favourably". Ms Halsall submitted that the named comparators of MB– Director of Operations and Mr Borg were not appropriate and invited us to consider a hypothetical comparator. We agree these named comparators are not appropriate. There must be no material difference between the circumstances of the named comparators and the claimant apart from race. That was not the case for the named comparators. We then considered a hypothetical comparator – a non-Lebanese/Asian working in the respondent hotel as the Director of Finance. For the reasons given above we concluded a hypothetical comparator would have been treated the same way.

(h)Dismissing the claimant

129. The claimant asserted that he has suffered less favourable treatment by Mr Borg dismissing the claimant in March 2020. He relies on MB – director of operations and Mr Borg as comparators.

130. In this regard, we first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the claimant had been dismissed from his employment, because the claimant is Lebanese / Asian. We found that he did not therefore the burden of proof does not shift to the respondent.

131. Our reason is that the invitation to the capability hearing referred to the investigation report which had been prepared and which set out the six areas of concern about the claimant's capability. In reaching the decision to dismiss the claimant Mr Borg considered these six areas of concern. Each of the concerns were about matters which pre-dated Mr Borg's arrival at the hotel on 6 November 2020 or which were ongoing. Mr Borg relied on the expertise of his financial colleagues, Mr Stone, Mr Kemp and Ms Reeves on financial matters in reaching the decision to dismiss. In this regard it is credible and plausible that the dismissal by Mr Borg was based on concerns about the claimant's performance and capability shared by him and other colleagues with financial expertise.

132. In these circumstances, it could not be said the claimant was treated "less favourably". Ms Halsall submitted that the named comparators of MB– Director of Operations and Mr Borg were not appropriate and invited us to consider a hypothetical comparator. We agree these named comparators are not appropriate. There must be no material difference between the circumstances of the named comparators and the claimant apart from race. That was not the case for the named comparators. We then considered a hypothetical comparator – a non-Lebanese/Asian working in the respondent hotel as the Director of Finance. For the reasons given above we concluded a hypothetical comparator would have been treated the same way.

Summary

133. In summary therefore we were not satisfied that the claimant had made out a case of direct discrimination, either in relation to any of the individual matters (a) - (h) above or when stepping back and looking at the whole picture, which would put the onus on the respondent to prove that there was a non-discriminatory reason for its actions. The evidence was sufficient to show that the respondent did not act in a discriminatory way. To the extent that matters happened as the claimant described them, they did not involve the respondent treating him less favourably than it would have treated a person without his protected characteristic of race. His direct race discrimination complaint fails.

Reasonable adjustments

134. A claim of failure to make reasonable adjustments requires that a provision, criterion or practice, or a physical feature, or the absence of an auxiliary aid put the claimant at a particular disadvantage compared with people not sharing his disability, and that it would be reasonable for the respondent to make an adjustment which would wholly or partly alleviate the disadvantage. The respondent must have known or reasonably been expected to know about the disability and the disadvantage caused at the time the adjustment allegedly should have been made. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e. what the respondent ought reasonably to have known).

135. The claimant's disability is stress, anxiety and depression. The claimant says that there was a provision, criterion or practice in the form of strict adherence to its formal management process. He says this placed him at a particular disadvantage compared to someone without the claimant's disability, in that he was unable to substantively take part in the process leaving his views unaddressed and depriving him of an opportunity to challenge.

Knowledge of disability and substantial disadvantage

136. The respondent argued that it did not know that the claimant was disabled at the point of dismissal or when the appeal hearing was arranged and did not know of any substantial disadvantage. The claimant argued that the respondent knew or ought to have known of his disability as he had had previous discussion with Mr Kemp about suffering from stress during his divorce proceedings. Mr Kemp could not recall that conversation. The claimant also argued that the medical information provided by him put the respondent on notice of his disability.

137. Prior to the decision to dismiss the claimant taken by Mr Borg on 3 March 2020, the claimant and his partner had written to the claimant stating "*I am now suffering from significant depression...My GP has commenced me on treatment for this work related depression*" on 4 February 2020; "*Due to the extreme stress this situation has caused me, I am currently in no mental condition to attend this meeting or to represent myself...*" on 9 February 2020; *"I am currently unable to attend any meetings due to the significant mental health problems I am experiencing...*" on 1 March 2020; and on the same date enclosing a letter from his GP stating "T*his gentleman has attended the surgery recently with symptoms of stress, anxiety and panic attacks which have been further exacerbated by work related circumstances...His current symptoms presentation are significant and hence he is not able to attend work at least until these symptoms are stabilised with medication and support*".

138. Ms Halsall submitted that the only knowledge the respondent had of the claimant's ill health at the point of dismissal and when the appeal hearing was arranged (which did not go ahead) was the GP letter and emails from the claimant and his partner which suggested that claimant's health condition was recent and caused by the current work situation.

139. We considered that at the time of the first email from the claimant on 4 February 2020 referring to "significant depression" at that stage it ought to have been considered a material possibility at the least, that the claimant was a disabled person under EqA, such as to put it on notice and to ask for a medical opinion on that issue. We considered that the matter was then put beyond reasonable doubt by 1 March 2020 when the respondent had received the email from the claimant referring to "significant mental health problems" and enclosing the GP letter dated 25 February 2020, which referred to the claimant's "significant symptoms" and indication that there would be no return to work at least until the symptoms had stabilised with medication and support.

140. We considered, having regard to all the evidence that was given and taking account also of the example given in the Code of Practice at paragraph 6.19, that the respondent ought reasonably to have been aware of the material possibility by 4 February 2020, at least, of the claimant being a disabled person and then to have made further enquiries, asking either the claimant's GP or an external adviser for a formal opinion, which would probably have been carried out in consultation with the claimant's GP. That may have taken about two weeks to undertake and been concluded before the capability hearing on 2 March 2020. Had the respondent done so, the claimant's previous medical history is likely to have been discovered, and the conclusion given the circumstances at the time is most likely to have been that the claimant was disabled under EqA as the respondent now accepts. Considering that, we concluded that, having regard to the terms of paragraph 20 of schedule 8 EqA, the respondent ought reasonably to have known that the claimant was a disabled person by on or about 18 February 2020.

141. The respondent must also know or ought to have known of the substantial disadvantage suffered by the claimant. We concluded that the substantial disadvantage was known or ought to have been known to the respondent because of it was clearly explained in the claimant's correspondence.

Was the PCP applied to the claimant?

142. The PCP relied upon is the "strict adherence to the formal management process. The application of the PCP was challenged by the respondent. In submissions Ms Halsall said the claimant accepted on the witness stand that they did not apply the formal management process to him and in questions to the respondent's witnesses by Mr Robson they said that they did not apply their formal management process to him.

143. We concluded that the claimant gave evidence that he did not consider that the respondent adhered to the formal management process only in the context of his belief that the respondent had not followed the informal stages of the Performance Capability Procedure with him before moving to the formal stages. His evidence was also in the context of his belief that the respondent had provided insufficient documentation to support the allegations being made against him in the letter of 5 February 2020 inviting him to the capability hearing. The evidence of the respondent's witnesses was also in the context of whether it had followed the informal stages and whether it required to do so. We find that the informal stages did not require to be followed and that the Performance Capability Procedure provided that stages could be skipped. In any event the procedure was non-contractual. The evidence of the respondent's witnesses was also in the context of whether the respondent could skip stages and move straight to a hearing

where dismissal was a potential outcome. Again, we concluded that it could and that the Performance Capability Procedure provided for this.

144. It is not our view that the claimant accepted that the formal management process did not apply to him in relation to the formal hearing to which he was invited by letter of 5 February 2020. It is our view that the respondent was applying the Formal Capability Procedure to the claimant as set out in the letter dated 5 February 2020 inviting him to a capability hearing and by inviting him to an appeal hearing following dismissal. The letter stated that it was an invite to a formal meeting "in accordance with the Performance Capability Procedure". The capability hearing was scheduled to take place on 12 February 2020, which was then delayed and took place on 2 March 2020. We found that the PCP was applied to the claimant. This was borne out by the procedure itself and the letter of 5 February 2020.

Substantial disadvantage

145. The substantial disadvantage identified by the claimant is that he is unable to substantively take part in the process leaving his views unaddressed and depriving him of an opportunity to challenge.

146. We considered that the claimant was placed at a more than minor or trivial disadvantage by the application of the PCP. The claimant was unable to attend the capability hearing which took place on 2 March 2020. The claimant was also unable to send written submissions to be considered by the respondent at the capability hearing on 2 March 2020. The claimant was unable to attend the capability appeal hearing scheduled for 23 March 2020, although in the event this did not go ahead.

Steps to avoid the disadvantage

147. Having been placed at a substantial disadvantage by the PCP applied, did the respondent fail to take any step that it was reasonable to have to take to avoid the disadvantage?

148. The steps identified by the claimant are (i) delaying the capability hearing and (ii) dealing with the claimant's appeal against dismissal on the papers.

Delaying the capability hearing

149. The claimant suggested two steps which he suggests could have been taken to avoid that disadvantage. The first one is delaying the capability hearing. He says this is an adjustment which reasonably should have been made. He says the adjustment should have been made before the capability hearing took place on 2 March 2020.

150. The time period for which the capability hearing should have been delayed was not identified in the agreed list of issues. In the claimant's email of 9 February 2020, he asked that the hearing was delayed "*until I am in a position with my mental health to cope with the process*". The GP letter received by the respondent on 1 March 2020 stated "*His current symptoms presentation are significant and hence he is not able to attend work at least until these symptoms are stabilised with medication and support*" The email from the claimant's partner on 2 March stated that the hearing should be delayed *"until he has regained his mental health*."

151. We have therefore firstly considered the step of delaying the capability hearing for an undefined or indefinite period, until the claimant had regained his mental health. We noted all the emails and letters from the claimant and the letter from his GP were unable to give any indication of when the claimant may have regained his mental health to participate in the capability hearing.

152. We concluded that the suggestion of delaying the capability hearing for an undefined or indefinite period until the claimant had regained his mental health, is not a step which we regarded as reasonable.

153. There was no evidential indication from the claimant that delaying it, without any time frame for conclusion, would have resulted in the claimant being able to substantively take part in the formal management process.

154. From the respondent's perspective, it had identified six areas of concern about the claimant's capabilities which covered a range of financial matters which adversely impacted upon the finances of the respondent hotel. One of these was overpayment of an invoice by £164,000 around a time when the hotel had had cash flow problems. The respondent had already delayed the capability hearing on one occasion to accommodate the claimant's ill health, the hearing on 12 February 2020 having been postponed and a new hearing date set for 2 March 2020. The claimant had offered that the claimant could participate by way of written submissions, but he did not or could not do so. The granting of an indefinite delay to the capability hearing without limit of time and where it may never have taken place, would have brought continued uncertainty for the respondent at a time when there were concerns about financial matters at the hotel. Going beyond what the respondent did in fact do, by way of one postponement to the hearing and the offer of written submissions would not have been practical in such circumstances and was not therefore a reasonable step required by statute.

155. In evidence the claimant provided another suggested step which was to delay the capability hearing for a short period of one to two weeks. This time frame was not proposed by the claimant at the time of the capability hearing.

There was no opposition by the respondent to this step being considered by us.

156. There had already been a short delay to the hearing from 12 February 2020 to 2 March 2020, which is around three weeks. This had not avoided or alleviated the substantial disadvantage suffered by the claimant. There was no evidence available to the respondent on 2 March 2020 that a further short delay of one or two weeks would have avoided or alleviated the substantial disadvantage suffered by the claimant. The letter from the claimant's GP gave no timeframe or estimated time frame for a recovery by the claimant such that he could participate in the capability hearing.

157. On that basis we concluded that the proposed step of further delaying the capability hearing for a short period of one or two weeks after 2 March 2020 was not reasonable. There was no evidential indication from the claimant at the time, or in evidence now, that further delaying the capability hearing for one or two weeks would have been effective, resulting in the claimant being able to substantively take part in the capability hearing.

158. We also noted that shortly before the appeal hearing scheduled for 23 March 2020, the claimant's partner emailed the respondent to say that the claimant remained unable to represent himself effectively and would be unable to participate in the appeal hearing on 23 March 2020. The email asked that the appeal hearing be delayed "*until he has the mental capacity to represent himself appropriately*". She then emailed on 31 March 2020 stating "*It is not possible at this stage for Maher to provide a date at which point he will be well enough to represent himself in the appeal process*". We considered the emails from the claimant at the time of the appeal hearing about his continued incapacity to participate in the process. We concluded those were relevant for our consideration, in so far as they cast light on what the likelihood was, objectively speaking, of the proposed step of a further delay to the capability hearing of one or two weeks being effective. We concluded that, objectively speaking, it was unlikely to have been effective.

Dealing with appeal hearing on the papers

159. The second step identified in the agreed list of issues.is dealing with the appeal hearing on the papers. This was because on 12 March 2020 the claimant had submitted written grounds of appeal against his dismissal.

160. This second proposed step was added by the claimant's representative to the list of issues at the outset of the final hearing, there being no opposition from the respondent. However, in evidence the claimant said that he did not want the respondent to deal with the appeal hearing on the papers and that he wanted the appeal hearing to be delayed until he was fit to attend.

161. The claimant's position in evidence is borne out by the email correspondence between the claimant and Mr McAllister at the time where Mr McAllister says to the claimant's partner "*I note your concerns with regard to Maher feeling unable to participate in an appeal process right now. On that basis we agree to hold this in abeyance*" and "*...we have no issue with allowing you to delay the appeal. As soon as you are ready to proceed, we will ensure that this takes place as soon as possible*". There was no evidence led that the claimant had said thereafter that he was ready to proceed and no appeal hearing took place.

162. Given the claimant's position in evidence we concluded that this was no longer a step which the claimant relied upon. In any event, had the claimant continued to rely upon this step we would have concluded that it was not reasonable. The claimant was clearly asking for the appeal hearing to be held in abeyance, this is what the respondent did, and it communicated that to the claimant. Had the respondent chosen at the time to deal with the appeal on the papers, contrary to the claimant's specific request at the time, the likelihood objectively speaking is that the claimant would have objected to this outcome.

163. Consequently, we concluded that there was no breach of the respondent's duty to make the reasonable adjustments sought and we dismiss this complaint.

Lieu hours

164. The claimant relied on what he said was the assurance from Ms Reid that he was entitled to be paid for all lieu hours worked as the basis of his lieu hours entitlement. His evidence was also that it was the respondent's policy to either pay lieu hours to leavers or extend their leaving date so that leavers, including managers and general managers could take their lieu hours back. Mr McAllister's evidence was that the 2019 contract stated that overtime had to be agreed with his manager which had not happened. The 2019 contract also stated that overtime, when agreed, is balanced monthly. He calculated that lieu time accrued in the month before the claimant left was 3.5 hours. This was stated to be paid on a goodwill basis as the overtime had not been agreed with the claimant's line manager. The claimant had not asked for it to be approved.

165. We concluded that there was no contractual entitlement to the lieu hours for the reasons set out in correspondence to the claimant from the respondent. We also concluded, for the reasons already given, that Ms Reid did not have authority to approve overtime or lieu hours and that she did not do so.

166. Consequently, we concluded that the claimant had no entitlement to payment for lieu hours either as an unlawful deduction from wages or a breach of contract claim and we dismiss this complaint.

Bonus

167. There was an area of dispute in relation to which bonus scheme was applicable to the claimant. The respondent's evidence was that the relevant bonus scheme was contained in the letter to him dated 31 May 2019. The claimant's evidence was that this was not the scheme in which he participated but rather a different bonus scheme which had been issued to him by letter prior to 31 May 2019. The claimant did not have a copy of the letter or any evidence of the earlier scheme upon which he relied. The claimant did not present any evidence to allow us to consider whether a different bonus scheme was relevant to him. We concluded, on balance, that the claimant's bonus scheme was that contained in the letter to him dated 31 May 2019.

168. The respondent's evidence was that nobody from the respondent was paid a bonus from the 2019 Management Bonus Scheme as the hotel did not hit the financial targets. The respondent's evidence was also that at other Interstate hotels where targets were reached bonuses were not paid due to covid. The claimant did not present evidence that others at the hotel had been paid bonus from the 2019 Management Bonus Scheme or that the hotel had hit the financial targets set. We therefore concluded that the claimant was not entitled to receive any bonus under the 2019 Management Bonus Scheme

169. Consequently, we concluded that the claimant had no entitlement to payment of bonus either as an unlawful deduction from wages or a breach of contract claim and we dismiss this complaint.

Conclusion

170. Having concluded that each of the complaints is not well- founded, there is no requirement for a remedies hearing. The claimant's claim is dismissed.

Employment Judge McCluskey

Date: 16 July 2023

JUDGMENT SENT TO THE PARTIES ON
17 July 2023

FOR THE TRIBUNAL OFFICE

APPENDIX 1

Time Limits

1. Were the direct discrimination claims made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
    a. Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?
    b. If not, was there conduct extending over a period?
    c. If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?
    d. If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:
        a. Why were the complaints not made to the Tribunal in time?
        b. In any event, is it just and equitable in all the circumstances to extend time?

Direct Discrimination

2. Did the Respondent treat the claimant less favourably than it treated or would have treated a person who was not Lebanese/Asian? The less favourable treatment relied upon is:
    a. Dan Kemp refusing the claimant's attendance in monthly financial reviews every month;

b. Paul Borg refusing the claimant's attendance to an owner meeting in November 2019;

c. Lorna Reid and Paul Borg not inviting the claimant to calls on dates unspecified, relating to payroll issues and challenges from October 2019 until termination of employment;

d. Being told by Dan Kemp that he cannot trust the claimant in January 2020;

e. The claimant having to negotiate intently with Lorna Reid to have one week of compassionate leave in January 2020;

f. Paul Borg and Lorna Reid not paying the claimant's lieu hours in March 2020;

g. Investigating the claimant on 19 December 2019; and

h. Paul Borg dismissing the claimant in March 2020.

3. The claimant relies upon the following comparators, whom he asserts are all White British, which align with 2 a-h;

    a. MK, LB and MB;

    b. Paul Borg;

    c. A hypothetical comparator;

    d. A hypothetical comparator;

    e. MB and LB;

    f. MK, MB, LB, Paul Borg, KL and JL;

    g. MB and Paul Borg; and

    h. MB and Paul Borg.

4. Has the claimant proven primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's race?

5. If so, what is the respondent's explanation? Can it prove a non-discriminatory reason for the treatment?

<u>Disability Discrimination- Failure to Make Reasonable adjustments.</u>

6. The respondent accepts that the claimant was disabled by stress, anxiety and depression at the material time.

7. Did the respondent know or ought it to have known that the claimant was disabled?

8. Did the respondent apply a provision, criterion or practice to the claimant? The PCP relied upon is the strict adherence to its formal management process.

9. Did the PCP place the claimant at a substantial disadvantage to a non-disabled person? The claimant says the substantial disadvantage is the claimant being unable to substantively take part in the process leaving his views unaddressed and depriving him of an opportunity to challenge.
10. Did the respondent have knowledge that the PCP placed the claimant at a substantial disadvantage?
11. Did the respondent fail to take such steps as were reasonable to avoid the substantial disadvantage which was caused by the application of the PCP? The claimant suggests:
    a. Delaying the process.
    b. Dealing with the claimant's appeal against dismissal on the papers.
    c. Is there evidence of these proposed adjustments having a prospect of eliminating or mitigating the substantial disadvantage?
    d. Can the respondent prove that the substantial disadvantage would not have been eliminated or reduced by the proposed adjustments?
    e. Can the respondent prove that it was not reasonable to make the proposed adjustments?
12. By what date should the respondent have taken those steps?

<u>Breach of Contract and/ or Unlawful Deduction from Wages</u>

13. Is the claimant entitled to a bonus? If so, how much?
14. Are any sums due and owing to the claimant in respect of any hours worked in excess of his contractual hours? If so, over what period and what sums, if so, what is due and owing to him?
15. Are any of these claims out of time? If so, was it reasonably practicable to bring the claim in time?

<u>Remedy</u>

16. If the claimant's claims, or any of them, succeed:
    a. What compensation is the claimant entitled to in respect of:
        i. Financial loss?
        ii. Injury to Feelings?
    b. Should any declarations or recommendations be made by the Tribunal?